

Hate Crimes Against Minorities in India

Locating the Value of an International Criminal Law Discourse?

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Abstract

Violence against Muslims and Dalits in India has drastically increased since the incumbent political party, the Bharatiya Janata Party (BJP), came to power in 2014. Around 85% of perpetrators are alleged to have been associated either with the BJP or its sister Hindu organizations. In at least some cases, law enforcement agencies have been either indifferent or hostile to the victims. Such crimes may be considered as hate crimes, yet an understanding of this concept — as a tool which accounts for the criminality of individual acts while appreciating the systemic prejudices that motivate them — is lacking in Indian law. This warrants consideration of international criminal law, as a discourse which may complement and support domestic reform, since hate crimes constitute an inhumane affront to the values of dignity and liberty which underlie international core crimes. In this context, this paper examines whether the elements of crimes against humanity, particular those of murder and persecution, may be applied to the recent events in India.

‘Oh god, the terrible tyranny of the majority. We all have our harps to play.

And it is up to you to know with which ear you’ll listen.’

– Ray Bradbury

1. Introduction

On 23 February 2020, Kapil Mishra, a politician from India’s ruling party, the Bharatiya Janata Party (‘BJP’), gave an incendiary speech where he called on the police to remove ‘Muslim’ protestors (who were protesting the widely criticized Citizenship (Amendment) Act 2020)¹

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¹ Section 2 of the Citizenship (Amendment) Act 2019 (India).

from the north-east regions of Delhi.² Failing this, Mishra threatened the police that he and his followers would ‘take the streets’ and do it themselves.³

Hours after Mishra’s speech, in what may be the worst sectarian riots India has seen in over two decades, Hindu mobs were seen torching Muslim homes and shops, and lynching cornered Muslim men.⁴ Hindu homes which identified themselves with a flag remained unscathed, amidst debris of slain Muslims, smouldering house-fronts, and charred vehicles. The riots claimed 53 lives (of which 38 were Muslims) and injured over 500 others.⁵

Heart-breaking as it were, the Delhi riots join a long list of brutalities afflicted upon minorities including Muslims and Dalits in India (who comprise 16 and 14 percent of India’s population respectively⁶) since the BJP assumed power in 2014.⁷ A political affiliate of the Hindu organization Rashtriya Swayamsevak Sangh (‘RSS’),⁸ the BJP has openly endorsed the idea of an exclusively Hindu nation.⁹ Shortly after assuming power, the BJP implemented a nation-wide beef ban. Intended to protect the cow which is considered sacred to Hindus,¹⁰ several BJP-ruled states passed laws prohibiting the possession, transport, and sale of cows, bulls, and bullocks.¹¹ This significantly and disproportionately impacted Muslims and Dalits, who are not only regular consumers of beef, but also rely on cow skin/cow meat for their

² J. Gettleman, S. Raj, and S. Yasir, ‘The Roots of the Delhi Riots: A Fiery Speech and an Ultimatum’, *The New York Times*, 26 February 2020, available online at <https://www.nytimes.com/2020/02/26/world/asia/delhi-riots-kapil-mishra.html> (visited 25 June 2021).

³ *Ibid.*

⁴ L. Frayer, ‘Delhi Riots Aftermath: ‘How Do You Explain Such Violence?’’, *NPR*, 7 March 2020, available online at <https://www.npr.org/2020/03/07/812193930/delhi-riots-aftermath-how-do-you-explain-such-violence?t=1624623021194> (visited 25 June 2021).

⁵ The Polis Project, *The high cost of targeted violence in Northeast Delhi: A list of the deceased* (2020) (updated), available online at <https://www.thepolisproject.com/the-high-cost-of-targeted-violence-in-northeast-delhi-a-list-of-the-deceased/#.YNXIK6gzbIU> (visited 25 June 2021) (‘The Polis Project, List of Deceased’).

⁶ Census of India (2011), available at <https://censusindia.gov.in/2011-common/censusdata2011.html> (visited 25 June 2021).

⁷ Amnesty International, *Halt the Hate* (2019), available online at <https://amnesty.org.in/wp-content/uploads/2019/10/Halt-The-Hate-KeyFindings-Amnesty-International-India-1.pdf> (visited 25 June 2021) (‘AI, *Halt the Hate*’).

⁸ L. Frayer and F. Latif Khan, ‘The Powerful Group Shaping the Rise of Hindu Nationalism in India’, *NPR*, 3 May 2019, available online at <https://www.npr.org/2019/05/03/706808616/the-powerful-group-shaping-the-rise-of-hindu-nationalism-in-india> (visited 25 June 2021).

⁹ *Ibid.*

¹⁰ W.N. Brown, ‘The sanctity of the cow in India’, 16 (Issue no.5-6-7) *Economic Weekly* (1964) 245–255, at 247.

¹¹ See Section 5A of the Maharashtra Animal Preservation (Amendment) Bill 1995 (India); Sections 3-5 of the Rajasthan Bovine Animal (Prohibition of Slaughter and Regulation of Temporary Migration or Export) Act 1995 (India); Section 6A of the Gujarat Animal Preservation Act 1954 (amended in 2011 and subsequently in 2017) (India); Section 6 of the Madhya Pradesh Gauvansh Pratishedh Adhiniyam 2010 (India).

livelihood.¹² Despite the pending judicial challenges,¹³ the beef bans prompted Hindu mobs to take law enforcement into their own hands. Independent studies indicate that cow vigilantism claimed 129 lives between 2015 and 2019.¹⁴ It is no coincidence that some of the most violent attacks on Muslims saw the participation of BJP leaders¹⁵ or were carried out in BJP-led Indian states. Anti-Dalit violence also began occupying a visible place in India's public discourse after the BJP's election.¹⁶

Describing the menace of mob lynching as 'nauseatingly perverse',¹⁷ a three-judge bench of the Supreme Court of India directed the Parliament and state legislatures to create a separate offence of lynching.¹⁸ Although four Indian states have now enacted laws/bills criminalizing lynching,¹⁹ efforts at the national level have not yet materialized. Even after the judgment of the Supreme Court, only one instance of hate crime has resulted in a conviction.²⁰ Many attribute this to the active and passive influence of the ruling party, which victims do not have the political capital to combat.²¹

¹² Many Dalits and Muslims are engaged in the abattoir/meat processing, footwear, and apparel industry. See Rukmini S, 'Meat of the matter', *The Hindu*, 11 July 2014, available online at <https://www.thehindu.com/opinion/blogs/blog-datadelve/article6195921.ece> (visited 25 June 2021).

¹³ *Sheikh Zahid Mukhtar v. State of Maharashtra*, Writ Petition No. 5731 of 2015 (Bombay High Court).

¹⁴ Conclusion drawn from the *The Quint* Data Lab, 'Mob lynching cases across India' (updated till September 2019), available online at <https://www.thequint.com/quintlab/lynching-in-india/> (visited 25 June 2021) ('*The Quint* Data Lab, Lynching in India').

¹⁵ See N. Mukhopadhyay, 'Past Continuous: How the Kalyan Singh Government Aided the Ram Mandir Movement', *The Wire*, 11 November 2018, available online at <https://thewire.in/politics/ram-mandir-babri-masjid-demolition-kalyan-singh> (visited 25 June 2021) (on the BJP's involvement in the demolition of the Babri mosque in 1992 and the communal riots that followed).

¹⁶ M. Bhat, 'How mob violence and hate crimes are linked to social vulnerability', *The Wire*, 23 July 2018, available online at <https://thewire.in/law/mob-violence-hate-crimes-and-social-vulnerability> (visited 25 June 2021).

¹⁷ *Tehseen Poonawala v. Union of India*, WP No. 754 of 2016 (Supreme Court of India) ('*Tehseen Poonawala*'), § 38.

¹⁸ *Ibid.*, § 43.

¹⁹ See 'West Bengal Assembly passes bill against mob lynching', *Scroll.in*, 30 August 2019, available online at <https://scroll.in/latest/935709/west-bengal-assembly-passes-bill-against-mob-lynching-congress-and-cpi-m-back-legislation> (visited 25 June 2021); Rajasthan Protection from Lynching Bill 2019, Bill No.22/2019 (India), available online at <https://rajassembly.nic.in/LegislationGovernmentBills.aspx> (visited 25 June 2021); *The Manipur Protection from Mob Violence Bill 2018*, available online at <https://manipur.gov.in/wp-content/uploads/2016/05/mobviolence.pdf> (visited 25 June 2021); Uttar Pradesh Combatting of Mob Lynching Bill 2019, available online at <http://upslc.upsdc.gov.in/MediaGallery/7thReport.pdf> (visited 25 June 2021).

²⁰ The eight accused for lynching Imteyaz Khan (12) and Mohammad Majloom (35) to death in Jharkhand in March 2016 were convicted of murder on 19 December 2018. See Press Trust of India, 'Latehar lynching case: Eight get life term for double murder in Jharkhand', *The Hindu*, 21 December 2018, available online at <https://www.thehindu.com/news/national/other-states/latehar-lynching-case-eight-get-life-term-for-double-murder-in-jharkhand/article25799853.ece> (visited 27 June 2021).

²¹ Human Rights Watch, *Violent Cow Protection in India* (2019), available online at <https://www.hrw.org/report/2019/02/18/violent-cow-protection-india/vigilante-groups-attack-minorities> (visited 25 June 2021) ('HRW, *Violent Cow Protection*'); Human Rights Watch, *India: End Bias in Prosecuting Delhi Violence* (2020), available online at <https://www.hrw.org/news/2020/06/15/india-end-bias-prosecuting-delhi-violence> (visited 25 June 2021) ('HRW, *End Bias in Prosecuting*').

The severe inadequacies of the current institutional design call for a reconsideration of the legal lens through which crimes against minorities in India are viewed. This paper constructs a case for why international criminal law ('ICL') may be a useful alternate framework — at least for the purpose of public discourse. Conceived to hold individual perpetrators accountable for crimes which 'shock the conscience of humanity',²² ICL has the potential to remedy the accountability deficit writ large over hate crimes against minorities in India. Admittedly, India has not signed the Rome Statute. Therefore, the International Criminal Court ('ICC') cannot directly exercise jurisdiction over Indian territory or Indian nationals on the territory of non-States Parties.²³ However, this does not render ICL insignificant. For one, ICL can be instructive in identifying the elements of core crimes that have attained customary law status which domestic courts in India and foreign courts can invoke to prosecute perpetrators. Employing the language of ICL allows victims, courts, and the perpetrators to appreciate the heightened heinousness of the crime, and prevents trivialization. Moreover, ICL holds immense expressive value in its capacity for norm signalling and ensuring social deterrence.²⁴ Therefore, drawing relevant analogies to ICL findings in historical situations that bear similarity to the current situation in India may also help mobilize society towards initiating monitoring, review, and research exercises that can enable eventual claims of accountability to succeed. For these reasons — and while acknowledging that the argument made here may be more theoretical than immediately practical — the primary motivation of the paper is to elevate the epistemic authority of ICL in the Indian context. It is hoped that this exercise will create discursive cognition within ICL and Indian law, which may lead further to social cognition in the form of actual accountability.

To this end, section 1 investigates why the domestic penal law in India has failed to generate sufficient criminal accountability for the violence against Muslims and Dalits. This justifies invoking ICL, given that recent hate crimes in India are constitute an inhumane affront to the values of dignity and liberty which underlie international core crimes. This section pays particular attention to the framing of such crimes by the police and by courts, and the extent to which they factor in societal prejudices that motivate crimes against minorities. Section 2 discusses why this academic exercise is timely by tracing ICL's engagement with Asia in general and India in particular.

²² Preamble, § 2, ICCSt.

²³ Art. 12(2) ICCSt.

²⁴ *Report of the Secretary General on The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/616, 23 August 2004, § 39 ('UNSG Rule of Law Report').

Sections 3 and 4 theorize the scope of crimes against humanity as applicable to India and the recent events. Given that India has not acceded to the Rome Statute, it can only be bound by the definition of crimes against humanity under customary law. Consistent with the recent approach of the International Law Commission, this paper uses the definition of the *chapeau* elements under Article 7 of the Rome Statute as a benchmark. A recent ruling of the Delhi High Court suggests that this might be the Indian position as well.²⁵ Particular reference is paid to the crimes of murder and persecution.

Assuming the potential application of ICL and the framework of crimes against humanity, the final section briefly explores the legal remedies which may be available to victims of hate crimes. India is bound by the obligation to prosecute and prevent crimes against humanity which may increasingly come to be recognised as a peremptory or *jus cogens* norm.²⁶ The section examines whether this obligation can be used to invoke the domestic jurisdiction of Indian courts or universal jurisdiction to prosecute those who perpetrated the hate crimes.

2. The Need to Invoke International Criminal Law

Before ascertaining how the rampant crimes against Muslims and Dalits might potentially fall within the framework of ICL, it is crucial to test whether the domestic penal law in India can successfully capture the actual and expressive harm caused by anti-minority violence.

Scholars attribute the frightening rise in crimes against minorities to the BJP winning the national elections in 2014 (and getting re-elected in 2019).²⁷ Since 2014, there is a supposed 500 percent increase in the invocation of communal hatred in speeches by politicians.²⁸ Senior leaders of the BJP — from Union ministers²⁹ to lawmakers³⁰ to chief ministers of BJP-ruled

²⁵ *State through CBI v. Sajjan Singh and Ors.*, CrI. App.1099/2013 (Delhi High Court), § 367 ('Sajjan Singh').

²⁶ International Law Commission, *Fourth report of the International Law Commission on the Draft Convention on the Prevention and Punishment of Crimes against Humanity*, A/CN.4/L.935 (2019), at 5.

²⁷ R. Ayyub, 'What a Rising Tide of Violence Against Muslims in India Says About Modi's Second Term', *Time*, 28 June 2019, available online at <https://time.com/5617161/india-religious-hate-crimes-modi/> (visited 25 June 2021).

²⁸ N. Jaiswal, S. Jain, and M. Pratap, 'Under Modi Government, VIP Hate Speech Skyrockets - By 500%', *NDTV*, 19 April 2018, available online at <https://www.ndtv.com/india-news/under-narendra-modi-government-vip-hate-speech-skyrockets-by-500-1838925> (visited 25 June 2021).

²⁹ 'Those who can't live without beef should go to Pakistan: Naqvi at Aaj Tak Manthan', *India Today*, 21 May 2015, available online at <https://www.indiatoday.in/india/north/story/naqvi-dying-without-beef-should-go-to-pakistan-manthan-254120-2015-05-21> (visited 25 June 2021).

³⁰ 'BJP MP Sakshi Maharaj says ready to kill and get killed for our mother, calls SP's Azam Khan a 'Pakistani'', *News18.com*, 6 October 2015, available online at <https://www.news18.com/news/politics/bjp-mp-sakshi-maharaj-says-ready-to-kill-and-get-killed-for-our-mother-calls-sps-azam-khan-a-pakistani-1143939.html> (visited 25 June 2021).

regions — have openly advertised the idea of a Hindu nation and their desire to remove’ Muslims from India.³¹ Amnesty International’s *Halt the Hate* study documented a total of 902 incidents of alleged hate crimes between September 2015 and June 2019.³² *The Quint*’s ‘Mob Lynching Lab’ also studied and tracked 244 cases of lynching between September 2015 and September 2019.³³ Barring three cases, all other victims were Hindus perceived as being of a ‘lower caste’ (such as Dalits) or Muslims.³⁴

Perturbingly, Indian law enforcement machinery has not been consistently responsive to the rising violence. Out of 244 cases of lynching since September 2015, at least 50 (just over 20%) were either not followed by criminal complaints or are still pending investigation.³⁵ In the cases where complaints were lodged, the accused were charged with offences such as murder, attempted murder, rioting, criminal intimidation, and voluntarily causing grievous hurt under the Indian Penal Code 1860.³⁶

Albeit technically accurate, these offences do not account for the fact that crimes against religious minorities are consequences of deeper social fissures. Strikingly, none of the criminal complaints contain any references to the offence of promoting enmity between religious groups or perpetrating deliberate acts to outrage the religious feelings of any class.³⁷ Now, it is true that criminal law typically individualizes wrongful acts and omissions.³⁸ However, criminal law cannot always afford to operate in a social vacuum. In the crimes described above, the perpetrators seem to have chosen the victims to assault their identity as part of a minority community and to terrorize them.³⁹ In other jurisdictions, such crimes are commonly described as hate crimes, and treated as a distinct social harm justifying specific punishment. As Perry explains, hate crimes are ‘usually directed toward already stigmatized and marginalized groups... [as a] mechanism of power, intended to reaffirm the precarious

³¹ ‘Will hang those who kill cows: Chhattisgarh Chief Minister Raman Singh’, *India Today* 2 April 2017, available online at <https://www.indiatoday.in/india/story/will-hang-cow-killers-chhattisgarh-chief-minister-968979-2017-04-01> (visited 25 June 2021).

³² AI, *Halt the Hate*, *supra* note 7, at 2.

³³ For the basis of this conclusion, see *The Quint* Data Lab, *Lynching in India*, *supra* note 14.

³⁴ *Ibid.*

³⁵ For the basis of these conclusions, see: AI, *Halt the Hate*, *supra* note 7, at 7; *The Quint* Data Lab, *Lynching in India*, *supra* note 14; The Polis Project, *List of Deceased*, *supra* note 5.

³⁶ *Ibid.*

³⁷ These provisions are included as sections 153A and 295A of the *Indian Penal Code 1860*.

³⁸ Tom Gal, ‘Direct Commission’, in J. de Hemptinne, et. al. (eds.), *Modes of Liability in International Criminal Law* (Cambridge University Press, 2019), at 18.

³⁹ Scholars refer to such crimes as ‘message crimes’: see P. Iganski and L. Spiridoula, ‘The personal injuries of hate crime’, in N. Hall et al (eds), *The Routledge International Handbook on Hate Crime* (Routledge, 2014), at 52-64.

hierarchies that characterize a given social order’.⁴⁰ For an act to qualify as a hate crime, it is enough to show that the victim was deliberately targeted because of a particular ‘protected characteristic ... shared by a group, such as race, language, religion, ethnicity, nationality, or any other similar common factor.’⁴¹ The label of hate crimes enables the law to recognize the social conflicts that trigger crimes, and to appreciate that hate crimes need not necessarily be crimes that are extraordinarily *violent* or crimes that are limited to specific modes of commission.⁴²

Unfortunately, the penal laws in India have not managed to fully incorporate hate crimes into their vocabulary.⁴³ This is not to say that there have been no efforts in this direction. The Prevention of Atrocities (against Scheduled Castes and Scheduled Tribes) Act of 1989, for one, criminalizes violence against lower-caste Hindus.⁴⁴ As Bhat argues, ‘the atrocities legislation was an acknowledgment that “caste relations are defined by violence, both incidental and systematic,”⁴⁵ in ways that would remind us of Perry’s argument regarding the role of hate violence in maintaining and entrenching social power’.⁴⁶ However, by design, the Act does not bring other religious, ethnic, and sexual minorities within its ambit.⁴⁷ Even in implementation, the Act is left to the discretion of state governments. As many empirical studies now show, state police tend to write off a majority of complaints by SC/ST members as ‘false’.⁴⁸ Courts too have been slow to embrace prosecutions under the Act.⁴⁹

⁴⁰ B. Perry, *In the Name of Hate: Understanding Hate Crimes* (Routledge, 2001), at 10.

⁴¹ Office for Democratic Institutions and Human Rights, *Hate Crime Laws: A Practical Guide* (2009), at 16. Scholars have described how lynching was systematically used against African-Americans in the 1890s in order to garb the attack on their peoplehood and to disguise its role as an instrument of racial inferiorization: see e.g. L. Litwack, *Trouble in Mind: Black Southerners in the Age of Jim Crow* (Vintage, 1999).

⁴² N. Hall, ‘Hate and Homicide: Exploring extremes of Prejudice-Motivated Violence’, in F. Brookman, E. R. Maguire and M. Maguire (eds), *The Handbook of Homicide* (Wiley, 2017) 165, at 168.

⁴³ M. Alam Bhat, ‘Mob lynching should be categorized as a class of hate crimes’, *Hindustan Times*, 14 August 2018, available online at <https://www.hindustantimes.com/analysis/mob-lynching-should-be-categorised-as-a-class-of-hate-crimes/story-0NvzhshOfKg6h2dhm3NXRM.html> (visited 25 June 2021).

⁴⁴ Section 3(1) of the *Prevention of Atrocities (Against Scheduled Castes and Scheduled Tribes) Act 1989*.

⁴⁵ A. Telumbde, *The Persistence of Caste: the Khairlanji Murders and India's Hidden Apartheid* (Zed Books Ltd., 2010) at 77, 79.

⁴⁶ M. Bhat, ‘Mob, Murder, Motivation: The Emergence of Hate Crimes Discourse in India’, 16(1) *Socio-Legal Review* (2020) 76-107, at 89.

⁴⁷ T. Arora, ‘For 70 years, Dalits have been denied freedom of religion – through a presidential order’, *The Scroll*, 21 August 2020, available online at <https://scroll.in/article/970613/for-70-years-dalits-have-been-denied-freedom-of-religion-through-a-presidential-order> (visited 25 June 2021).

⁴⁸ S. Khora, ‘Final Reports under Sec-498A and the SC/ST Atrocities Act’, 49 (41) *Economic and Political Weekly* (2014) 17–20.

⁴⁹ *Hitesh Verma v. State of Uttarakhand*, Crl. App. No. 707 of 2020 (Supreme Court of India).

By late 2017, mainstream Indian media began using the term ‘lynching’ to frame anti-minority violence.⁵⁰ Often defined as the public extrajudicial killing of an alleged criminal,⁵¹ lynching is primarily associated with the post-reconstruction racist violence against African-Americans in the United States of America.⁵² The Indian Supreme Court also employed this label in its 2018 ruling on the petition filed by civil rights activist Tehseen Poonawala.⁵³ In its first intervention into the violence, the Court unequivocally condemned mob lynching and the inaction of state governments and lower courts.⁵⁴ Notwithstanding this welcome development, the Court’s use of the term ‘lynching’ to describe the violence⁵⁵ unfortunately lent weight to the narrative that the violence was an extrajudicial attempt to enforce anti-slaughter laws.⁵⁶ As such, it is not representative of the entire range of crimes actually perpetrated against minorities.

The Court’s judgment also hints at a different, more fitting, paradigm — where the criminal law infrastructure is read as a more comprehensive regime which not only regulates conduct on the basis of the violence used (for instance, mob violence) or the disruption of the state’s exclusive authority to enforce the law (such as lynching). In paragraph 20, the Supreme Court described these acts as ‘hate crimes’ and noted that ‘hate crimes as a product of intolerance, ideological dominance and prejudice ought not to be tolerated; lest it results in a reign of terror.’

By referencing hate crimes, *Tehseen Poonawala* takes a step in the right direction. Sadly, despite these inroads, the contribution of the Supreme Court is severely limited — since

⁵⁰ See e.g. ‘Public lynching: Chilling acts of violence that shook India’, *Times Now* 26 June 2017, available online at <https://www.timesnownews.com/india/article/public-lynchings-that-shook-india-a-timeline/64250> (visited 25 June 2021); ‘Mob Lynching Debate Reaches Parliament, Minister Says Don’t Blame BJP, Will Take Action’, *Outlook India*, 19 July 2017, available online at <https://www.outlookindia.com/website/story/mob-lynching-debate-reaches-parliament-minister-says-dont-blame-bjp-will-take-ac/299640> (visited 25 June 2021). The first civil society report documenting anti-minority violence in the context of cow vigilantism also characterized the violence as ‘lynching’: see Citizens Against Hate, *Report of fact finding into religiously motivated vigilante violence in India* (2017), available online at <http://www.misaal.ngo/wp-content/uploads/2017/09/FINAL-report-Lynching-without-End.pdf> (visited 25 June 2021) (‘Citizens Against Hate Report’).

⁵¹ Section 1 of the *Dyer Anti-Lynching Bill* 1922 (United States of America) defined lynching as ‘three or more persons acting in concert for the purpose of depriving any person of his life without authority of law as a punishment for or to prevent the commission of some actual or supposed public offense.’

⁵² Rich scholarship across disciplines has focused on violence against African Americans and the category of lynching: see e.g. J. Goldsby, *A Spectacular Secret: Lynching in American Life and Literature* (University of Chicago Press, 2006); A.H.A. Rushdy, *American Lynching* (Yale University Press, 2012).

⁵³ *Tehseen Poonawala*, *supra* note 17.

⁵⁴ *Ibid.*, § 40.

⁵⁵ *Tehseen Poonawala*, *supra* note 17, §§ 18-19, 24-25, 39-40.

⁵⁶ *Tehseen Poonawala*, *supra* note 17, § 18.

it left hate crimes undefined. Moreover, the Court did not direct legislative codification of these concepts, leaving readers with reduced clarity regarding their conceptual utility.

As a result, the domestic criminal law framework in India continues to remain insufficient to address the widespread hate crimes against Muslims and Dalits. This may prompt recourse to other avenues for enforcement of criminal responsibility — one of which is ICL. Importantly, the paper does not understand the turn to ICL as discounting ongoing legislative/judicial efforts.⁵⁷ Rather, this paper encourages those efforts, and invites attention to other complementary areas of law, such as ICL, whose discourse may clarify and supplement the agenda for domestic reform.

Admittedly, ICL too remains a developing area of law. It began to assume prominence only in the 1990s, after the establishment of the ad hoc tribunals in the former Yugoslavia and Rwanda. Significant efforts have been made to identify its definitional scope, with one prominent being that international crimes are crimes ‘created by international law’.⁵⁸ For the commission of such crimes, international law directly imposes criminal responsibility upon individuals.⁵⁹ Prescribing the domain of ICL purely on this premise may lead to many crimes that are similar in substance being left unpunished. Responding to this potential accountability gap, Cherif Bassiouni theorized that the scope of ICL extends to all crimes which threaten international interests or fundamental values.⁶⁰ States, both via treaties and in their individual/collective practice, now agree that core international crimes ‘threaten the peace, security, and well-being of the world’⁶¹ and consequently affect ‘each and every member of mankind, whatever his or her nationality, ethnic group and location.’⁶² As stated in the Rome

⁵⁷ K. Rajgopal, ‘Expanding the SC/ST Act’, *The Hindu*, 5 April 2018, available online at <https://www.thehindu.com/opinion/op-ed/expanding-the-scst-act/article23446502.ece> (visited 25 June 2021); S. Kamble, ‘Despite political setbacks in India, Dalit voices grow stronger’, *The Conversation*, 20 May 2019, available online at <https://theconversation.com/despite-political-setbacks-in-india-dalit-voices-grow-stronger-117055> (visited 25 June 2021).

⁵⁸ R. Cryer, *Prosecuting International Crimes: Selectivity in the International Criminal Law Regime* (Cambridge University Press, 2005), at 1.

⁵⁹ As the International Military Tribunal noted ‘crimes against international law are committed by men, not abstract entities’, see ‘Nuremberg IMT: Judgment and Sentences’, 41 *American Journal of International Law* (AJIL) (1947) 172, at 221.

⁶⁰ M. Cherif Bassiouni, ‘The Sources and Content of International Criminal Law’ in M. Cherif Bassiouni (ed.) *International Criminal Law* (Transnational Publishers, 1999), at 3, 98.

⁶¹ Preamble, ICCSt.; *Attorney-General v. Adolph Eichmann*, Criminal Appeal 336/61, 29 May 1962 (Supreme Court of Israel) (‘Eichmann Case’), § 291; *United States v. Altstötter et al.*, 3 *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No 10* (1947) (‘Justice Case’), at 954.

⁶² Separate Opinion of Judge Kirk McDonald and Vohrah, Judgment, *Erdemović* (IT-96-22-A), Appeals Chamber, 7 October 1997, § 21.

Statute of the ICC, they are the most serious crimes of concern to the international community as a whole.⁶³

It appears that the recent crimes in India may answer this description.⁶⁴ The international community began to express alarm soon after the Centre for Africa Development and Progress ('CADP') drew the UN Human Rights Council's attention to the violent killing of killing of 24-year-old Tabrez Ansari at the hands of a Hindu mob in the state of Jharkhand for not hailing Hindu deities.⁶⁵ After the HRC meeting, the United Nations sought a detailed report on Ansari's lynching.⁶⁶ Following the Delhi riots, many international bodies and foreign governments expressed their condemnation of crimes against minorities and apparent police/governmental inaction.⁶⁷

In *Nahimana*, a Trial Chamber of the International Criminal Tribunal for Rwanda ('ICTR') found that publications of the Rwandan newspaper *Kangura* 'normalized ethnic hatred'.⁶⁸ It ultimately grounded its finding that *Kangura* publications constituted an act of persecution by expressing ethnic hatred.⁶⁹ The crimes against Muslims and Dalits in India are similarly motivated by anti-minority hatred. This aligns the crimes with the purposive scope of ICL.

⁶³ See Preamble and Art. 5 ICCSt. But see also Art. 17(1)(d) (limiting cases admissible at the ICC to those of 'sufficient gravity').

⁶⁴ P. Pillai, 'India take heed, lynchings are crimes against humanity under international law', *The Wire*, 4 July 2019, available online at <https://thewire.in/law/lynchings-in-india-are-crimes-against-humanity-as-per-international-law#:~:text=India%20Take%20Heed%2C%20Lynchings%20are%20Crimes%20Against%20Humanity%20Under%20International%20Law,-The%20systematic%20nature&text=In%20December%202018%2C%20in%20a,mass%20atrocities%20and%20international%20crimes> (visited 25 June 2021).

⁶⁵ P. Newmann, 'Statement by Centre for Africa Development and Progress', 41st Regular Session of the Human Rights Council, 1 July 2019, available online at <http://webtv.un.org/search/item3-general-debate-contd-17th-meeting-41st-regular-session-human-rights-council/6054568069001/?term=human%20rights&sort=date&page=3&fbclid=IwAR0L-L5jtwExzbkXdMG4w0caz8BuSzZtm3mfytaYimfZVlzhui2IMpEnin4#player> (visited 25 June 2021).

⁶⁶ 'UN seeks report on Tabrez Ansari lynching from India', *ENewsroom*, 11 July 2019, available online at <https://www.newsclick.in/united-nations-report-tabrez-ansari-lynching-india> (visited 25 June 2021).

⁶⁷ US Department of State, *2019 Report on International Religious Freedom* (2020), available online at <https://www.state.gov/reports/2019-report-on-international-religious-freedom/> (visited 25 June 2021).

⁶⁸ Judgment, *Nahimana et. al.* (ICTR-99-52-T), Trial Chamber, 3 December 2003 ('*Nahimana* Trial Judgment'), § 951.

⁶⁹ *Ibid.*, § 1077.

Scholars have theorized how ICL contains many facets of immense expressive value – including the performance of the trial,⁷⁰ the sentencing of the perpetrators,⁷¹ its contribution to social deterrence, and norm signalling.⁷²

Amongst the expressive functions of ICL, norm signalling is most relevant to regions like India that may otherwise seem to be largely insulated from the reach of this facet of international law. By re-articulating international norms and denouncing certain violations as crimes, international criminal tribunals contribute to a ‘culture shift’ towards increased rights awareness.⁷³ As Teubner wrote, legal communication ‘autonomously processes information, creates worlds of meaning, sets goals and purposes, produces reality constructions, and defines normative expectations’.⁷⁴ Foucault also famously notes that ‘discourse transmits and produces power; it reinforces it, but also undermines and exposes it, renders it fragile and makes it possible to thwart’.⁷⁵ Even if the viability of particular ICL prosecutions may be in doubt, the increased social cognition associated with the discourse of ICL may still be potentially valuable.

As Lohne explains, such a climate has the ability to mobilize civil society to monitor and report human suffering,⁷⁶ and to lobby for accountability. This is perhaps exemplified by the prosecution of the leaders of the Lord’s Resistance Army in Uganda, which was given fresh impetus by the video campaigns by US-based NGO Invisible Children.⁷⁷ It is often hoped that this will be accompanied by a ‘justice cascade’ where one international ruling or attempted prosecution triggers further prosecutions in other relevant jurisdictions.⁷⁸ On this basis, it is hoped that increased discourse on the relevance of ICL for India will encourage regional civil society members to coordinate their efforts for domestic reform and accountability.

⁷⁰ B. Sander, ‘The Expressive Limits of International Criminal Justice: Victim Trauma and Local Culture in the Iron Cage of the Law’, *ESIL Annual Conference* (2015), at 3.

⁷¹ B. Simmons and J. Heyrans, ‘Can the International Criminal Court Deter Atrocity?’ 70 *International Organization* (2016) 443-475.

⁷² UNSG Rule of Law Report, *supra* note 24, § 39.

⁷³ OHCHR Rule of Law Tools, *Maximizing the Legacy of Hybrid Tribunals* (2006).

⁷⁴ G. Teubner, ‘How the Law Thinks: Toward a Constructivist Epistemology of Law’, 23 *Law & Society Review* (1989) 727-758.

⁷⁵ M. Foucault, *The History of Sexuality: The Will to Knowledge* (1998), at 100-101.

⁷⁶ K. Lohne, ‘Global Civil Society, the ICC, and Legitimacy in International Criminal Justice’, in N. Hayashi and C.M. Bailliet (eds.), *The Legitimacy of International Criminal Tribunals* (Cambridge University Press, 2017), at 451.

⁷⁷ A. Taub, *Beyond #Kony2012: Atrocity, Awareness, & Activism in the Internet Age* (Lean Publishing, 2012).

⁷⁸ K. Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (The Norton Series in World Politics, 2011).

3. Probing India's Engagement with International Criminal Law

Notwithstanding the otherwise disparate socio-political and cultural interests within the region, many Asian states including India have been united in deep suspicion of some aspects of international law. Given their long and harrowing experience with colonialism, Asian States have been wary of international institutionalization 'encroaching upon their hard-fought sovereignty'.⁷⁹ Perhaps rightly, early ICL trials came under fire for their neo-colonial/colonial veneer, and concern that they were perpetuating selective justice against ongoing national liberation movements.⁸⁰ This continuing wariness has manifested in strong misgivings about the ICC and very limited accession to the Rome Statute.⁸¹ Of the 123 states that have ratified or acceded to the Rome Statute, only 11 states are Asian.⁸²

India has not ratified the Rome Statute of the ICC. Nevertheless, India enjoyed a good participatory record in the drafting of both the Genocide Convention⁸³ and the Rome Statute. India was in fact elected to the Drafting Committee during the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an ICC.⁸⁴ Yet despite this initial involvement, India abstained from voting on the final draft of the Rome Statute. Per the statements of the Indian delegation at the Rome Conference, the abstention was motivated by India's objections to the excessive powers delegated to the UN Security Council with regard to the Rome Statute and the Statute's silence on the use of nuclear and chemical weapons constituting a war crime.⁸⁵

⁷⁹ H. Kim, 'Missed Opportunities in the Judicialization of International Criminal Law? Asian States in the Emergence and Spread of the Rome Statute System to Punish Atrocity Crimes', 35 *Netherlands Quarterly of Human Rights* (2017) 246, at 260.

⁸⁰ See Judge Radhabinod Pal's famed dissent: R. Pal, *International Military Tribunal for the Far East: Dissident Judgment of Justice R.B. Pal* (1953), at 115; S. Chesterman, 'International Criminal Law with Asian Characteristics', 27 *Columbia Journal of Asian Law* (2013) 129, at 145; N. Boister and R. Cryer. *The Tokyo International Military Tribunal: A Reappraisal* (Oxford University Press, 2008), at 245.

⁸¹ A. Rajesh Saibaba, 'India and the International Criminal Court: Re-Invigorating and Re-Visiting the Non-Ratification Debate', 11 *ISIL Yearbook on International Humanitarian and Refugee Law* (2011) 189, at 192–198.

⁸² See 'State parties to the Rome Statute', available online at https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (visited 26 June 2021).

⁸³ *The Crime of Genocide: Report of the Sixth Committee*, 55th plenary meeting, UN Doc. A/231, 11 December 1946, at 1134.

⁸⁴ *Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Volume II*, UN Doc. A/Conf./183/13, 15 June – 17 July 1998 ('Rome Conference Records'), at 45.

⁸⁵ *Amendments proposed by India, Summary records of the meetings of the Committee of the Whole*, 42nd meeting, UN Doc. A/CONF. 183/C. 1/L.94 and A/CONF. 183/C. 1/L.95, 17 July 1998, §§ 6-8.

ICL remains conspicuously missing from India's domestic legal lexicon. Although India ratified the Genocide Convention in 1959,⁸⁶ it is yet to enact domestic legislation to give effect to the obligation in Article V. In 2016, former Minister of State for Home Affairs Kiren Rijiju defended this lack by noting that the Indian Penal Code sufficiently captures the crime of genocide.⁸⁷

Like genocide, crimes against humanity are not recognized as separate crimes in the Indian Penal Code. Unlike genocide, India has not signed any treaty that defines crimes against humanity. Yet, India often invokes crimes against humanity in its diplomatic statements.⁸⁸ This prompts the question of how the scope of crimes against humanity is to be delimited for India. Considering the present lack of a *lex specialis* treaty definition, recourse may be had to customary law.⁸⁹ The Indian Constitution — the touchstone of India's domestic laws — recognizes the continuation of customary norms that applied at the time of India's independence and the need to foster respect for 'international law and treaties'.⁹⁰ Scholars like Alexandrowicz read these provisions as proof of customary law not being *per se* incorporated in the domestic law.⁹¹ This is in keeping with India's commitment to the dualist model in its engagements with international law.⁹² Lately though, Indian courts have eagerly and monistically embraced customary law, repeatedly finding that the 'rules of customary law which are not contrary to the municipal law shall be deemed to be incorporated in the domestic law'.⁹³ As Chimni rightly argues, for being a postcolonial state, India has been surprisingly welcoming of customary law.⁹⁴ Arguably, customary law offers a route to introduce ICL into Indian prosecutorial discourse.

⁸⁶ See <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280027fac> (visited 26 June 2021).

⁸⁷ 'Enacting law in conformity with UN Convention on Genocide and racial discrimination', Q. 718, *Rajya Sabha Debates*, 2 March 2016, available online at https://rsdebate.nic.in/bitstream/123456789/656850/1/IQ_238_02032016_U718_p213_p214.pdf (visited 26 June 2021).

⁸⁸ "'Crimes against humanity': India condemns terror attacks in Afghanistan, demands accountability of perpetrators", *The Statesman*, 13 May 2020, available online at <https://www.thestatesman.com/india/crimes-humanity-india-condemns-terror-attacks-afghanistan-demands-accountability-perpetrators-1502888012.html> (visited 26 June 2021).

⁸⁹ Art. 38(1)(b) ICJ Statute.

⁹⁰ Arts 51(c), 372 of the Constitution of India (1950).

⁹¹ C.H. Alexandrowicz, 'International Law in India', 1 *International and Comparative Law Quarterly* (1952) 289, at 291.

⁹² A. Chandra, 'India and international law: formal dualism, functional monism', 57 *Indian Journal of International Law* (2017) 25-45.

⁹³ *People's Union for Civil Liberties v. Union of India* AIR 1997 SC 568 (Supreme Court of India); *Vellore Citizens Welfare Forum v. Union of India* AIR 1996 SC 2715 (Supreme Court of India).

⁹⁴ B.S. Chimni, 'India' in S. Chesterman, H. Owada, and B. Saul (eds), *Oxford Handbook for International Law in Asia and the Pacific* (Oxford University Press, 2019), at 573.

A rather ground-breaking judgment by the Delhi High Court recently attempted to introduce and articulate crimes against humanity using customary law.⁹⁵ The High Court was tasked with pronouncing on the culpability of Sajjan Singh, a former politician, who was accused of criminal conspiracy and murder in relation to the 1984 Sikh massacre.⁹⁶ In rendering its judgment, the Division bench of the Delhi High Court found that the mass murder of Sikhs cannot be diagnosed or prosecuted exclusively within the domestic penal architecture. The Court noted that the attacks were carried out in a ‘systematic manner’⁹⁷ and carefully planned to achieve the ‘scale of violence, destruction, and loss of lives’.⁹⁸ The judgment is also replete with references to the ‘apathy of the police’,⁹⁹ ‘facilitation by the police’,¹⁰⁰ and ‘active connivance in the murders perpetrated.’¹⁰¹ In the Court’s words, such crimes ‘shock the conscience of mankind’ and their legal harm is best captured by the label of crimes against humanity.¹⁰² Pertinently, the Court did not exclusively make references to conventional sources of crimes against humanity in its delineation. Instead, it traced the evolution of crimes against humanity from the first formal reference to the term in 1915 to its present interpretation in state practice. Notably, the Court included the practice of non-signatories to the Rome Statute while surveying state practice on the elements of crimes against humanity.¹⁰³ It would not be incorrect to presume that the Court considered this to be the definition of crimes against humanity under customary law.

More recently, the Delhi police made a reference to ‘crimes against humanity’ in the charge-sheet filed against those accused of committing crimes during the Delhi riots of February/March 2020.¹⁰⁴ This seems to recall the approach in *Sajjan Singh*. Much like the Delhi High Court, the charge-sheet referred to a ‘sustained and well-oiled campaign’, ‘organized’ to commit ‘morally reprehensible acts’ that led to the loss of many lives.¹⁰⁵ The

⁹⁵ *Sajjan Singh*, *supra* note 25, § 367.

⁹⁶ *Ibid.*, § 152.

⁹⁷ *Ibid.*, § 287.

⁹⁸ *Ibid.*, § 283.

⁹⁹ *Ibid.*, § 149.

¹⁰⁰ *Ibid.*, § 367.6.

¹⁰¹ *Ibid.*, § 149.

¹⁰² *Ibid.*, § 367.1.

¹⁰³ *Ibid.*, § 367.7.

¹⁰⁴ It is important to note, however, that the Delhi police has rightly been criticized for targeting political dissidents in its investigations, and therefore its identification of the ‘accused’ in this case may be suspect. See *infra* notes 168-181 and accompanying text.

¹⁰⁵ ‘Delhi riots | Umar Khalid, Sharjeel Imam committed crime against humanity, police say in charge sheet’, *The Hindu*, 25 November 2020, available online at <https://www.thehindu.com/news/cities/Delhi/delhi-riots-accused-committed-crime-against-humanity-police-says-in-chargesheet/article33178239.ece> (visited 26 June 2021).

following section evaluates whether the Delhi High Court's interpretation is consistent with the components of crimes against humanity under customary law.

4. Measuring the Recent Crimes in India against the Framework in Customary International Law for Crimes Against Humanity

Article 7 of the Rome Statute defines crimes against humanity by reference to certain prohibited acts committed as part of a *widespread* or *systematic attack* directed *against any civilian population*, pursuant to a *State or organisational policy*. Consistent with the recent approach of the International Law Commission, this study uses the contextual elements of Article 7 as a benchmark model for the position in customary law, and tests whether the events in India may satisfy these requirements. Given that hate crimes either go unreported or suffer from bias in the Indian news media, the paper tries to rely mainly on empirical compilations on hate crimes prepared by independently-funded think tanks – both within India and outside. Expectedly, some of these organizations have also come under fire for their revealing studies and anti-government political views.¹⁰⁶ For the purpose of this study, it is assumed that all relevant acts are committed with intent and knowledge, to the extent required.

A. Attack Against Any Civilian Population

1. Customary Law

Article 7(2)(a) of the Rome Statute defines an attack as a 'course of conduct involving the commission of multiple acts referred to in [Article 7(1) (underlying acts of crimes against humanity)]'.¹⁰⁷ This is consistent with the approach of the ad hoc tribunals, which considered that the threshold could be met by a course of conduct, or in certain circumstances a single event encompassing a sufficient number of acts of victimisation.¹⁰⁸ An 'attack' need not be a military attack,¹⁰⁹ and the acts making up the attack need not satisfy any particular test other

¹⁰⁶ See Amnesty International India, 'Amnesty International India halts its work on upholding human rights in India due to reprisal from Government of India', 29 September 2020, available online at <https://www.amnesty.org/en/latest/news/2020/09/amnesty-international-india-halts-its-work-on-upholding-human-rights-in-india-due-to-reprisal-from-government-of-india/> (visited 26 June 2021).

¹⁰⁷ Art. 7(2)(a) ICCSt. See also Judgment, *Ntaganda* (ICC-01/04-02/06-2359), Trial Chamber, 8 July 2019 ('*Ntaganda* Trial Judgment'), § 663.

¹⁰⁸ See e.g. Judgment, *Akayesu* (ICTR-96-4-T), Trial Chamber, 2 September 1998 ('*Akayesu* Trial Judgment'), § 581; Judgment, *Blagojević and Jokić* (IT-02-60-A), Appeals Chamber, 17 January 2005, § 545; *Ministère Public v. Habré*, Judgment, 30 May 2016, Extraordinary African Chambers, § 1359; Judgment, *Kaing Guek Eav alias Duch* (001/18-07-2007/ECCC/TC), Trial Chamber, 26 July 2010 ('*Duch* Trial Judgment'), § 298; Judgment, *Sesay, Kallon and Gbao* (SCSL-04-15-T), Trial Chamber, 2 March 2009, § 77.

¹⁰⁹ ICC Elements of Crimes, Art. 7, Introduction, § 3. See also *Ntaganda* Trial Judgment, *supra* note 107, § 662.

than qualification as underlying acts of crimes against humanity.¹¹⁰ For example, domestic courts have found the blockade of food and water,¹¹¹ widespread deportation,¹¹² and detention¹¹³ to constitute acts which may establish the existence of an attack. While the Rome Statute does not define the meaning of ‘civilian population’,¹¹⁴ abundant caselaw has held that the term ‘civilian’ at least includes individuals who are not combatants.¹¹⁵

2. *Application to Events in India*

The recent crimes in India are predominantly violent, and undoubtedly constitute multiple acts which could form the underlying acts of crimes against humanity such as murder, assault, and sexual abuse.¹¹⁶ They also include other oppressive acts which may be associated with the infringement of fundamental rights such as the destruction of property, banning the consumption of beef, institutional discrimination by the police,¹¹⁷ and the loss of livelihood.¹¹⁸ Likewise, with the possible exception of one lynching in Jammu and Kashmir, the victims of all these crimes were civilians, and the crimes took place in peacetime.¹¹⁹

B. *Widespread or Systematic*

1. *Customary Law*

¹¹⁰ Judgment, *Kunarac et al.* (IT-96-23-A & IT-96-23/1-A), Appeals Chamber, 12 June 2002 (‘*Kunarac* Appeal Judgment’), § 415; Judgment, *Naletilić and Martinović* (IT-98-34-T), Trial Chamber, 31 March 2003 (‘*Naletilić* Trial Judgment’), § 233. See also *Akayesu* Trial Judgment, *supra* note 108, § 581; G. Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford University Press, 2005), at 156.

¹¹¹ *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, Court of Appeals for the Ninth Circuit, Judgment, 25 October 2011, at 1150.

¹¹² ECLI: NL: GHDHA: 2015: 1082, Case No 22-005123-11, Judgment, 7 May 2015 (Palace of Justice in The Hague).

¹¹³ *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 453 F. Supp. 2d 633, District Court for the Southern District of New York, Opinion, 12 September 2006, at 670–671.

¹¹⁴ D. Robinson, ‘The context of crimes against humanity’, in R. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Evidence* (Transnational Publishers, 2001) (‘Lee’), at 78.

¹¹⁵ Judgment, *Blaškić* (IT-95-14-A), Appeals Chamber, 29 July 2004 (‘*Blaškić* Appeal Judgment’), § 110; Judgment, *Bemba* (ICC-01/05-01/08-3343), Trial Chamber, 21 March 2016, §§ 154, 156; *Duch* Trial Judgment, *supra* note 108, § 305.

¹¹⁶ AI, *Halt the Hate*, *supra* note 7, at 6–7.

¹¹⁷ *Zulfikar Nasir & Others v. State of Uttar Pradesh & Others*, (2018) SCC Online Del 12153 (Delhi High Court), § 72.

¹¹⁸ A. Lukose, ‘At Asia’s largest abattoir, butchers fear livelihood loss as beef ban sets in’, *The Indian Express*, 23 March 2015 (‘Lukose’), available online at <https://indianexpress.com/article/india/india-others/at-asias-largest-abattoir-butchers-fear-livelihood-loss-as-beef-ban-sets-in/> (visited 27 June 2021).

¹¹⁹ AI, *Halt the Hate*, *supra* note 7, at 11.

Article 7(1) of the Rome Statute requires that an attack against the civilian population is either ‘widespread’ or ‘systematic’. There is no requirement to satisfy both criteria, and this is also borne out by the practice of the ad hoc tribunals.¹²⁰ This approach prompted concern among some delegations during the drafting of the Statute¹²¹ – including India¹²² – but this was resolved by the understanding that the requirements for an ‘attack’ and ‘State or organizational policy’ would exclude an aggregate of isolated or random acts from qualifying as a crime against humanity.

The ‘widespread’ requirement is relatively uncontroversial,¹²³ and is accepted to mean large in scale, although there is no fixed quantitative or qualitative standard to assess when the requirement is met. The assessment is completely dependent on the facts of each case.¹²⁴ However, it can generally be stated that a sufficiently large number of persons must be victimised,¹²⁵ and courts have declined to find that a widespread attack has been carried out when this number is too low.¹²⁶ Although it is not a *sine qua non*, crimes affecting a large geographical area can assist in demonstrating the requisite scale.¹²⁷

The ‘systematic’ requirement is also well-established, but the concept has sometimes proved difficult to distinguish from notions such as ‘policy’ (addressed below).¹²⁸ When studying the need for an international tribunal to adjudicate the violence in Lebanon preceding

¹²⁰ Authorization of an Investigation into the Situation in the Republic of Kenya, *Kenya* (ICC-01/09-19-Corr), Pre-Trial Chamber II, 31 March 2010 (‘*Kenya Decision*’), § 94.

¹²¹ See Rome Conference Records, *supra* note 84, at 150 (United Kingdom of Great Britain and Northern Ireland, France), 151 (Thailand, Egypt), 152 (Islamic Republic of Iran), 155 (Russian Federation).

¹²² See Rome Conference Records, *supra* note 84, at 148 (India).

¹²³ C.K. Hall, ‘The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court’, 91 *AJIL* (1997) 177-187, at 182. See also *Draft Articles on Prevention and Punishment of Crimes Against Humanity, with commentaries 2019, International Law Commission*, 71st session, UN Doc. A/74/10 (2019) (‘2019 ILC Draft Articles’), footnote 27.

¹²⁴ See e.g. *Kenya Decision*, *supra* note 120, § 95; Confirmation Decision, *L. Gbagbo* (ICC-02/11-01/11-656-Red), Pre-Trial Chamber I, 12 June 2014 (‘*Gbagbo Confirmation Decision*’), § 222.

¹²⁵ *Gbagbo Confirmation Decision*, *supra* note 124, §§ 17, 24, 37, 42, 55, 64, 72, 211; Judgment and Sentence, *Rutaganda* (ICTR-96-3-T), Trial Chamber, 6 December 1999, §§ 67–69.

¹²⁶ See e.g. *Mamani v. Berzaín*, 654 F.3d 1148, 11th Circuit Court, 2011 (concerning the alleged killing of 70 people by Bolivian authorities); *Bowoto v. Chevron Corporation*, Order Granting Defendants’ Motion for Summary Judgment on Plaintiffs’ Crimes Against Humanity Claim, District Court for the Northern District of California, Case No C 99-02506 SI, 14 August 2009 (concerning the alleged targeting of political dissidents by Nigerian police forces).

¹²⁷ Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Bemba, *Bemba* (ICC-01/05-01/08-424), Pre-Trial Chamber II, 15 June 2009, §§ 117-124.

¹²⁸ See e.g. Judgment, *Blaškić* (IT-95-14-T), Trial Chamber, 3 March 2000 (‘*Blaškić Trial Judgment*’), § 203. This approach was also followed in Judgment, *Kordić and Čerkez*, (IT-95-14/2-T), Trial Chamber, 26 February 2001 (‘*Kordić Trial Judgment*’) § 184; *Prosecutor v. Abilio Soares* (Judgment), Case No 01/PID.HAM/AD.Hoc/2002/ph.JKT.PST, Human Rights Court of Justice Jakarta, 14 August 2002, § 79; *Government of the People's Republic of Bangladesh v. Abdul Quader Molla*, Appellate Division of the Supreme Court of Bangladesh, Criminal Appeal No 24-25 of 2013 (‘*Molla Judgment*’), § 376.

and following the assassination of Prime Minister Rafiq Hariri, the UN Secretary-General observed that systematicity is characterised by the execution of a methodical plan.¹²⁹ Similar reasoning has been endorsed by domestic courts¹³⁰ and various international tribunals.¹³¹ They have emphasised that systematicity reflects the ‘organised nature’ of the acts such as ‘the existence of “patterns of crimes” and the improbability of their random or accidental occurrence.’¹³²

2. Application to Events in India

According to Amnesty International and *The Quint*, 938 instances of violence against Muslims or Dalits were reported between September 2015 and June 2019. If more recent data from the Delhi riots is taken into consideration, then hate crimes seem to have affected around 1500 victims,¹³³ and claimed over 250 Muslim and 650 Dalit lives.¹³⁴ Muslims and Dalits have been attacked in over 24 states over the past five years.¹³⁵ These numbers still appear to be rising. While this scale of victimisation may be small compared to some attacks which have been characterised as ‘widespread’ for the purpose of crimes against humanity, it is not clear it falls outside the permitted threshold.¹³⁶

There is also reason to consider that the ‘systematic’ criterion might be established. While individual criminal acts were principally authored by private citizens, or mobs,¹³⁷ they were not wholly spontaneous. Many victims informed the police that they had been threatened by

¹²⁹ *Report of the Secretary-General on the establishment of a special tribunal for Lebanon*, UN Doc. S/2006/893, 15 November 2006, § 11, and Annex II, § 24. See also Opinion and Judgment, *Tadić* (IT-94-1-T), Trial Chamber, 7 May 1997 (‘*Tadić* Trial Judgment’), §§ 648-649.

¹³⁰ See *Attorney-General (Minister of Immigration) v. Tamil X and Another* [2010] NZSC 107, Supreme Court of New Zealand; *Alberto Fujimori* (Special Criminal Chamber Decision), Supreme Court of Peru, Case No AV-19-2001, 7 April 2009, § 714; *Mugesera v. Canada (Minister of Citizenship and Immigration)* [2005] 2 S.C.R. 100, Supreme Court of Canada (‘*Mugesera*’), § 160.

¹³¹ Judgment, *Niyitegeka* (ICTR-96-14-T), Trial Chamber, 16 May 2003, § 804; *Chea and Samphan* (002/19-09-2007/ECCC/TC), Judgment, Trial Chamber, 7 August 2014), § 179; *Gbagbo* Confirmation Decision, *supra* note 124, § 223.

¹³² Judgment, *Ongwen* (ICC-02/04-01/15-1762-Red), Trial Chamber IX, 4 February 2021, § 2682.

¹³³ Data compiled from: *The Quint* Data Lab, *Lynching in India*, *supra* note 14; AI, *Halt the Hate*, *supra* note 7; The Polis Project, *List of Deceased*, *supra* note 5.

¹³⁴ *Ibid.*

¹³⁵ AI, *Halt the Hate*, *supra* note 7, at 3.

¹³⁶ *Kenya* Decision, *supra* note 120, § 95.

¹³⁷ The crimes in Jharkhand, West Bengal, and Assam were perpetrated by large congregations, whereas crimes in Haryana were more directed attacks. See Citizens Against Hate Report, *supra* note 50, s. 3.3. Illustratively, 92.5% of the hate crimes committed against Muslims in the first half of 2019 were mob attacks: AI, *Halt the Hate*, *supra* note 7, at 9.

the perpetrators prior to the lynching.¹³⁸ The crimes also occurred in similar ways: accounts of the Delhi riots describe how Hindu mobs, armed with revolvers, metal rods, and crowbars, vandalized mosques and shrines, and went from street to street torching Muslim homes, shops, and property.¹³⁹ Nor did these events occur in a political vacuum. After assuming power at the national level, the BJP introduced a near nation-wide beef ban, and BJP-ruled states began modifying their existing legislation to treat cow slaughter with more stringency.¹⁴⁰ The ban placed Dalits and Muslims at a significant disadvantage, since many relied on beef for their livelihood¹⁴¹ and regularly consumed beef because it was cheap.¹⁴² The beef bans were followed by an almost 300% increase in hate crimes against Muslims and Dalits.¹⁴³ Furthermore, 80% of the perpetrators were officially affiliated to the ruling party, BJP or its sister Hindu organizations such as the *Vishwa Hindu Parishad*, *Hindu Yuva Vahini*, and *Bajrang Dal*.¹⁴⁴ Many cow-protectors (or *gau rakshaks*) worked for state governments,¹⁴⁵ either due to legislation outsourcing cow protection to private groups¹⁴⁶ or because of state-sponsored reward schemes for cow vigilantes.¹⁴⁷

3. State or Organizational Policy

1. Customary Law

¹³⁸ HRW, *Violent Cow Protection*, *supra* note 21, footnotes 94 and 102. The commentary to the 2019 ILC Draft Articles on Crimes Against Humanity notes that advance planning and coordination is indicative of systematicity: see 2019 ILC Draft Articles, *supra* note 123, § 16.

¹³⁹ H. Ellis-Peterson, 'Inside Delhi: lynched, beaten, and burnt', *The Guardian*, 1 March 2020, available online at <https://www.theguardian.com/world/2020/mar/01/india-delhi-after-hindu-mob-riot-religious-hatred-nationalists> (visited 27 June 2021).

¹⁴⁰ Gujarat Animal Preservation (Amendment) Act 2017.

¹⁴¹ See Lukose, *supra* note 118.

¹⁴² See Rukmini, *supra* note 12.

¹⁴³ AI, *Halt the Hate*, *supra* note 7, at 4.

¹⁴⁴ Apoorvanand, 'What is behind India's epidemic of mob lynching?', *Al Jazeera*, 6 July 2017, available online at <https://www.aljazeera.com/opinions/2017/7/6/what-is-behind-indias-epidemic-of-mob-lynching> (visited 27 June 2021).

¹⁴⁵ See e.g. Citizens Against Hate Report, *supra* note 50, s. 4.2 (concerning Khushnud Khan, December 2015), and at 13 (concerning the Una case, July 2016).

¹⁴⁶ In 2010, the Haryana government created a *Gau Raksha Ayog* (state Cow Protection Commission) which included members of the RSS and Hindu extremists: see Citizens Against Hate Report, *supra* note 50, at 19. Sections 16 and 17 of Haryana's Gauvansh Sanrakshan and Gausamvadhan Act 2015 authorize the police or 'any person authorized by the state' to search and confiscate vehicles used or intended to be used for the export of cows.

¹⁴⁷ In 2011, the Gujarat state government disbursed Rs 75 lakh in cash rewards to 1,394 vigilantes for raiding illegal cattle transporters and filing FIRs against them. See H. Dave, 'Can't kill in cow's name, says PM but as CM, Gau Rakshaks thrived in his Gujarat', *Hindustan Times*, 15 July 2017, available online at <https://www.hindustantimes.com/india-news/modi-warns-gau-rakshaks-but-cow-protectors-flourished-in-gujarat-with-him-as-cm/story-yGaSUNUQkhAWN3Txa9nPP.html> (visited 27 June 2021).

The requirement that the attack occurs pursuant to a ‘State or organizational policy’ continues to be the most controversial aspect of the *chapeau* requirements for crimes against humanity, as set out in Article 7 of the Rome Statute. While it was expressly included by the ICC drafters, the ICTY Appeals Chamber in *Kunarac* notably rejected the existence of such an element in customary international law.¹⁴⁸ Likewise, while some states’ legislative practices clearly deviate from Article 7 of the Rome Statute,¹⁴⁹ other state practice appears to support a policy requirement. States like Hungary,¹⁵⁰ Brazil,¹⁵¹ South Africa,¹⁵² and Argentina¹⁵³ have incorporated Article 7 verbatim, and states like Chile and Estonia have adopted similar approaches.¹⁵⁴ Yet other states like Australia, Germany, and DRC omitted the reference to state or organizational policy in their legislation,¹⁵⁵ but the drafting histories confirm that proof of policy was still anticipated to be necessary to qualify acts as crimes against humanity. The judicial practice of states also tends to take a similar approach.¹⁵⁶

India has been rather un-involved in the formulation and development of the policy element of Article 7 of the Rome Statute. Nonetheless, as discussed earlier, the *Sajjan Singh* judgment implicitly endorsed deliberate inaction by the state as evidence of policy.¹⁵⁷ The Delhi High Court also made references to similar standards endorsed by sister courts. In paragraph 367.7, it cited the *Abdul Qader Molla* judgment of the Bangladeshi Supreme Court where the Court lamented how ‘perpetrators of crimes against humanity were rewarded by the authorities in power since August 1975 instead of putting them to justice.’¹⁵⁸ On this basis, while recognising that the position in customary law is not yet settled, this paper will proceed on the assumption that the policy requirement must also be satisfied.

¹⁴⁸ *Kunarac* Appeal Judgment, *supra* note 110, § 98.

¹⁴⁹ See e.g. Sections 4(3) and 6(3) of the Canadian Crimes Against Humanity and War Crimes Act 2000; Art. 158 of Romanian Law No. 286/2009; Bangladesh International War Crimes (Tribunal) Act 1973; Section 102 of the Norwegian Law No. 28/2005.

¹⁵⁰ Section 143(3) of Hungary’s Act C of 2012 in the Criminal Code.

¹⁵¹ Brazil’s Resolução da Assembleia da República no 3/2002.

¹⁵² Section 1(i) and Schedule 1, Part 2 of the *South African Implementation of the Rome Statute of the International Criminal Court Act 2002*.

¹⁵³ Argentina’s Law No. 25390 of 2000.

¹⁵⁴ Art. 1(2) of the Chilean Law No 20.357 (2008); Art. 89 of the Estonian Penal Code 2001.

¹⁵⁵ Section 268.20(1)(f) of the Australian Criminal Code 2002; Draft Code of Crimes against International Law (Federal Ministry of Justice of Germany, 2001), at 42.

¹⁵⁶ See e.g. *SRYYY v. Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 42, Federal Court of Australia, § 75; *Prosecutor v. Vişinescu (Judgment)*, Romanian High Court of Cassation and Justice, Case No 3986/2/2014, 16 February 2016, §§ 3, 139–140; *R (JS (Sri Lanka))*, [2010] UKSC 15, UK Supreme Court, § 9. But see *Mugesera*, *supra* note 130, § 157 (followed in *R v. Munyaneza* [2009] QCCS 2201, Supreme Court of Canada, § 114).

¹⁵⁷ *Sajjan Singh*, *supra* note 25, § 376.6.

¹⁵⁸ *Molla* Judgment, *supra* note 128, § 267.

2. Application to Events in India

Bearing in mind that a policy may be established not only by positive actions but also in some circumstances by relevant omissions,¹⁵⁹ there may be some basis to consider that the policy requirement is also met with respect to the recent crimes in India.

It is telling that 642 of the 938 hate crimes committed from 2015 to 2019 against Muslims and Dalits were committed in BJP-ruled states,¹⁶⁰ and in a number of cases current or former officials appeared to tolerate or acquiesce in the criminal conduct. For example, members of a Hindu mob cornered 55-year-old Pehlu Khan and his two sons and beat them with hockey sticks while chanting the names of Hindu gods.¹⁶¹ The attackers live recorded the lynching and posted it on social media. Yet a former BJP lawmaker called Khan ‘a sinner’ and celebrated the acquittal of the accused.¹⁶² In 2018, Union Minister Jayant Sinha garlanded 11 accused of lynching a Muslim man to death in Jharkhand, and reportedly paid the legal fees for their appeal to the High Court as well.¹⁶³ Even during the protests against the Citizenship (Amendment) Act 2020, several BJP leaders — including a cabinet minister — openly called Muslims ‘traitors’¹⁶⁴ and ‘rapists’,¹⁶⁵ inciting their Hindu supporters to ‘forcibly evict Muslims from their properties’ and even ‘shoot them’.¹⁶⁶ While the Prime Minister once condemned cow vigilantism in 2019,¹⁶⁷ senior BJP leadership did not register any condemnation for the statements made by the MPs/MLAs during the Delhi riots.

¹⁵⁹ See Elements of Crimes, Article 7, Introduction (footnote 6: ‘Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action.’)

¹⁶⁰ See *The Quint* Data Lab, Lynching in India, *supra* note 14 (July to September 2019); AI, *Halt the Hate*, *supra* note 7 (until June 2019), at 2.

¹⁶¹ HRW, *Violent Cow Protection*, *supra* note 21, footnote 68.

¹⁶² M. Pratap Singh, ‘No regret over Pehlu’s death: Alwar BJP MLA’, *Indian Express*, 25 April 2017, available online at <https://indianexpress.com/article/india/cow-vigilantes-no-regret-over-pehlu-khan-dairy-farmer-death-alwar-bjp-mla-gyandev-ahuja-4627024/> (visited 27 June 2021).

¹⁶³ ‘Jayant Sinha Legally Assisted ‘Innocent’ Lynching Convicts, But Regrets Garlanding Them’, *The Wire*, 23 July 2018, available online at <https://thewire.in/rights/jayant-sinha-ramgarh-lynching-convicts> (visited 27 June 2021).

¹⁶⁴ ‘Anurag Thakur Leads Crowd to Chant “Shoot the Traitors”’, *The Wire*, 27 January 2020, available online at <https://thewire.in/politics/anurag-thakur-delhi-chants> (visited 27 June 2021) (‘*The Wire*, 27 January 2020’).

¹⁶⁵ R. Chatterji, ‘Hate Speech: Shaheen Bagh Protesters Will Rape, Kill Your Sisters, Says BJP MP Parvesh Verma’, *Huffington Post*, 28 January 2020, available online at https://www.huffpost.com/archive/in/entry/shaheen-bagh-parvesh-verma-delhi-election-2020-in-5e2fb918c5b6ce51a4eac9bd?utm_hp_ref=in-parvesh-verma (visited 27 June 2021).

¹⁶⁶ *The Wire*, 27 January 2020, *supra* note 164.

¹⁶⁷ S. Prakash, ‘Narendra Modi condemns mob lynchings while asking whether it started in 2014’, *The Hindu*, 1 January 2019, available online at <https://www.thehindu.com/news/national/narendra-modi-condemns-mob-lynchings-while-asking-whether-it-started-in-2014/article25882792.ece> (visited 27 June 2021).

The inconsistent response of law enforcement agencies to crimes against Muslims and Dalits may also support the existence of a relevant policy. Human Rights Watch found that the police was often deliberately unresponsive,¹⁶⁸ evidently biased during investigation,¹⁶⁹ or involved in the hate crimes as perpetrators or bystanders.¹⁷⁰ In the case concerning the lynching of Samaydeen and Mohammad Qasim in Uttar Pradesh, the police allegedly falsified a complaint of lynching by attributing the victims' death to a motorbike accident — despite being eyewitness to the incident.¹⁷¹ In only 3 cases were police officers suspended for dereliction of duty.¹⁷² Instead, in one-third of cases, police lodged complaints against victims under laws that ban cow slaughter.¹⁷³

The nature of the police response to the hate crimes committed during the Delhi riots may be even more concerning. The Delhi-based People's Union for Democratic Rights analyzed the public details of 40 complaints (out of 700 complaints¹⁷⁴) filed in connection with the 2020 Delhi riots. In this sample, it found that police officers were allegedly re-scripting the narrative of violence by painting the Muslim community as responsible.¹⁷⁵ In reality, Muslim victims faced trouble filing complaints. Serious charges against Hindu attackers were

¹⁶⁸ In 70% of the hate crimes committed between 2015 and 2019, the police failed to lodge a complaint or arrest the accused. For the basis of this conclusion, see *The Quint* Data Lab, *Lynching in India*, *supra* note 14.

¹⁶⁹ For example, following the murder of Arif Qureshi (August 2015) the police allegedly agreed to file a complaint only after receiving a bribe, and even then did not charge the attackers for murder: see HRW, *Violent Cow Protection*, *supra* note 21, footnote 80. Following the lynching of Junaid Khan (July 2017), the police did not pursue charges against the main accused: see Citizens Against Hate Report, *supra* note 50, at 26. Following the lynching of Imteyaz Khan and Majlum Ansari, the police did not charge the leader of the cow protection group whom witnesses had identified as a perpetrator: see HRW, *Violent Cow Protection*, *supra* note 21, footnotes 98-99.

¹⁷⁰ See e.g. Citizens Against Hate Report, *supra* note 50 (referring to the lynching of Khushnud Khan (December 2015); Minhaj Ansari (October 2016); Mohammad Qasim (June 2018); and Shamiuddin (June 2018)). See also N. Dixit, 'For Haryana Police, the Holy Cow Is an Excuse for Extra-Judicial Killings', *The Wire*, 10 May 2018, available online at <https://thewire.in/communalism/for-haryana-police-the-holy-cow-is-an-excuse-for-extra-judicial-killings#:~:text=May%2010%2C%202018-.For%20Haryana%20Police%2C%20the%20Holy%20Cow%20Is%20an%20Excuse%20for,the%20Mewat%20region%20of%20Haryana> (visited 27 June 2021).

¹⁷¹ S. Raju, 'Hapur lynching: UP Police apologize after viral picture shows victim being 'dragged' in cops' presence', *Hindustan Times*, 22 June 2018, available at <https://www.hindustantimes.com/india-news/hapur-lynching-up-police-apologise-after-viral-picture-shows-victim-being-dragged-in-cops-presence/story-vOzuCxb2qN2esq7NOL5wJL.html> (visited 27 June 2021).

¹⁷² In the case of Minhaj Ansari (October 2016), the accused police superintendent was suspended from duty. Likewise, the lynching of Balamurugan and Karuppiiah (June 2017) in Rajasthan was also followed by disciplinary action against the responsible police officers. For this data, see *The Quint* Data Lab, *Lynching in India*, *supra* note 14.

¹⁷³ HRW, *Violent Cow Protection*, *supra* note 21, footnote 66.

¹⁷⁴ 'Perpetrators of Delhi riots will be punished irrespective of caste, religion, political affiliations: Amit Shah', *RSTV*, available online at <https://rstv.nic.in/perpetrators-delhi-riots-will-punished-irrespective-caste-religion-political-affiliations-amit-shah.html> (visited 27 June 2021).

¹⁷⁵ V. Kumar and R. Chitkara, 'Rescripting north-east Delhi riots – and the question of justice', *The Hindu*, 16 May 2020, available online at <https://www.thehindu.com/news/cities/Delhi/rescripting-north-east-delhi-riots-and-the-question-of-justice/article31597139.ece> (visited 27 June 2021).

dropped.¹⁷⁶ Strikingly, no complaint named BJP leader Kapil Mishra, who is largely blamed for the riots.¹⁷⁷ No police officers were charged even after complainants presented video evidence of police officers assaulting and abusing a 23-year old Muslim boy, Faizan, who died shortly after.¹⁷⁸ In contrast, many Muslim student leaders and activists — some of whom were not even at the site of the riots — were framed for inciting violence.¹⁷⁹ Even after the onset of the pandemic, the Delhi police filed ‘new charges against activists who were granted bail to ensure that they remained in custody’.¹⁸⁰ In its damning July 2020 report, the Delhi Minorities Commission — an official body set up by the Delhi legislative assembly to safeguard minority rights — found that the police investigations were targeting Muslims, and deliberately ignoring the culpable acts of Hindu protestors and leaders.¹⁸¹

Although irregularities by the police have been publicly known, courts have only rarely found them actionable.¹⁸² Except when the accused surrendered,¹⁸³ only one instance of a hate crime against Muslims resulted in a successful conviction.¹⁸⁴

5. Persecution and Murder as Relevant Crimes Against Humanity in Customary Law

Article 7 of the Rome Statute lists eleven underlying crimes that constitute crimes against humanity when committed in the context of a qualifying attack against a civilian population. Amongst these, the crimes of murder and persecution appear to be most relevant to the hate

¹⁷⁶ *Ibid.*

¹⁷⁷ T. Anwar, ‘Police’s Charge-sheet Gives Chronology of Delhi Riots, Omits Kapil Mishra’s Crucial ‘Hate Speech’’, *NewsClick*, 10 June 2020, available at <https://www.newsclick.in/Delhi-Riots-Police-Charge-Sheet-Chronology-Omits-Kapil-Mishra-Hate-Speech> (visited 27 June 2021).

¹⁷⁸ *The Quint*, ‘Justice for George Floyd in USA, why did India fail to track those who killed Faizan?’, 5 June 2020, available at https://www.youtube.com/watch?v=pyV5lSUS2aw&ab_channel=TheQuint (visited 27 June 2021) (‘*The Quint*, Justice for George Floyd’).

¹⁷⁹ HRW, *End Bias in Prosecuting*, *supra* note 21.

¹⁸⁰ *Ibid.*

¹⁸¹ Delhi Minorities Commission, *Report of the Fact-Finding Committee on the North-East Delhi riots of February 2020*, Delhi Minorities Commission (2020), available at <https://sanhati-india.in/2020/07/28/report-of-the-dmc-fact-finding-committee-on-north-east-delhi-riots-of-february-2020/> (visited 27 June 2021).

¹⁸² One notable exception is the decision of the Punjab and Haryana High Court where it scathingly criticized the state police and local administration for their silence and active connivance in dealing with the complaint filed against the lynching of Mustain Abbas. See *Tahir Hasan v. State of Haryana & Ors.*, CRWP No. 382 of 2016 (High Court of Punjab and Haryana).

¹⁸³ See the cases of Ummar Khan (November 2017) and Neelam Ahirwar (September 2017), cited in *The Quint* Data Lab, *Lynching in India*, *supra* note 14.

¹⁸⁴ The eight persons accused of lynching Inayatullah Khan (aged 12) and Mohammad Majloom (aged 35) to death in Jharkhand in were convicted for murder on 19 December 2018. See *The Quint* Data Lab, *Lynching in India*, *supra* note 14.

crimes against minorities in India, and there is no doubt that they are well established in customary international law.¹⁸⁵

A. The Crime of Murder

Under customary law, the underlying crime of murder is committed when an act/omission of the perpetrator causes the death of a person.¹⁸⁶ The perpetrator must have intended to kill the victim¹⁸⁷ or known that their act/omission is likely to cause the victim's death¹⁸⁸ or acted without due regard to human life;¹⁸⁹ and the killing must not be excusable.¹⁹⁰ The perpetrator's act or omission need not have been the sole cause of the death of the victim.¹⁹¹ However, it should have substantially contributed to the death of the victim.¹⁹² In respect of mental element, ad hoc tribunal chambers have lent overwhelming weight to the standard of likelihood or probability, i.e. for the perpetrator to know that death or serious injury is probable or likely to occur due to the act or omission.¹⁹³

Over 375 Muslim and Dalit lives were claimed by lynching between 2015 and 2019.¹⁹⁴ All cases contained proof of direct intention. In fact, as mentioned in previous sections, incidents of cow vigilantism and the murders during the Delhi riots were preceded by the perpetrators voicing their desire to murder Muslims and Dalits and later defending their actions.

B. The crime of Persecution

Building on precedents following World War II,¹⁹⁵ the crime of persecution was invoked as early as the *Tadić* case where the ICTY recognized that persecution, despite its universal application, had not been defined by any major criminal justice systems.¹⁹⁶ In subsequent

¹⁸⁵ R. Dubler and M. Kalyk, *Crimes Against Humanity in the 21st Century* (Brill Nijhoff, 2018), ch.10.

¹⁸⁶ M. Kelt and H. von Hebel, 'What Are the Elements of Crimes?', in Lee, *supra* note 114, at 26; *Blaškić* Trial Judgment, *supra* note 128, § 271; *Molla* Judgment, *supra* note 128, § 293.

¹⁸⁷ Judgment, *Kayishema and Ruzindana* (ICTR-95-1-T), Trial Chamber, 21 May 1999, § 140.

¹⁸⁸ Judgment, *Strugar* (IT-01-42-T), Trial Chamber, 31 January 2005 ('*Strugar* Trial Judgment'), § 236.

¹⁸⁹ Judgment, *Delalić et al.* (IT-96-21-T), Trial Chamber, 16 November 1998 ('*Čelebići* Trial Judgment'), § 439.

¹⁹⁰ Judgment, *Gotovina et. al.* (IT-06-90-T), Trial Chamber, 15 April 2011, § 1730.

¹⁹¹ *Molla* Judgment, *supra* note 128, § 290.

¹⁹² *Čelebići* Trial Judgment, *supra* note 189, § 494.

¹⁹³ *Strugar* Trial Judgment, *supra* note 188, § 236; Judgment, *Limaj* (IT-03-66-T), Trial Chamber, 30 November 2005, § 241.

¹⁹⁴ See *The Quint Data Lab*, Lynching in India, *supra* note 14.

¹⁹⁵ Art. 6(c) of the Charter of the International Military Tribunal; Principle VI (c), *Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal*, UN Doc. A/RES/95, 11 December 1946; *Justice case*, *supra* note 61, at 23–25, 1144–1156 (conviction for racial persecution) and at 1110–1114, 1118 (conviction on the basis of deprivation of rights in civil and penal cases).

¹⁹⁶ *Tadić* Trial Judgment, *supra* note 129, § 694.

rulings, the *actus reus* of persecution came to be identified as consisting of underlying acts which discriminate in fact and deny fundamental rights contrary to international law by reason of the identity of a group or collectivity.¹⁹⁷ The *mens rea* for the crime includes the specific intention to discriminate on political, racial, or religious grounds.¹⁹⁸

Compared to the ad hoc tribunals, Article 7(1)(h) of the Rome Statute proscribes a somewhat wider range of discriminatory grounds, which may or may not necessarily all be reflected in customary law.¹⁹⁹ For example, it is reported that Middle Eastern states at the Rome conference strongly opposed the inclusion of grounds such as gender, due to their view that they had not attained the status of customary law.²⁰⁰ While the definition of some concepts such as religion and race is relatively straightforward,²⁰¹ others (such as politics²⁰² and gender²⁰³) have been more contentious. Yet as demonstrated by the judicial analysis of the concept of ethnicity, tribunals have been able to put flesh on the bones of such concepts — for example, by grounding it in the broader cultural and linguistic identity of the group.²⁰⁴

A wide variety of conduct may constitute the underlying acts of persecution. These include acts afflicting severe bodily harm,²⁰⁵ cruel and inhumane treatment,²⁰⁶ inhuman conditions of detention,²⁰⁷ sexual assault,²⁰⁸ harassment and psychological abuse,²⁰⁹ hate speech (when it calls for violence),²¹⁰ and violations of the Geneva Conventions.²¹¹ Customary law has broadened the ambit of persecution to include serious violations of social, economic, and

¹⁹⁷ Judgment, *Kupreškić et al.* (IT-95-16-T), Trial Chamber, 14 January 2000, § 621 ('*Kupreškić Trial Judgment*').

¹⁹⁸ *Ibid.*

¹⁹⁹ K. Kittichaisaree, *International Criminal Law – Beyond the Nuremberg Legacy*, 3rd Ed. (OUP, 2009), at 100.

²⁰⁰ T. McCormack, 'Crimes against Humanity', in P. Rowe et. al. (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (OUP, 2004), at 197.

²⁰¹ *Blaškić Appeal Judgment*, *supra* note 115, § 139.

²⁰² Judgment, *Semanza* (ICTR-97-20-T), Trial Chamber, 15 May 2003, § 471.

²⁰³ M. Boot, 'Article 7(3)', in O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article* (2nd edn., C.H. Beck/Hart/Nomos, 2008), at 171-172.

²⁰⁴ Judgment, *Brđanin* (IT-99-36-T), Trial Chamber, 1 September 2004 ('*Brđanin Trial Judgment*'), § 992 (footnote 2484); Judgment, *Krnojelac* (IT-97-25-A), Appeals Chamber, 17 September 2003 ('*Krnojelac Appeal Judgment*'), § 185; Judgment, *Kvočka et al.* (IT-98-30/1-A), Appeals Chamber, 28 February 2005 ('*Kvočka Appeal Judgment*'), §§ 366, 455; *Kupreškić Trial Judgment*, *supra* note 197, §§ 636, 589, 780.

²⁰⁵ *Blaškić Appeal Judgment*, *supra* note 115, § 155.

²⁰⁶ *Krnojelac Appeal Judgment*, *supra* note 204, § 187.

²⁰⁷ Judgment, *Kvočka et al.* (IT-98-30/1-T), Trial Chamber, 2 November 2001 ('*Kvočka Trial Judgment*'), §§ 190-192.

²⁰⁸ Judgment, *Stakić* (IT-97-24-T), Trial Chamber, 31 July 2003, § 757.

²⁰⁹ *Kvočka Trial Judgment*, *supra* note 207, §§ 190-192.

²¹⁰ *Nahimana Trial Judgment*, *supra* note 68, §§ 986-987; *Mugesera*, *supra* note 130, § 150.

²¹¹ *Blaškić Appeal Judgment*, *supra* note 115, § 159.

cultural rights such as the denial of proper medical care²¹² and the right to property.²¹³ The underlying acts of persecution as defined in the Rome Statute likewise encompass ‘any act referred to in [article 7(1)] or any crime within the jurisdiction of the Court’,²¹⁴ or in other words ‘the intentional and severe deprivation of fundamental rights contrary to international law’.²¹⁵ It is acknowledged that the deprivation of rights may not be trivial, and must be comparable to other core crimes.²¹⁶

In establishing the requisite specific intent, the victim group is considered from the perspective of the perpetrator,²¹⁷ whether positively (because they belong to a specific class, as defined by proscribed grounds of discrimination) or negatively (because they do not belong to such a class). Thus, in *Kvočka*, the ICTY Appeals Chamber found that targeting a group of non-Serbs as such, or sympathizers of non-Serbs, amounted to prohibited discrimination.²¹⁸ The ECCC also endorsed this approach.²¹⁹

While readily acknowledging that the spreading of hatred is not sufficient to qualify as persecution,²²⁰ the crimes against Muslims and Dalits in India appear to go well beyond this threshold. Certainly, the lynching of Muslims and Dalits in India constitutes an intentional and severe deprivation of the fundamental rights of the victims, contrary to international law. Apart from jeopardizing the right to life, liberty, and equality of members of these communities,²²¹ the incidents that were particularly backed by motives of cow vigilantism assault the right to food,²²² which is recognized as a fundamental right in international human rights law.²²³ Following the beef ban, many BJP-ruled states ordered the closure of slaughterhouses and prohibited cattle fairs.²²⁴ For many Muslims, Dalits and nomad herders, the ban brought their

²¹² *Brđanin* Trial Judgment, *supra* note 204, § 1049.

²¹³ Judgment, *Deronjić* (IT-02-61-S), Trial Chamber, 30 March 2004, § 122; *Eichmann* Case, *supra* note 61, § 276.

²¹⁴ Art. 7(1)(h) ICCSt.

²¹⁵ Art. 7(2)(g) ICCSt.

²¹⁶ See e.g. *Kupreškić* Trial Judgment, *supra* note 197, § 622; Judgment, *Kaing Guek Eav alias Duch* (001/18-07-2007-ECCC/SC), Supreme Court Chamber, 3 February 2012 (‘*Duch* Appeal Judgment’), § 257; *Blaškić* Appeal Judgment, *supra* note 115, § 139; *Naletilić* Trial Judgment, *supra* note 110, § 635.

²¹⁷ See e.g. *Naletilić* Trial Judgment, *supra* note 110, § 636; *Kvočka* Appeal Judgment, *supra* note 204, § 195.

²¹⁸ *Kvočka* Appeal Judgment, *supra* note 204, § 363.

²¹⁹ *Duch* Appeal Judgment, *supra* note 216, § 272.

²²⁰ *Kordić* Trial Judgment, *supra* note 128, § 209.

²²¹ *Tehseen Poonawala*, *supra* note 17, § 23.

²²² See Rukmini, *supra* note 12.

²²³ Art. 25 Universal Declaration of Human Rights; UN Committee on Economic, Social and Cultural Rights, General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), 12 May 1999.

²²⁴ S. Daniyal, “‘BJP is taking revenge on Muslims’: UP’s crackdown has left the meat industry panicked and scared’, *Scroll.in*, 26 March 2017, available online at <https://scroll.in/article/832802/bjp-is-taking-revenge-on-muslims-ups-crackdown-has-left-the-meat-industry-panicked-and-scared> (visited 27 June 2021).

livelihood to the brink of collapse.²²⁵ Beyond the physical injuries, victims have also been unable to avail themselves of their right to access justice on account of police resistance towards lodging criminal complaints and the reticence of courts in awarding convictions.²²⁶

This treatment was meted out to the victims purely on account of their membership of certain groups. Studies reveal that 89.2% of the victims of the hate crimes reported from 2015 onwards have been either Muslim or Dalit.²²⁷ When situated in the backdrop of the ruling party's openly anti-minority, Islamophobic, upper caste serving policies — whether it is the beef ban or the Citizenship (Amendment) Act 2020 — it seems clear that the hate crimes were committed with discriminatory intent. Evidently, Muslims are singled out because of their religious identity (or for not subscribing to the majority religion).²²⁸

It may be more difficult to characterise the nature of the discrimination against the Dalits, because caste is *prima facie* not a prohibited ground.²²⁹ That said, caste-based discrimination may bear similarities to racial discrimination. It is no coincidence that the gruesome murder of George Floyd was likened to that of Faizan.²³⁰ While caste is typically associated with social stratification,²³¹ it is similar to race in so far as it is a permanent and involuntary label assigned at birth.²³² Caste and race also share notions of purity and pollution.²³³ These comparisons have long plagued the Committee on Elimination of Racial discrimination ('CERD'). After many rounds of debates, the CERD, in General Comment 29, read caste-based discrimination as a form of descent-based 'racial' discrimination. Given that persecution was not intended to be

²²⁵ J. Rahi, 'Why the attack on Kashmir's pastoralists is a big concern', *DownToEarth*, 27 April 2017, available online at <https://www.downtoearth.org.in/blog/agriculture/threatening-a-centuries-old-tradition-57703> (visited 27 June 2021).

²²⁶ This may be similar to the *Justice case* where German jurists had amended the law to prosecute Jews and assist Nazis in the perpetration of atrocities. See also S. Chopra and P. Jha (eds), *On their Watch: Mass Violence and State Apathy in India* (Three Essays Collective, 2014), at 99.

²²⁷ For the basis of this conclusion, see: AI, *Halt the Hate*, *supra* note 7; *The Quint* Data Lab, *Lynching in India*, *supra* note 14; The Polis Project, *List of Deceased*, *supra* note 5.

²²⁸ R. Ayyub, 'Mobs are killing Muslims in India. Why is no one stopping them?', *The Guardian*, 20 July 2018, available online at <https://www.theguardian.com/commentisfree/2018/jul/20/mobs-killing-muslims-india-narendra-modi-bjp> (visited 27 June 2021).

²²⁹ M. Nair, 'Dalits in India: The Need to Raise Standards of Accountability', in V. Uma and S. Nainar (eds), *Pursuing Elusive Justice: Mass Crimes in India and Relevance of International Standards* (Oxford University Press, 2013), at 71.

²³⁰ *The Quint*, *Justice for George Floyd*, *supra* note 178.

²³¹ See Committee on the Elimination of Racial Discrimination, *India: tenth to fourteenth report*, UN Doc. CERD/C/299/Add.3, 29 April 1996, § 13.

²³² See A. Waughray, *Capturing Caste in Law: the Legal Regulation of Caste-based Discrimination* (Routledge, 2017), chapter 1.

²³³ A. Deshpande, 'The Ugly Reality of Caste Violence and Discrimination in Urban India', *The Wire*, 11 December 2017, available online at <https://thewire.in/caste/ugly-reality-caste-violence-discrimination-urban-india> (visited 27 June 2021).

strictly circumscribed under customary law, there is a strong case to be made in favour of prosecuting the hate crimes against Dalits as persecution.²³⁴

6. The Search for Accountability within the Framework of International Criminal Law

Assuming that the ICL framework might indeed be applicable in principle to the recent crimes against Muslims and Dalits in India, the following section explores the options which might be available to victims and states to pursue individual criminal responsibility for the crimes against humanity of persecution and murder.

A. Domestic Accountability in India

The first avenue is domestic prosecution of international crimes. States are encouraged to incorporate core international crimes into their national laws in order to enable prosecution.²³⁵ As of 2013, 92 states had incorporated crimes against humanity into their national laws,²³⁶ even if they do not necessarily label them as such.²³⁷ Although it is gaining currency now, actual exercise of domestic jurisdiction to prosecute crimes against humanity is rare.²³⁸ Scholars attribute this to the fact that there is no international obligation enjoined upon states to incorporate the definition of crimes against humanity or to prosecute alleged perpetrators of such crimes. The ILC's ongoing initiative to draft a convention on crimes against humanity is an attempt to remedy this gap.²³⁹

As a signatory of the 1968 Convention,²⁴⁰ India agrees that the 'effective punishment of war crimes and crimes against humanity is an important element in the prevention of such crimes, the protection of human rights and fundamental freedoms'.²⁴¹ India has also ratified the Genocide Convention of 1948²⁴² and the Geneva Conventions of 1949, all of which affirm

²³⁴ *Naletilić* Trial Judgment, *supra* note 110, § 63 (footnote 1571).

²³⁵ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ICJ Reports (2012) 450, § 72.

²³⁶ Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World - 2012 Update* (2012) ('AI, Universal Jurisdiction Survey'), at 2–3.

²³⁷ *Ibid.*, at 2, 13.

²³⁸ L. Olson, 'Re-enforcing Enforcement in a Specialized Convention on Crimes Against Humanity', in L. Sadat (ed.), *Forging a Convention for Crimes against Humanity* (Cambridge University Press, 2011), at 334.

²³⁹ See 2019 ILC Draft Articles, *supra* note 123, draft art.10.

²⁴⁰ Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, UN Doc. A/7218 (1968).

²⁴¹ *Ibid.*, Preamble.

²⁴² Art. 3 of the Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 (1948).

its belief in the notion that core crimes must be prevented and appropriately punished. India may also be bound to prevent and punish crimes against humanity because the prohibition of such crimes is a peremptory norm.²⁴³

Yet according to Article 253 of the Indian Constitution, only Parliament is competent to give effect to the international agreements that India has signed and/or ratified. While there have been attempts by Indian lawmakers to table bills that recognize and penalize crimes against humanity, none of them has been successful. In 2005, former home minister Shivraj Patil introduced the Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill in the upper house of the Parliament.²⁴⁴ The Bill was intended to prevent communal riots and set up effective mechanisms to provide redress for victims of communal riots.²⁴⁵ The Parliamentary Standing Committee on Home Affairs returned the Bill, suggesting the inclusion of ‘genocide, a crime against humanity’.²⁴⁶ The Congress-led government that later assumed power revoked the Bill and prepared the draft of an alternative bill titled the Prevention of Communal and Targeted Violence (Access to Justice and Reparations) Bill 2011.²⁴⁷ Importantly, the revised version of the bill did not address the crime of genocide or crimes against humanity at all. Due to political pushback, the Bill never found its way to either of the two Parliamentary houses.²⁴⁸ More recently, Panun Kashmir, an organization representing the interests of the Hindu Kashmiri Pandits, has prepared a draft bill seeking recognition of the

²⁴³ 2019 ILC Draft Articles, *supra* note 123, Preamble (§ 4). See (IACtHR) *Almonacid-Arellano et al. v. Chile*, Judgment (Preliminary Objections, Merits, Reparations and Costs), Inter-American Court of Human Rights, Series C, No. 154, 26 September 2006, § 99 (acknowledging the *jus cogens* status of crimes against humanity); Decision on Mr. Ruto’s Request for Excusal from Continuous Presence at Trial, *Ruto and Sang* (ICC-01/09-01/11-777), Trial Chamber V(a), 18 June 2013, § 90; *Mazzeo, Julio Lilo y otros*, Appeal Judgment, Supreme Court of Argentina, 13 July 2007, Fallos: 330:3248, § 15 (recognizing the prohibition of crimes against humanity as *jus cogens*).

²⁴⁴ The Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005, Bill No. CXV of 2005, available online at <https://www.jurist.org/commentary/wp-content/uploads/sites/3/2019/01/Doc-1-Communal-violence-bill-2005.pdf> (visited 27 June 2021).

²⁴⁵ *Ibid.*, s.5 and Ch. VI.

²⁴⁶ Department-related Parliamentary Standing Committee on Home Affairs, 122nd report on *The Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005* (2006), available online at <https://www.jurist.org/commentary/wp-content/uploads/sites/3/2019/01/Doc-2-Standing-Committee-Report-Communal-Violence-Bill-2006.pdf> (visited 27 June 2021).

²⁴⁷ National Advisory Council, Draft Prevention of Communal and Targeted Violence (Access To Justice And Reparations) Bill 2011 (2011), available online at <https://www.prsindia.org/uploads/media/draft/NAC%20Draft%20Communal%20Violence%20Bill%202011.pdf> (visited 27 June 2021).

²⁴⁸ S. Chatterji, ‘Bill to crack down on communal violence languished in Parliament for 9 years’, *Hindustan Times*, 4 March 2020, available online at <https://www.hindustantimes.com/india-news/bill-to-crack-down-on-communal-violence-languished-in-parliament-for-9-years/story-YXKbGOUqACEhDa5wyz1SP.html> (visited 27 June 2021).

‘cultural genocide against Kashmiri Hindus’.²⁴⁹ The bill has yet to be brought to the floor of the Parliament. While the bill borrows the definition of genocide and the scheme for responsibilities from the 1948 Genocide Convention, its scope is limited to the protection of Kashmiri Hindus.

The constitutional framework, and these political difficulties, do not entirely prevent courts from taking judicial cognizance of India’s international obligations. In fact, some courts have been quite forthright in articulating and clarifying India’s position on customary law rules in environmental law and human rights law.²⁵⁰ The *Sajjan Singh* judgment by the Delhi High Court is a textbook example of how courts may navigate executive omissions. In *Sajjan Singh*, the High Court reminded the Indian state of its international obligation to prosecute perpetrators of core crimes and also attempted to remedy the legislative shortcomings by issuing a finding of the commission of crimes against humanity by itself.²⁵¹

But it remains important to confront the clear challenges presented to the prospect of prosecuting those most responsible for the hate crimes against Muslims and Dalits. According to many, the *Sajjan Singh* decision itself was possible only because the Indian National Congress (to which Singh belonged) was not in power at the time of the decision. Knowing this, it is likely to be difficult to achieve similar success in holding those accused of hate crimes against Muslims and Dalits liable so long as the BJP enjoys political majority. However, it is equally important to reinforce that judicial prospects must not be affected by the executive, given the fundamentality of the separation of powers doctrine on which the Indian state is based.²⁵² Despite the heavy and legitimate criticism that has been levelled against the judiciary for abdicating justice,²⁵³ many courts — especially sub-regional courts — have managed to brave political pushback to prosecute/convict political leaders.²⁵⁴ Importantly, many of these decisions were rendered in the wake of sustained civil society, public, and academic discourse

²⁴⁹ ‘Panun Kashmir’s Genocide and Atrocities Prevention Bill 2020’, available online at <https://hindumediabureau.s3.amazonaws.com/Genocide+%26+Attrocities+Prevention+Bill-2020.pdf> (visited 27 June 2021).

²⁵⁰ L. Rajamani, ‘International Law and the Constitutional Schema’, in S. Choudhry, M. Khosla and P. Bhanu Mehta (eds), *The Oxford Handbook of The Indian Constitution* (Oxford University Press, 2016), at 143.

²⁵¹ *Sajjan Singh*, *supra* note 25, § 367.10.

²⁵² R. Pal, ‘Separation of Powers’ in Choudhry et al., *supra* note 250.

²⁵³ A.P. Shah, ‘Only Institution Capable of Stopping the Death of Democracy Is Aiding it’, *The Wire*, 18 September 2020, available online at <https://thewire.in/law/supreme-court-rights-uapa-bjp-nda-master-of-roster> (visited 27 June 2021).

²⁵⁴ A. Chakravorty, ‘India’s High Courts stepping up is a silver lining in judicial gloom’, *The Leaflet*, 23 February 2020, available online at <https://www.theleaflet.in/indias-high-courts-stepping-up-is-a-silver-lining-in-judicial-gloom/> (visited 27 June 2021).

— domestically and internationally. The success of these decisions itself ought to serve as a reminder of the need for more such discourse, to which this paper hopes to contribute.

B. Universal Jurisdiction

One alternative to domestic prosecutions in India may be that of universal jurisdiction, exercised by other states. Universal jurisdiction essentially allows any state to prosecute perpetrators of certain crimes, notwithstanding the absence of territorial, nationality or impact related connections between the state and the crime in question.²⁵⁵

According to a study conducted by Amnesty International in 2012, 147 out of the 193 states surveyed provided for universal jurisdiction for one or more core crimes — such as genocide and war crimes.²⁵⁶ Since 2012, support for universal jurisdiction for crimes against humanity has only been rising.²⁵⁷ 80 states are said to have specifically proscribed crimes against humanity in their domestic law, and asserted the right to exercise universal jurisdiction over such offences.²⁵⁸ As Langer and Eason note, this rise has particularly manifested through the geographical expansion of prosecuting states.²⁵⁹ Until 2009, universal jurisdiction complaints were concentrated in Western Europe.²⁶⁰ Recently, such complaints have been brought to courts in the United Kingdom, Latin America, and Africa.²⁶¹ To date, this trend does not seem to extend to Asia — in terms of judicial contribution to universal jurisdiction. Only 8.2% of the universal jurisdiction cases have been against Asian defendants.²⁶² Barring one trial each

²⁵⁵ M. Langer, 'Universal Jurisdiction Is Not Disappearing: the Shift from "Global Enforcer" to "No Safe Haven" Universal Jurisdiction', 13 *Journal of International Criminal Justice* (2015) 245-256.

²⁵⁶ AI, Universal Jurisdiction Survey, *supra* note 236, at 2.

²⁵⁷ *European Parliament Resolution of 15 March 2018 on the Situation in Syria*, UN Doc. 2018/2626(RSP), 15 March 2018; M. Langer and M. Eason, 'The Quiet Expansion of Universal Jurisdiction', 30 *European Journal of International Law* (2019) 779-817, at 791.

²⁵⁸ Langer and Eason, *ibid.*, annex II.

²⁵⁹ *Ibid.*, at 782.

²⁶⁰ *Ibid.*

²⁶¹ See *R v. Kumar Lama*, Case no. 2013/05698 (Central Criminal Court, London, 2016); *Juzgado Nacional Criminal y Correccional Federal 1*, CFP 4591/2010 '*N.N. s/genocidio*', Decision, 18 September 2013, at 1; *National Commission of the South African Police v. Southern African Human Rights Litigation Centre and Another*, [2014] ZACC 30, § [4]; *Chambre Africaine Extraordinaire d'Assises d'Appel, Situation en République du Tchad, Le Procureur Général c. Hissein Habré*, 27 April 2017.

²⁶² Langer and Eason, *supra* note 257, at 782.

in China and Japan for the crime of piracy,²⁶³ no universal jurisdiction trials have been opened in Asian courts.²⁶⁴

Despite the ILC's recent finding that the prohibition of crimes against humanity has been accepted a *jus cogens* norm, scholars have cited the lack of state practice on universal jurisdiction in Asia to construct a case for the non-application of universal jurisdiction in Asian states.²⁶⁵ However, India in particular, has not objected to universal jurisdiction for crimes against humanity. During the drafting of the Genocide Convention, the Indian delegation proposed that the Convention mention that perpetrators may be tried by the tribunals of the state parties in whose territory they are found, provided no request for extradition is made by the state of which they are a national or the state where the crime was committed.²⁶⁶ More recently, in its statements on the ILC's 2019 Draft Articles on Prevention and Punishment of Crimes against Humanity, India was completely silent on Draft Article 10 which prescribes an obligation on signatory states in whose territories perpetrators are present to prosecute such persons, if it chooses not to extradite them.²⁶⁷ Given this impetus, it may be possible to generate accountability for the systematic hate crimes against Muslims and Dalits in India by invoking universal jurisdiction, including potentially in any Asian states that might be willing.

7. Conclusion

The BJP and RSS have buoyed a state that now completely denies minority identity. The horrifying brutalities perpetrated on Muslims and Dalits, and the brazen indifference of the police and courts, are intended to convey to minorities that they have no place in India. History bears testimony to similarly violent othering campaigns that have raged in other parts of the world — *inter alia*, on grounds of race, religion, ethnicity, and gender. The scholarship on

²⁶³ Atan Naim, Deng Qiangjiean [Atan Naim et al., Robbery], Shantou Municipal Interim People's Court, 15 January 2003, available online at http://www.pkulaw.cn/Case/payz_117675567.html?match=Exact (visited 27 June 2021); *Prosecutor v. Mohamed Urgus Adeysey*, Tokyo District Court (April 2013), see summary available online at <http://www.internationalcrimesdatabase.org/upload/icd/Prof-Akio-Morita-Piracy-Trial-in-Japan-2013.pdf> (visited 27 June 2021). In 2003, universal jurisdiction complaints were filed in Seoul, Korea. However, these did not lead to the opening of formal proceedings. See *Korean Falun Gong Practitioners File Lawsuit Charging Jian Zemin and "610 Office" Head Luo Gan with Genocide*, available at <http://en.minghui.org/emh/articles/2003/12/29/43602.html> (visited 27 June 2021).

²⁶⁴ See <https://trialinternational.org/resources/universal-jurisdiction-database/>.

²⁶⁵ Xing Yun, 'Asia's Reticence Towards Universal Jurisdiction', 4 *Groningen Journal of International Law* (2016) 54-67, at 63-4.

²⁶⁶ See the statement of Mr. Sundaram in Sixth Committee of the General Assembly, Summary records of 100th meeting, 11 November 1948, at 396, available online at https://www.un.org/ga/search/view_doc.asp?symbol=A/C.6/SR.%20100 (visited 27 June 2021).

²⁶⁷ *India's statement in Sixth Committee of the General Assembly*, Summary record of the 21st meeting, UN Doc. A/C.6/70/SR.21, § 63, available online at <https://undocs.org/en/A/C.6/70/SR.21> (visited 27 June 2021).

those conflicts is instructive in so far as it maps the utility of the legal tool of hate crimes in addressing the unique and frightening combination of social and individual injury that such violence afflicts. This paper argues that India's current legislative and judicial vocabulary does not make sufficient space for hate crimes. While the Indian Supreme Court and the High Court of Delhi have both attempted to locate crimes against minorities within the paradigm of prejudice and institutional bias, neither court laid down a comprehensive framework to identify and/or charge hate crimes. As a result, the domestic penal architecture is still lacking. While it is of course desirable to initiate domestic legislative amendments to account for hate crimes, it is crucial to acknowledge that the prospect for immediate improvement is low given the political capital that opposes such a change. In these circumstances, it may be useful (and even imperative) to have recourse to ICL.

This paper contends that ICL has the ability to perform three functions when invoked in conflicts like this. Firstly, it acknowledges deep-rooted social prejudices and marries it with the potential for findings of individual culpability. Secondly, in attaching the labels of core international crimes (or at least raising this possibility), ICL can ensure due recognition of the heinousness of hate crimes and the suffering of its victims. Thirdly, generating discourse on the applicability of ICL can mobilize civil society efforts towards ensuring accountability, and even inspire domestic and regional courts to internationalize the narrative in their rulings.

The hate crimes in India do indeed substantively answer the description of crimes against humanity, as defined in customary international law. There is at least some basis to assert that they were perpetrated (and continue to be perpetrated) against a civilian population as part of a widespread or systematic attack, pursuant to a state policy in which the crimes were backed and even incentivized by the Union government and law enforcement agencies. In particular, the lynching crimes answer the description of the underlying crimes of murder and persecution. This paper makes a case for victims and interested groups to consider attempting to enforce criminal responsibility for these crimes by invoking domestic and universal jurisdiction. In so doing, the paper hopes to re-orient the public discourse towards the material and symbolic relevance of ICL to India, and to invite more scholarship and advocacy on individual criminal responsibility for hate crimes against Muslims and Dalits.