

FROM NUREMBERG TO NEW DELHI: ANALYZING MISSED  
OPPORTUNITIES IN CODIFYING CRIMES AGAINST  
HUMANITY IN INDIAN DOMESTIC LAW<sup>1</sup>

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*“The history of man is the history of crimes, and history can repeat. So information is a defence. Through this, we can build, we must build, a defence against repetition”*<sup>2</sup> Simon Wiesenthal, Holocaust Survivor

I. INTRODUCTION

Crimes against humanity (CAH) emerged within the development of twentieth-century international criminal law (ICL).<sup>3</sup> This category of offense was first articulated at Nuremberg and was designed to encompass atrocities that went beyond isolated criminal conduct, instead

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1. The author acknowledges the use of AI to assist in structuring the paper. The headings and title were originally generated by AI, but were subsequently edited and modified by the author. The author has also taken the assistance of Grammarly, an AI-driven grammar check tool, to refine sentence structure and identify grammatical errors.

2. *About Simon Wiesenthal*, SIMON WIESENTHAL CTR., <https://wiesenthal.org/about/about-simon-wiesenthal> (last visited Apr. 30, 2026).

3. See Tatjana Grote, *Crimes of Humanity: International Criminal Law as a Collective Psychological Defence Mechanism*, 24 INT’L CRIM. L. REV. 1, 6–8 (2024) (discussing the degree of organization required to qualify as a CAH, albeit in the context of positing organized mass atrocity as ‘crimes of humanity’).

reflecting organized campaigns of violence against civilian populations.<sup>4</sup> The term was conceived by Hersh Lauterpacht in Article 6(c) of the Nuremberg Charter.<sup>5</sup> It has, in a certain sense, diluted the notion of State sovereignty by designating a crime committed against one's own civilians within its own territory as an international crime, regardless of its legality according to municipal law.<sup>6</sup>

Article 7 of the Rome Statute of the International Criminal Court (Rome Statute) provides the most influential definition of CAH.<sup>7</sup> The *actus reus* component includes crimes of murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, sexual violence, persecution, enforced

4. Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 280 <http://avalon.law.yale.edu/imt/imtconst.asp>; G.A. Res. 95(I), Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, U.N. Doc. A/64/Add.1, (Dec. 11, 1946).

5. Nuremberg Charter, art. 6(c) (stating “[c]rimes Against Humanity- murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”) (emphasis added).

6. Guido Acquaviva & Fausto Pocar, *Crimes Against Humanity*, MAX PLANCK ENCYCLOPAEDIA OF PUB. INT’L LAW ¶ 19 (Jan. 2022).

7. Rome Statute art. 7(1) (stating: “For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

*Murder;*

*Extermination;*

*Enslavement;*

*Deportation or forcible transfer of population;*

*Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;*

*Torture;*

*Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;*

*Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;*

*Enforced disappearance of persons;*

*The crime of apartheid;*

*Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”) (emphasis added).*

disappearance, apartheid or other inhumane acts inflicting great suffering or serious injury.<sup>8</sup> The *mens rea* element is fulfilled when the perpetrator has the *intent* to commit the underlying offense, and additionally, the *knowledge* that the conduct was part of, or *intended* the conduct to be part of a widespread or systematic attack directed against a civilian population.<sup>9</sup> Article 30 of the Rome Statute further clarifies this element, outlining that the threshold for “knowledge” is “awareness that a circumstance exists or a consequence will occur in the ordinary course of events.”<sup>10</sup>

In their piece for the Max Planck Encyclopaedia of International Law, Guido Acquaviva and Fausto Pocar outline four key features of the formulation of CAH in the Rome Statute.<sup>11</sup> *Firstly*, the crimes must be committed in furtherance of a State or organizational policy, which is a requirement that was absent in earlier formulations. They can be perpetrated by the State as well as non-State armed groups or paramilitary forces. *Secondly*, the grounds of persecution are broader than those recognized under customary international law (CIL) and encompass grounds such as culture and gender in addition to political, racial, ethnic, and national grounds. *Thirdly*, it enumerates additional acts, such as enforced prostitution, enforced sterilization, forced pregnancy, enforced disappearance, and apartheid, not all of which are firmly established under CIL. *Finally*, for the crime against humanity of persecution, it must be committed in connection with other acts or crimes within the jurisdiction of the ICC, such as genocide, war crimes, and crimes of aggression. This diverges from the CAH jurisprudence of the International Criminal Tribunal of Yugoslavia (ICTY), which has held that hate speech would constitute persecution even if it does not constitute a crime in international law.<sup>12</sup> The Rome Statute therefore outlines a higher threshold for persecution to constitute a CAH. Thus, a CAH is distinguished from ordinary crimes based on contextual elements of systematicity, scale, and policy.<sup>13</sup>

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8. INT'L CRIM. CT., ELEMENTS OF CRIMES 3-9 (2013).

9. Geert-Jan Alexander Knoops, *Mens Rea and Crimes Against Humanity*, in *Mens Rea at the International Criminal Court* 111, 111-13 (2016).

10. Rome Statute art. 30(3).

11. Guido Acquaviva & Fausto Pocar, *Crimes Against Humanity*, Max Planck Encyclopaedia of Pub. Int'l Law ¶ 19 (Jan. 2022).

12. Guido Acquaviva & Fausto Pocar, *Crimes Against Humanity*, Max Planck Encyclopaedia of Pub. Int'l Law ¶ 16 (Jan. 2022); Nahimana et al. v. Prosecutor, Case No. ICTR-99-52-A, Appeals Chamber Judgment ¶¶ 987-88 (Nov. 28, 2007).

13. See GUÉNAËL METTRAUX, *Chapeau or Contextual Elements in INTERNATIONAL CRIMES: LAW AND PRACTICE: VOLUME II: CRIMES AGAINST HUMANITY* (2020) (outlining the core distinguishing features of CAH, highlighting their collective character).

Quite notably, countries not party to the Rome Statute include large States like China, Russia, the United States and India.<sup>14</sup> In India, for example, this creates a unique legal position. India has neither ratified the Rome Statute nor legislated to criminalize CAH in its domestic penal code.<sup>15</sup> The Indian Penal Code, 1860 (IPC) was replaced in 2023 by the Bharatiya Nyaya Sanhita, 2023 (BNS) in an attempt to decolonize and modernize India's criminal laws.<sup>16</sup> However, the BNS is similar to its predecessor in proscribing many of the underlying acts that constitute CAH, but failing to capture the broader contexts of systematicity and scale.

These laws treat such conduct as individual crimes, prosecuting the parts but not recognizing the whole. This doctrinal incongruity has been recognized by the Delhi High Court (DHC) in *State v. Sajjan Kumar* (*Sajjan Kumar*), wherein it observed that acts fitting the description of international crimes could not be adequately addressed through the extant domestic laws in India.<sup>17</sup> This has tangible consequences: prosecutions of actions constituting CAH instead often proceed as cases of murder, rioting and conspiracy, thus failing to capture the collective criminality of these atrocities.

This paper proceeds in three parts, arguing that the BNS revision process reflected an overhaul of India's criminal codes,<sup>18</sup> presenting a rare opportunity for India to align its domestic law with ICL by introducing an offense addressing CAH. The first section draws from existing literature to briefly analyze India's troubled history with ICL from a policy perspective. The second section undertakes a doctrinal assessment of the extant provisions of the BNS, testing their adequacy in encompassing CAH. This section illustrates the practical consequences of this doctrinal gap through recounting multiple instances of orchestrated violence in India. The third section draws from other jurisdictions to form a comparative analysis of the domestic codification of CAH in the United States and South Africa, respectively. The final section acknowledges potential roadblocks to domestic codification of

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14. *States Parties to the Rome Statute*, Int'l Crim. Ct. Assembly of States Parties, <https://asp.icc-cpi.int/states-parties> (last visited Apr. 30, 2026).

15. *State v. Sajjan Kumar*, 2018 SCC OnLine Del 12930 ¶ 392 (India) [hereinafter *Sajjan Kumar*].

16. The Bharatiya Nyaya Sanhita, 2023, Act No. 45 of 2023 [India].

17. *Sajjan Kumar*, ¶ 395.

18. SMA Ali & Pritha Mukhopadhyay, *Bharatiya Nyaya Sanhita: Decolonizing Criminal Law or Colonial Continuities*, 62 INTL. ANNALS OF CRIMINOLOGY 406 (2024) (discussing and evaluating the premise for the legislative overhaul of the Indian penal codes).

CAH and presents a compelling case in support of the incorporation of a CAH provision in the BNS.

## II. INDIA'S UNEASY RENDEZVOUS WITH ICL

There is a plethora of existing literature on India's cautious, fragmented, and often defensive engagement with ICL,<sup>19</sup> with Aman Kumar's work contributing valuable context to the issues explored in this section.<sup>20</sup> The core reason for this engagement lies in India's adherence to the dualist school of international law, which maintains that international law and municipal law operate as distinct legal systems.<sup>21</sup> It upholds State sovereignty, delineating how international law cannot overrule municipal law, and is codified under Article 253 of the Indian Constitution.<sup>22</sup> Indian law is peculiar, however, because while directing the State to foster respect for its international obligations, Article 51(c) of the Constitution lists international law and treaty obligations separately.<sup>23</sup>

Scholars believe that this is deliberate and reflective of an acknowledgement that international law encompasses more than treaty obligations, extending to CIL as well.<sup>24</sup> Furthermore, in *Vellore Citizens Welfare Forum v. Union of India*, the Supreme Court of India held that "those rules of CIL which are *not contrary* to municipal law shall be deemed to have been incorporated in the domestic law and shall be

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19. Usha Ramanathan, *India and the ICC*, 3 J. INT'L CRIM. JUST. 627, 631-634 (2005); H. Jamil, *Critical evaluation of India's position on the Rome Statute*, 57 INDIAN J. INT'L L. 411, 414 (2017); Arjun Bhagi, *India's Tryst With International Criminal Law* 3 CULJ 95, 97-105 (2014).

20. Aman Kumar, *Finding India's International Criminal Law Obligations in Its Domestic Laws*, in INTERNATIONAL CRIMES IN NATIONAL REGULATIONS OF SELECTED STATES 135-156 (Patrycja Grzebyk ed., Instytut Wymiaru Sprawiedliwości 2022).

21. M.N. SHAW, INTERNATIONAL LAW 97 (8th ed. 2017).

22. INDIA CONST., art. 253 (stating "Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.") (emphasis added).

23. INDIA CONST., art. 51 (stating "The State shall endeavour to: (c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another.") (emphasis added).

24. Kumar, *supra* note 20, at 144; H. Alexandrowicz, *International Law in India*, 1 INT'L. & COMP. L. W. 289, 300 (1952); B.S. Chimni, *India*, in THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ASIA AND THE PACIFIC 153 (Simon Chesterman, Hisashi Owada & Ben Saul eds., 2019).

followed by courts of law.”<sup>25</sup> This essentially results in the dualist approach losing out where CIL can align with municipal law.<sup>26</sup> Aparna Chandra has recognized that such framing produces a key implication: while treaty obligations must be adopted by the legislature to be applicable, CIL is directly incorporated into municipal law.<sup>27</sup>

ICL is inapplicable from the lens of treaty law when a State has not accepted the treaty obligations. India has abstained from adopting the Rome Statute, consistently objecting to the UN Security Council’s referring and veto powers under the treaty,<sup>28</sup> which it viewed as politicization of the ICC that also binds non-parties against their will.<sup>29</sup> India’s additional concerns include the absence of an opt-out or reservations system, the broad powers vested in the ICC Prosecutor, and the rejection of India’s proposals to include terrorism and the use of nuclear weapons within the ICC’s jurisdiction.<sup>30</sup>

On the CAH front, India opined that the Rome Statute “blurred legal distinctions between normative CIL and treaty obligations, particularly in respect of the definitions of CAH offenses and their application to internal conflicts. This placed countries in a position wherein they are forced to acquiesce to provisions of international treaties they have not yet accepted.”<sup>31</sup>

25. *Vellore Citizens Welfare Forum v. Union of India & Ors*, (1996) 5 S.C.R. 241, ¶ 15 (India) (emphasis added).

26. Vayuna Gupta, *Using International Law in Domestic Indian Courts*, 54 N. Y. U. J. INT’L L. & POL. 1077, 1084 (2022).

27. Aparna Chandra, *India and International Law: Formal Dualism, Functional Monism*, 57 INDIAN J. INT’L L. 26, 34 (2017).

28. Rome Statute art. 13 (stating “The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.”) (emphasis added).

The “veto powers” refer to those of the Permanent Five Members of the UNSC on the ICC Referral Process delineated under Article 13(b) of the Rome Statute.

29. See Dilip Lahiri, *Should India Continue to Stay Out of ICC?*, OBSERVER RSCH. FOUND. (Nov. 24, 2010), <http://www.orfonline.org/research/should-india-continue-to-stay-out-of-icc> (this blog has been authored by the leader of India’s delegation to the Rome Conference, discussing India’s misgivings with Article 7 of the Rome Statute); India Statement, U.N. GAOR 6th Comm., 79th Sess., on the Draft Articles on the Prevention and Punishment of Crimes Against Humanity (Oct. 10, 2024), ¶ 8 [https://www.un.org/en/ga/sixth/79/pdfs/statements/cah/09mtg\\_india.pdf](https://www.un.org/en/ga/sixth/79/pdfs/statements/cah/09mtg_india.pdf).

30. Ian Hall & Renée Jeffery, *India, the Rome Statute, and the International Criminal Court: Negotiating to No*, 27 GLOB. GOVERNANCE 460, 471-75 (2021).

31. Kumar, *supra* note 20, at 149.

India's rejection of the Rome Statute in terms of a treaty obligation as well as its persistent objection<sup>32</sup> to the notion that it codifies CIL complicates this matter. The persistent objector principle is recognized as an exceptional case where a rule would not be opposable to a State if it has persistently maintained a clear objection to it.<sup>33</sup> However, this exception would not apply to *jus cogens*, or peremptory norms, of international law that give rise to obligations owed to the international community as a whole.<sup>34</sup> It is widely accepted that the prohibition of CAH is a *jus cogens* norm, but as Aman Kumar observes, there is currently no global convention on CAH apart from the Rome Statute,<sup>35</sup> reiterating the view of the Working Group of the International Law Commission.<sup>36</sup> While CAH are widely recognized as a part of CIL,<sup>37</sup> the Rome Statute reflects an effort to “codify, advance[,] and refine” those laws.<sup>38</sup>

While commenting on the Draft Articles on the Prevention and Punishment of CAH as recommended by the International Law Commission,<sup>39</sup> India unequivocally stated that member States that have not subscribed to the Rome Statute, “have extant national legislation in place to deal with such offenses.”<sup>40</sup> While this claim is scrutinized and found to ring hollow in the subsequent section, it exacerbates India's tensions with ICL. By insisting that municipal law already adequately addresses CAH when it plainly does not, Indian policymakers create a lacuna in application. Courts are left without a statutory framework to punish CAH as such.

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32. Shelly Aviv Yeini, *The Persistent Objector Doctrine: Identifying Contradictions*, 22 CHI. J. INT'L L. 581, 584 (2021).

33. Int'l L. Comm'n, Draft Conclusions on Identification of Customary International Law, concl. 15, U.N. Doc. A/73/10, at 122 (2018).

34. *Id.* at concl. 15(3).

35. Kumar, *supra* note 20, at 150.

36. Rep. of the Int'l Law Comm'n, 65th Sess., Annex II, Crimes Against Humanity, 93, ¶ 3 U.N. Doc. A/68/10 (2013).

37. Leila N. Sadat, *Crimes Against Humanity and Customary International Law* 6 (Wash. Univ. in St. Louis Legal Stud. Rsch. Paper No. 25-03-06, 2025), [https://openscholarship.wustl.edu/law\\_scholarship/809/](https://openscholarship.wustl.edu/law_scholarship/809/).

38. Leila N. Sadat, *Custom, Codification and Some Thoughts about the Relationship between the Two: Article 10 of the ICC Statute*, 49 DEPAUL L. REV. 909, 910 (2000) (emphasis added).

39. Int'l L. Comm'n, Rep. on the Work of Its Seventy-First Session, U.N. Doc. A/74/10 (2019), <http://legal.un.org/docs/?symbol=A/74/10>.

40. *India Statement*, U.N. GAOR Sixth Comm., 78th Sess. (Oct. 23, 2023) [https://www.un.org/en/ga/sixth/78/pdfs/statements/cah/38mtg\\_india\\_1.pdf](https://www.un.org/en/ga/sixth/78/pdfs/statements/cah/38mtg_india_1.pdf) (emphasis added).

This carries weight in the context of the Indian position on ICL and CAH, which is reflective of inconsistencies. India has adopted UN Security Council Resolution 1325, which emphasizes the responsibility of all States to “put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls, and in this regard stresses the need to exclude these crimes, where feasible from amnesty provisions.”<sup>41</sup> As highlighted above, the Rome Statute is currently the only international legal framework addressing CAH. There persists a cloud of uncertainty for a State such as India, which opposes the Rome Statute but remains bound by jus cogens norms as well as Resolution 1325.<sup>42</sup> It is unclear as to how India can fulfil its obligations when it has not only refused to recognize a definition of the international crimes outlined in the sole international framework on the subject but has also failed to incorporate a definition within its domestic framework. There does not exist any framework for such implementation.

Thus, India’s troubled history with ICL reverberates in the debate around domestic CAH application, which is marked by formal rejection, rhetorical compliance, and substantive gaps. This sets the stage for the next section, which tests India’s claims of the adequacy of the BNS against the doctrinal features of CAH.

### III. THE BNS AND THE ILLUSION OF ADEQUACY

#### A. *Absence of Contextual and Systematic Elements*

India’s frequent refrain of CAH being adequately addressed under the domestic penal law lies in the belief that the IPC and BNS criminalize many of the acts listed under Article 7 of the Rome Statute. Murder is punishable under §§ 101-104 of the BNS,<sup>43</sup> torture and grievous

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41. *India Statement*, U.N. GAOR Sixth Comm., 74th Sess. (Oct. 29, 2019) <http://statements.unmeetings.org/media2/23328673/india>.

42. See Kwadwo Appiagyei-Atua, *United Nations Security Council Resolution 1325 on Women, Peace, and Security- Is It Binding?* 18(3) HUMAN RIGHTS BRIEF 2, 5 (2011) (examining the legal value of this Resolution and concluding that it is binding on the Member States of the UN).

43. Bharatiya Nyaya Sanhita, 2023, §§ 101-104, No. 45, Acts of Parliament, 2023 (India).

§ 101 (Murder); § 102 (Culpable homicide by causing death of person other than person whose death was intended) § 103 (Punishment for murder); § 104 (Punishment for murder by life convict).

hurt under §§ 115-119,<sup>44</sup> wrongful confinement under §§127-132,<sup>45</sup> and trafficking under §144.<sup>46</sup> Similarly, provisions on promoting enmity between groups and outraging religious feelings can be invoked in cases of hate-based violence.<sup>47</sup>

The overlap in this regard is not under contention, as many of these are constituent acts for CAH, serving as a skeletal framework paralleling the list of enumerated acts in Article 7(1) of the Rome Statute.<sup>48</sup> However, the similarity is only superficial, as each of these acts is a distinct criminal offense within Indian law, which makes no provision for recognizing how such acts can be part of a collective attack on a civilian population. Such fragmentation strikes at the heart of CAH, which emphasizes the structural and organized features of mass violence. By mainly targeting direct perpetrators, it neglects the broader context of orchestrated atrocities.

The contextual element of a “*widespread or systematic attack*” directed against civilians, with knowledge of the attack distinguishes CAH from ordinary crime by capturing the organized and collective nature of the atrocities.<sup>49</sup> The doctrinal framing of murder, torture and confinement in the BNS does not capture the collective criminality that CAH was designed to address. These doctrinal omissions have been noted in Indian case law, most succinctly in *Sajjan Kumar*, where the DHC observed that mass killings necessitate an approach divergent from isolated incidents,<sup>50</sup> stating:

“Common to these mass crimes were the targeting of minorities and the attacks spearheaded by the dominant political actors being facilitated by the law enforcement agencies. The criminals responsible for the mass crimes have enjoyed political patronage and managed to evade prosecution and

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44. *Id.* at § 115 (Voluntarily causing hurt) § 116 (Grievous hurt); § 117 (Voluntarily causing grievous hurt) § 118 (Voluntarily causing hurt or grievous hurt by dangerous weapons or means); § 119 (Voluntarily causing hurt or grievous hurt to extort property, or to constrain to an illegal act).

45. *Id.* at § 127 (Wrongful confinement) § 128 (Force); § 129 (Criminal force) § 130 (Assault); § 131 (Punishment for assault or criminal force); § 132 (Assault or criminal force to deter public servant from discharge of his duty).

46. Bharatiya Nyaya Sanhita, 2023, § 144 (Exploitation of a trafficked person), No. 45, Acts of Parliament, 2023 (India).

47. *Id.* at §§ 196, 299.

48. Rome Statute art. 7(1).

49. Nuremberg Charter art. 6(c), *supra* note 5 (emphasis added).

50. *Sajjan Kumar*, ¶ 396.

punishment. Bringing such criminals to justice poses a serious challenge to our legal system. As these appeals themselves demonstrate, decades pass by before they can be made answerable. This calls for strengthening the legal system. Neither ‘crimes against humanity’ nor ‘genocide’ is part of our domestic law of crime. This loophole needs to be addressed urgently.”<sup>51</sup>

The phrase “what’s in a name?” bears great relevance in this regard. The principle of fair labeling in criminal law essentially posits that distinctions among offenses should reflect distinctions in the nature and seriousness of the wrongdoing that they criminalize.<sup>52</sup> It is essential to call a spade a spade, as anything less may risk mischaracterization with profound implications that are not merely symbolic, but are in fact substantive in both letter and spirit. Theodor Meron argues that deterrence of future atrocities can be ensured by increasing the frequency of national and international trials on correctly identified and proscribed international crimes.<sup>53</sup> Furthermore, Akhavan has posited that such prosecutions would contribute to dismantling cultures of impunity by reinforcing international norms.<sup>54</sup>

The phrasing of the term “crimes against humanity” signals that such acts are not mere wrongs against individual victims, but wrongs against the entire human community as a collective crime with collective victims.<sup>55</sup> The expressive function of ICL<sup>56</sup> entails that through punishment “the international community disavows that conduct, to

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51. *Id.* at ¶ 392 (emphasis added).

52. Douglas Guilfoyle, *Responsibility for Collective Atrocities: Fair Labelling and Approaches to Commission in International Criminal Law*, 64 *CURRENT LEGAL PROBS.* 255, 260 (2011); J.G. Stewart, *The End of “Modes of Liability” for International Crimes*, 25 *LEIDEN J. INT’L L.* 155, 176-178 (2012); Miles Jackson, *The Attribution of Responsibility and Modes of Liability in International Criminal Law*, 29 *LEIDEN J. INT’L L.* 879, 888 (2016).

53. Theodor Meron, *From Nuremberg to the Hague*, 149 *MIL. L. REV.* 107, 110 (1998); David Wippman, *Atrocities, Deterrence and the Limits of International Justice*, 23 *FORD. I.L.J.* 473, 475 (1999).

54. Payam Akhavan, *Justice in the Hague, Peace in the Former Yugoslavia A Commentary on the United Nations War Crimes Tribunal* 20 *HUMAN RIGHTS Q.* 737, 744 (1999).

55. Javier S. Eskauriatza, “Complete Labelling” and Domestic Prosecution for Crimes Against Humanity 32 *CRIM. LAW. FORUM* 473, 496 (2021); Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law* 43 *STAN. J. INTL. L.* 39, 56-60 (2007).

56. Sloane, *supra* note 52, at 71.

indicate symbolically its refusal to acquiesce in the crimes.”<sup>57</sup> Akhavan argues that the stigmatization of criminal conduct in the context of ICL has far-reaching consequences, promoting post-conflict reconciliation and accountability measures.<sup>58</sup> He highlights the importance of public vindication of human rights and reaffirms that “ostracizing criminal leaders may help to prevent future atrocities through the power of moral example to transform behaviour.”<sup>59</sup>

### B. *The Indian Penchant for CAH*

India has a grim history of instances of mass violence that commentators, commissions, or courts have characterized as potentially satisfying CAH elements. The 1984 anti-Sikh pogroms are perhaps the clearest example, where organized mobs carried out killings, arson and sexual violence against Sikh communities in the aftermath of the assassination of Prime Minister Indira Gandhi.<sup>60</sup> Eyewitness accounts and inquiry reports confirmed that the violence was systematic and often aided-and-abetted by political actors,<sup>61</sup> thus fulfilling the necessary elements of a CAH.

Yet, prosecutions proceeded under ordinary IPC provisions of murder, rioting, and conspiracy.<sup>62</sup> In *Sajjan Kumar*, the DHC convicted a senior politician for his role in the pogroms and described the violence as an unequivocal CAH.<sup>63</sup> However, the DHC observed that such a category did not exist in Indian criminal law.<sup>64</sup> This acknowledgement by the DHC is a clear confirmation of the gap between the gravity of such atrocities and the extant statutory framework.

The Indian State has consistently characterized episodes of such violence within the framework of law and order or counter-insurgency, rather than atrocity crimes. The anti-Sikh pogroms are not an isolated case—similar gaps emerged in the Kashmiri Pandit exodus of the

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57. *Id.*; see Joel Feinberg, The Expressive Function of Punishment, in *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 101-105 (1970) (listing authoritative disavowal, symbolic non-acquiescence, vindication of the law and the absolution of others as derivative symbolic functions of punishment).

58. See Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?* 95 AM. J. INT'L L. 7, 27 (2001).

59. *Id.* at 10.

60. JUSTICE NANAVATI COMM'N OF INQUIRY, 1984 ANTI SIKH RIOTS REPORT (Feb. 9, 2005) (India).

61. *Id.*

62. *Id.*

63. *Sajjan Kumar*, ¶¶ 367.1, 367.10, 397(xi).

64. *Id.*

1990s,<sup>65</sup> the 2002 Gujarat riots,<sup>66</sup> and the repeated extrajudicial killings and enforced disappearances in the North-East.<sup>67</sup> In Kashmir, targeted killings and mass displacement of Pandits were treated as a by-product of militancy in the region, which obscured their character as a persecution crime.<sup>68</sup> The National Human Rights Commission has described the ethnic cleansing of Kashmiri Pandits as “*akin to genocide*.”<sup>69</sup> However, the law enforcement response and subsequent prosecution did not correspond to the gravity of the crime—there are reports of nearly two hundred and fifteen filed First Information Reports being left unaddressed and without an investigation.<sup>70</sup>

Similarly, the 2002 Gujarat Violence was officially narrated as a communal riot, rather than a systematic campaign of extermination and persecution of a minority community.<sup>71</sup> The Justice Sawant-Iyer Report has termed the carnage in Gujarat as a CAH, finding then-Chief Minister Narendra Modi responsible for CAH and genocide.<sup>72</sup> The Report is a scathing critique of the Indian indifference to such atrocities, highlighting how such crimes were allowed and condoned internally, and then shielded from international scrutiny due to the non-ratification of the Rome Statute.<sup>73</sup> The Report outlines that ratification of the Rome Statute is a “vital safeguard for the future” in order to prevent similar crimes from being orchestrated.<sup>74</sup>

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65. Sema Shekhawat, *Conflict Induced Displacement: The Pandits of Kashmir* 4 Conflict Trends 31, 32 (2009).

66. Sajjan Kumar, ¶ 392.

67. Sanjay Barbora, Rethinking India’s Counter-Insurgency Campaign in North-East, 41 Econ. & Pol. Wkly. 3805, 3809 (2006).

68. Ministry of Home Affs., Gov’t of India, RTI Response F. No. 16015/16/2014 K-V, Re: Information Sought Regarding “Kashmiri Hindus Living in J&K” (Aug. 27, 2014), [https://www.mha.gov.in/sites/default/files/RTI\\_Jkdiv\\_290814\\_0029\\_112.pdf](https://www.mha.gov.in/sites/default/files/RTI_Jkdiv_290814_0029_112.pdf).

69. Nat’l Hum. Rts. Comm’n, Annual Report 1999-2000, at 22 (India) (emphasis added).

70. Shivangi Sheth, *Kashmiri Pandits and J&K Reorganisation*, INST. OF PEACE & CONFLICT STUD. (Jan. 22, 2020), [https://www.ipcs.org/comm\\_select.php?articleNo=5645](https://www.ipcs.org/comm_select.php?articleNo=5645).

71. Lok Sabha Parliamentary Debates, *Discussion Regarding Relief and Rehabilitation of the Riot Victims in Gujarat* (July 23, 2002) (India) <https://eparlib.sansad.in/bitstream/123456789/712433/1/4324.pdf>.

72. REPORT OF THE TRIBUNAL, CRIME AGAINST HUMANITY: AN INQUIRY INTO THE CARNAGE IN GUJARAT—FINDINGS AND RECOMMENDATIONS Vol. II (2002) (India).

73. *Id.* at 154.

74. *Id.* at 154.

India's North-East is a region comprising states such as Manipur, Nagaland, and Assam. They have been marked by decades of insurgency and counter-insurgency operations since the 1950s.<sup>75</sup> Allegations of extrajudicial killings and enforced disappearances by security forces have been characterized as excesses in counter-insurgency operations,<sup>76</sup> not as part of a wider pattern of organized violence against civilians. This official framing, which reduces atrocities to isolated criminal acts or law-and-order disturbances, enables prosecutions under ordinary penal provisions while erasing the systematic and widespread dimensions that international law would classify as crimes against humanity.

A potential counter-argument is that the failure in such cases is the abdication of law enforcement rather than the absence of a framework for prosecution of such acts. In this scenario, the presence or absence of a CAH provision becomes irrelevant. While this is a legitimate consideration, it is precisely this lack of codification that further enables failure in enforcement. A CAH provision would confer a character of being exceptional rather than routine, warranting heightened scrutiny. A strong case for the "domesticization" of CAH in the BNS emerges, considering the widespread dissatisfaction with how the proceedings in each of these instances were conducted. In their research, Mark Berlin and Geoff Dancy draw from empirical evidence and statistical analysis to argue in favor of introducing national criminal laws against international crimes relating to violations of "physical integrity rights," with the focus being on genocide and CAH.<sup>77</sup> The authors reason that domestic enforcement of national legislation codifying international crimes facilitates human rights prosecutions more effectively.<sup>78</sup> This is undoubtedly the need of the hour, with human rights acquiring greater significance in broader international discourse.

#### IV. COMPLEMENTARITY AND COMPARATIVE FRAMEWORKS

The principle of complementarity is enshrined in Article 17 of the Rome Statute, establishing the ICC as a Court of Last Resort.<sup>79</sup> It

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75. Barbora, *supra* note 64, at 3810.

76. Extra-Judicial Execution Victim Families Assn. v. Union of India, (2016) 14 SCC 578 (2), ¶¶ 125, 191, 194, 234 (India).

77. Mark S. Berlin & Geoff Dancy, *The Difference Law Makes: Domestic Atrocity Laws and Human Rights Prosecutions*, 51 LAW & SOC'Y REV. 533, 560 (2017).

78. *Id.*

79. Sang-Hyun Song, *The Role of the International Criminal Court in Ending Impunity and Establishing the Rule of Law* U.N. CHRON. (Dec. 21, 2012) <https://www.un.org/en/chronicle/article/role-international-criminal-court-ending-impunity-and-establishing-rule-law>.

would exercise jurisdiction only where national systems are unwilling or unable to genuinely prosecute international crimes. Such architecture preserves State sovereignty and also creates a baseline obligation to adequately address such international crimes. As established in previous sections, India lacks both these dimensions. This strengthens the case for domesticization, as it would enable India to maintain its sovereignty without perpetuating impunity. This section traces the approaches taken by the United States and South Africa in codifying such crimes within their domestic systems.

*A. United States: the Non-Party Approach*

Unlike several Rome Statute signatories such as Germany, Canada, or South Africa,<sup>80</sup> the United States has not enacted a specific statute criminalizing CAH. The United States signed the Rome Statute in 2000 but later announced its intent not to ratify it, citing concerns over sovereignty, politicization of the ICC, and the exposure of U.S. military personnel to international jurisdiction.<sup>81</sup> As a result, there is no federal law that directly reflects Article 7 of the Rome Statute. This position is also common in States such as China and Russia, which have similarly refrained from codifying CAH as a standalone domestic offence.

That said, U.S. domestic legislation does partially overlap with CAH through other criminal statutes. The Genocide Accountability Act of 2007<sup>82</sup> and the War Crimes Act of 1996<sup>83</sup> create federal jurisdiction over individuals who commit genocide, war crimes, or torture, including when such conduct occurs outside U.S. territory. The Alien Tort Statute (ATS)<sup>84</sup> has been invoked in civil proceedings to seek damages for egregious human rights violations committed abroad, including acts that could amount to CAH, though its reach has been curtailed by recent U.S. Supreme Court jurisprudence in *Kiobel v. Royal*

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80. Völkerstrafgesetzbuch [VStGB] [Code of Crimes Against International Law], June 26, 2002, BGBl. I at 2254, § 7 (Ger.); Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24, § 7 (Can.); Implementation of the Rome Statute of the International Criminal Court Act, Act No. 27 of 2002 (S. Afr.).

81. Press Statement, James B. Foley, Deputy Spokesman, U.S. Dep't of State, *U.S. Participation in the Rome Conference on the Establishment of an International Criminal Court* (June 12, 1998), <https://1997-2001.state.gov/www/briefings/statements/1998/ps980612a.html>.

82. Genocide Accountability Act of 2007, Pub. L. No. 110-151, 121 Stat. 1821 (2007).

83. War Crimes Act of 1996, Pub. L. No. 104-192, 110 Stat. 2104 (1996).

84. Alien Tort Statute (ATS) 28 U.S.C. § 1350.

*Dutch Petroleum*<sup>85</sup> U.S. immigration law also provides for the exclusion or deportation of individuals suspected of involvement in atrocities.<sup>86</sup>

Although the U.S. has better-developed extraterritorial atrocity tools than India, the absence of a dedicated CAH statute leaves significant gaps. Prosecutors must rely on piecemeal statutes that address only specific acts, without capturing the contextual element of “widespread or systematic attack against a civilian population” that defines CAH.<sup>87</sup> The U.S. position, therefore, mirrors India’s in one respect: it punishes the parts but does not recognize the whole. The relative absence of recent large-scale atrocities within the United States means that this legal gap has not been tested in the same way as in India.

South Africa: The Global South Approach

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85. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) (holding to dilute the applicability of the ATS by ruling that it generally does not apply extra-territorially unless the claims sufficiently touch and concern the territory of the United States remarking “*there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms.*”) (emphasis added).

86. Immigration and Nationality Act § 212(a)(3)(e), 8 U.S.C. § 1182(a)(3)(E) (2018) (providing that “(E) *Participants in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing*”

(i) *Participation in Nazi persecutions*

Any alien who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with—

(I) the Nazi government of Germany,

(II) any government in any area occupied by the military forces of the Nazi government of Germany,

(III) any government established with the assistance or cooperation of the Nazi government of Germany, or

(IV) any government which was an ally of the Nazi government of Germany, ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion is inadmissible.

(ii) *Participation in genocide*

Any alien who ordered, incited, assisted, or otherwise participated in genocide, as defined in section 1091(a) of title 18, is inadmissible.

(iii) *Commission of acts of torture or extrajudicial killings*

Any alien who, outside the United States, has committed, ordered, incited, assisted, or otherwise participated in the commission of—

(I) any act of torture, as defined in section 2340 of title 18; or

(II) under color of law of any foreign nation, any extrajudicial killing, as defined in section 3(a) of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note), is inadmissible.” (emphasis added).

87. United States’ Response to the ILC’s Request for Information on Domestic Legislation and Decisions of National Courts Regarding Crimes Against Humanity, U.N. Int’l L. Comm’n 67th Sess. (2015), [https://legal.un.org/ilc/sessions/67/pdfs/english/cah\\_us.pdf](https://legal.un.org/ilc/sessions/67/pdfs/english/cah_us.pdf).

An analysis of South African law is pertinent to this analysis, as it is similarly placed with India in several regards, particularly in its Global South leadership, colonial past, and ethnic tensions. However, South Africa diverges from India in one key consideration, which is the Rome Statute. It is one of the clearest examples of a State that has chosen to incorporate CAH in its domestic legislation. In 2002, it enacted the Implementation of the Rome Statute of the International Criminal Court Act (ICC Act), directly incorporating the definitions of genocide, war crimes, and CAH as set out in Article 7 of the Rome Statute.<sup>88</sup>

It gives national courts full jurisdiction to prosecute these offenses.<sup>89</sup> Such prosecutions can be initiated even when the crimes are committed outside South African territory, as long as the alleged perpetrator is present in the country.<sup>90</sup> This is reflective of South Africa's

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88. Implementation of the Rome Statute of the International Criminal Court Act, Act No. 27 of 2002, sched. 1, pt. 2 (S. Afr.) [hereinafter S. Afr. ICC Act] (providing that “A crime against humanity” means any of the following conduct when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation or forcible transfer of population;
- (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) torture;
- (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity;
- (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in item 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this item or any crime within the jurisdiction of the Court;
- (i) enforced disappearance of persons;
- (j) the crime of apartheid; or
- (k) other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health.” (emphasis added).

89. Evode Kayitana, *The Universal Jurisdiction of South African Criminal Courts and Immunities of Foreign State Officials*, 18 POTCHEFSTROOM ELECTRON. L.J. 2561, 2563 (2015).

90. S. Afr. ICC Act, Article 4(3) (providing that

“(3) In order to secure the jurisdiction of a South African court for purposes of this Chapter, any person who commits a crime contemplated in subsection (1) outside the territory of the Republic, is deemed to have committed that crime in the territory of the Republic if-

- (a) that person is a South African citizen; or
- (b) that person is not a South African citizen but is ordinarily resident in the Republic; or
- (c) that person, after the commission of the crime, is present in the territory of the Republic; or

historical legacy of emerging from the apartheid system and seeking to correct the wrongs of the past. The ICC Act also expressly recognizes the doctrine of command responsibility, ensuring that leaders who order or fail to prevent atrocities can also be held accountable.<sup>91</sup>

The U.S. and South Africa present divergent approaches to the domestic incorporation of ICL principles in domestic law. While neither can be directly transposed to the Indian context, it is essential to distil lessons and adopt global best practices to facilitate effective regulation and enforcement.

## V. CONCLUSION

This paper presents a compelling argument in favor of domestic incorporation of CAH principles into the BNS. It focuses on a doctrinal and normative analysis of international obligations and extant domestic law to support its reasoning. Broadly, there are four major grounds supporting this argument.

*Firstly*, there is clear doctrinal incoherence in India's dualist approach, wherein its delegation acknowledges CAH in principle, but its legislators fail to incorporate it in practice. *Secondly*, the fair labeling

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*(d) that person has committed the said crime against a South African citizen or against a person who is ordinarily resident in the Republic.*

91. ICC Act, art. 28 (providing that "Responsibility of commanders and other superiors

*In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:*

*(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:*

*(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and*

*(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.*

*(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:*

*(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;*

*(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and*

*(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."* (emphasis added).

principle applies as the BNS is currently inadequate to address the systematicity and scale of CAH. *Thirdly*, this gap is highlighted in Indian atrocities which reflect patterns consistent with CAH but cannot be prosecuted as such due to the absence of a statutory framework. *Finally*, the incorporation of CAH principles into domestic legislation would dispel India's current misgivings with the ICC, as it would be able to retain its sovereign function by regulating the same internally.

Therefore, there is a moral and legal imperative to harmonize India's laws with the norms of CIL. These atrocities are not ordinary crimes but rather assaults on the very dignity of humanity. To continue without such legislation is to risk being complicit in the erasure and whitewashing of humanity's gravest crimes from our own legal vocabulary.