

**ADOPTED**

**RESOLUTION**

1 RESOLVED, That the American Bar Association urges Congress to enact legislation to prevent  
2 and punish crimes against humanity.

3

4 FURTHER RESOLVED, That the American Bar Association urges the United States  
5 government to take an active role in the negotiation and adoption of a new global convention for  
6 the prevention and punishment of crimes against humanity.



## REPORT

## I. Introduction

“Less than 1 percent of the perpetrators of international crimes have been brought to justice.”<sup>1</sup>

Almost 70 years have passed since the first prosecutions for crimes against humanity<sup>2</sup> at the Nuremberg tribunal. They have been called the “most serious crimes of concern to the international community as a whole.”<sup>3</sup> Yet their commission continues. Examples include ethnic cleansing in the former Yugoslavia, Cambodia’s killing fields, apartheid South Africa and, more recently, the system of forced labor in North Korea.<sup>4</sup> More than half of states worldwide, including the United States, have yet to adopt legislation proscribing crimes against humanity.<sup>5</sup> Further, while recognized as a core international crime by international and national courts and tribunals (including international efforts strongly supported by the United States), there is no multilateral treaty that comprehensively addresses this category of offenses. This arguably creates serious hurdles to prosecution.

The following report demonstrates the existence and negative consequences of gaps in both domestic and international legal regimes concerning crimes against humanity. It also demonstrates both a strong legal foundation for and a growing momentum toward comprehensive policies. By encouraging the United States government to implement domestic legislation as well as support a comprehensive international convention, the ABA would (1)

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<sup>1</sup> See M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION* 650 (2011).

<sup>2</sup> The Rome Statute defines a “crime against humanity” as “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,” including, but not limited to, murder, extermination, enslavement, deportation or forcible transfer of a population, torture, rape and other forms of sexual violence, and apartheid. Rome Statute of the International Criminal Court, art. 7, July 17, 1998, 2187 U.N.T.S. 90, available at <http://untreaty.un.org/cod/icc/statute/romefra.htm>

<sup>3</sup> William A. Schabas, *Convention on the Prevention and Punishment of the Crime of Genocide*, available at <http://untreaty.un.org/cod/avl/ha/cppcg/cppcg.html> (last accessed Oct. 15, 2012).

<sup>4</sup> Leila Nadya Sadat, *Crimes Against Humanity in the Modern Age*, 107 AM. J. INT’L L. 338-339 (2013); See, e.g., U.N. Human Rights Council, Report of the commission of inquiry on human rights in the Democratic People’s Republic of Korea, U.N. Doc. A/HRC/25/63 (Feb. 7, 2014); U.N. Human Rights Council, Report of the detailed findings of the commission of inquiry on human rights in the Democratic People’s Republic of Korea, U.N. Doc. A/HRC/25/CRP.1 (Feb. 7, 2014).

<sup>5</sup> See Arturo J. Carrillo & Annalise K. Nelson, *Comparative Law Study and Analysis of National Legislation Relating to Crimes Against Humanity and Extraterritorial Jurisdiction*, 46 GEO. WASH. INT’L L. REV. (forthcoming 2014) (manuscript at 29, annex B at 38, annex F at 44) available at [http://www.law.gwu.edu/Academics/EL/clinics/IHRC/Documents/CAH\\_Final\\_Web.pdf](http://www.law.gwu.edu/Academics/EL/clinics/IHRC/Documents/CAH_Final_Web.pdf) (last visited Nov. 24, 2013). “41%” is named as an “estimate of States worldwide with *per se* [crimes against humanity] legislation” that, according to the study, “easily supports extrapolation and is thus a reliable indicator of the global panorama in this regard.” *Id.* at 29 (emphasis in the original). See also David Scheffer, *Closing the Impunity Gap in U.S. Law*, 8 NW. U. J. INT’L HUM. RTS. 30, 30–45 (2009) (discussing gaps in U.S. law).

encourage clarity, consistency and enforceability of established legal principles; (2) promote international dialogue and cooperation; and (3) strengthen human rights globally.

## II. United States Federal Legislation Concerning Crimes Against Humanity

None of the 50 U.S. states nor the federal government has legislation penalizing crimes against humanity.<sup>6</sup> The United States therefore can serve as a “safe haven from prosecution”<sup>7</sup> for perpetrators.

Although prosecutions for specific acts, such as murder or rape, “may provide a measure of justice,” these individual crimes “fall far short of what a successful prosecution of a crime against humanity, with multiple victims (sometimes in the tens of thousands), would entail and what it would signify as America’s commitment to the rule of law.”<sup>8</sup> Further, lack of extraterritorial jurisdiction provisions and existing statutes of limitations found in existing law<sup>9</sup> add significant hurdles to prosecution.

The United States has adopted laws criminalizing genocide and the recruitment or use of child soldiers. The United States’ Genocide Convention Implementation Act of 1987 (the Proxmire Act) criminalizes genocide.<sup>10</sup> The Genocide Accountability Act of 2007 strengthens it by expanding jurisdiction over, *inter alia*, an “alleged offender” who “is brought into, or found in, the United States, even if [the] conduct occurred outside the United States.”<sup>11</sup> The Human

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<sup>6</sup> Puerto Rico enacted a statute defining and penalizing crimes against humanity. See P.R. LAWS ANN. tit. 33, §4934 (Westlaw through 2011). See also Carrillo & Nelson, *supra* note 5, at 8, 9, annex B at 38, annex F at 44.

<sup>7</sup> Scheffer, *supra* note 5, at 30. *But see Universal Jurisdiction: A Preliminary Survey of Legislation Around the World—2012 Update*, AMNESTY INT’L, 120 (Oct. 9, 2012) [hereinafter Amnesty Int’l Survey] (citation omitted), available at <http://www.amnesty.org/en/library/asset/IOR53/019/2012/en/2769ce03-16b7-4dd7-8ea3-95f4c64a522a/ior530192012en.pdf> (last visited Nov. 26, 2013) (noting that “US military courts and commissions tried former Axis nationals directly under international law for crimes against humanity; it is not clear if they would exercise such jurisdiction today.”). At 344–61 (discussing the capture of Pol Pot and efforts to bring him to justice in the United States); Scheffer, *supra* note 5, at 34 n.14 (“[W]e had wanted to have the option of bringing [Pol Pot] to the United States to stand trial for crimes against humanity and genocide in Cambodia from 1975 to 1979 in the event he could have been apprehended prior to his death in 1998. The Department of Justice advised that U.S. courts probably would have no jurisdiction over Pol Pot, and thus we had to seek a foreign jurisdiction, which proved very time-consuming, where he could be transported if captured. In the end, time spent trying to overcome U.S. jurisdictional inadequacies enhanced Pol Pot’s chances of avoiding imminent capture and eliminated the opportunity to move more decisively against him.”).

<sup>8</sup> Scheffer, *supra* note 5, at 37.

<sup>9</sup> The American Bar Association’s Resolution 107A “urges all countries, consistent with international law, not to apply statutes of limitation with respect to (1) genocide, (2) crimes against humanity, and (3) serious war crimes.” *Resolution 107A*, AM. BAR ASS’N (2013).

<sup>10</sup> See Genocide Convention Implementation Act of 1987 (the Proxmire Act), Pub. L. No. 100–606, 102 Stat. 3045 (1988) [hereinafter Proxmire Act]; Scheffer, *supra* note 5, at 34.

<sup>11</sup> Genocide Accountability Act of 2007, Pub. L. No. 110–151, 121 Stat. 1821 (2007); Scheffer, *supra* note 5, at 33–34 (footnote omitted). See Amnesty Int’l Survey, *supra* note 7, at 21, 119–20.

Rights Enforcement Act of 2009 reworded 18 U.S.C. §1091 to cover offenses if, “regardless of where the offense is committed, the alleged offender is . . . present in the United States.”<sup>12</sup> In addition, 18 U.S.C. §1091(f) eliminates the statute of limitations as a defense to prosecution.<sup>13</sup>

The Child Soldiers Accountability Act of 2008 permits the prosecution of someone who recruits or uses child soldiers under 18 U.S.C. §2442 and provides, *inter alia*, extraterritorial jurisdiction when “the alleged offender is present in the United States, irrespective of the nationality of the alleged offender[.]”<sup>14</sup> However, the Act’s ten-year statute of limitations restricts its application.<sup>15</sup> For instance, a non-national who commits these offenses abroad could evade federal prosecution if found in the United States after this time period has elapsed.<sup>16</sup>

New federal law proscribing crimes against humanity would be consistent with existing law. Providing extraterritorial jurisdiction and eliminating the statute of limitations would strengthen enforcement by ensuring that atrocity perpetrators can be tried in federal court regardless of where and when the atrocities occurred. More generally, enacting a separate statute criminalizing crimes against humanity would cover offenses not included in existing legislation.

### **III. International Law Concerning the Prevention and Punishment of Crimes Against Humanity**

Firm precedent and norms have developed in various international courts and tribunals concerning crimes against humanity. However, there is no comprehensive convention requiring the prevention and punishment of all crimes against humanity.

Civilians are frequently the victims of atrocities which may not be considered war crimes<sup>17</sup> when committed during peacetime and often do not meet the definition of genocide.<sup>18</sup>

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<sup>12</sup> 18 U.S.C. §1091(e)(2)(D) (2012); Human Rights Enforcement Act of 2009, Pub. L. No. 111–122, 123 Stat. 3481 (2009).

<sup>13</sup> 18 U.S.C. §1091(f) (2012) (“Notwithstanding section 3282, in the case of an offense under this section, an indictment may be found, or information instituted, at any time without limitation.”).

<sup>14</sup> 18 U.S.C. §2442(c)(3) (2012). Child Soldiers Accountability Act of 2008, Pub. L. No. 110–340, 122 Stat. 3735 (2008). For a discussion on the Child Soldiers Accountability Act, see Scheffer, *supra* note 5, at 34–35.

<sup>15</sup> See 18 U.S.C. §3300 (2012) (“No person may be prosecuted, tried, or punished for a violation of section 2442 unless the indictment or the information is filed not later than 10 years after the commission of the offense.”).

<sup>16</sup> Scheffer, *supra* note 5, at 45.

<sup>17</sup> The Rome Statute defines a “war crime” as “grave breaches of the Geneva Convention of 12 August 1949”. The definition includes, but is not limited to, any of the following acts when committed against persons or property protected by the Geneva Conventions: “willful killing, torture or inhuman treatment including biological experiments, willfully causing great suffering or serious injury to body or health”. Rome Statute of the International Criminal Court, art. 8, July 17, 1998, 2187 U.N.T.S. 90, available at <http://untreaty.un.org/cod/icc/statute/romefra.htm>

<sup>18</sup> The Rome Statute defines “genocide” as “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group,” including, but not limited to, “killing members of the group,

Crimes against humanity is “often ... the *only* offense chargeable in a particular case[.]”<sup>19</sup> Due to these gaps, “the need for a Convention is both essential and urgent.”<sup>20</sup>

Multilateral treaties currently prohibit genocide and war crimes but do not adequately address crimes against humanity. The Genocide Convention narrowly applies to acts specifically intended “to destroy, in whole or in part, a national, ethnical, racial or religious group[.]”<sup>21</sup> War crimes, codified by the Hague Conventions, the Geneva Conventions and the two Additional Protocols<sup>22</sup>, can occur only in “armed conflict”<sup>23</sup> International treaties prohibit certain, but not all, of the underlying offenses in crimes against humanity, such as torture and apartheid.<sup>24</sup> Offenses most notably absent from current treaties include the mass killing of civilians based on their membership in a political or social group, committed outside an armed conflict.

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causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part”. Rome Statute of the International Criminal Court, art. 6, July 17, 1998, 2187 U.N.T.S. 90, *available at* <http://untreaty.un.org/cod/icc/statute/romeofra.htm>

<sup>19</sup> Sadat, *supra* Note 4, at 377 (emphasis in the original).

<sup>20</sup> M. Cherif Bassiouni, *Revisiting the Architecture of Crimes Against Humanity*, in FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY, *supra* note **Error! Bookmark not defined.**, at 58 (citing THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE (M. Cherif Bassiouni ed., 2010)).

<sup>21</sup> Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, Dec. 9, 1948, S. Exec. Doc. O, 81-1 (1949), 78 U.N.T.S. 277. *See* Bassiouni, *supra* note 20, at 476-77; Sadat, *supra* note 4, at 339-40.

<sup>22</sup> Bassiouni, *supra* note 20, 461-62 (footnotes omitted), 461 n.16 (citations omitted). *See, e.g.*, Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803; Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609. *See also* GAOR, 68th Sess., Supp. No. 10 (2013) [hereinafter ILC 65th Session Report], annex B at 140.

<sup>23</sup> Sadat, *supra* note 4, at 339.

<sup>24</sup> *See* Leila Nadya Sadat, *A Comprehensive History of the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity*, in FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY, *supra* note **Error! Bookmark not defined.**, app. III at 449, 457; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. 100-20, 1465 U.N.T.S. 85; International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243.

Special tribunals<sup>25</sup>, such as the International Criminal Tribunal for the former Yugoslavia, included crimes against humanity within their jurisdiction.<sup>26</sup> These tribunals have established firm jurisprudence over several decades. They have, however, provided different definitions and interpretations of crimes against humanity.<sup>27</sup> This inconsistency makes it difficult for prosecutors and others to reliably use these precedents.

In 1998, the Rome Statute of the International Criminal Court (ICC) codified crimes against humanity in a multilateral convention which is now widely considered customary international law,<sup>28</sup> although this view is not uniform.<sup>29</sup> However, the definition is limited to cases brought before the ICC,<sup>30</sup> which provides only a “vertical” method of enforcement between States and the Court.<sup>31</sup> There is no “horizontal” instrument for direct cooperation between States.<sup>32</sup> The ICC is considered an exceptional system of enforcement, typically prosecuting only high-level defendants in a limited number of “situation” countries.<sup>33</sup> It “is predicated on the notion that national jurisdiction is, in the first instance, the proper place for prosecution, in the

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<sup>25</sup> Including the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the Extraordinary Chambers in the Courts of Cambodia

<sup>26</sup> See Statute of the International Criminal Tribunal for the former Yugoslavia, S.C. Res. 827, annex at art. 5, U.N. Doc. S/RES/827 (May 25, 1993); Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, annex at art. 3, U.N. Doc. S/RES/955 (Nov. 8, 1994); Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Statute of the Special Court for Sierra Leone, art. 2, Jan. 16, 2002, 2178 U.N.T.S. 137; S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000); Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, art. 9, June 6, 2003, 2329 U.N.T.S. 117.

<sup>27</sup> See Sadat, *supra* note 4, at 342–50.

<sup>28</sup> Sadat, *supra* note 4, at 373, 373 n.268.

<sup>29</sup> See Sadat, *supra* note 24, app. III at 463 (footnote omitted) (noting the existence of “thoughtful arguments contending that the Rome Statute was not a codification of custom, but treaty law applicable only before the International Criminal Court [.]”).

<sup>30</sup> Sadat, *supra* note **Error! Bookmark not defined.**, at xxii. See Rome Statute art. 7, *supra* note 2. For a discussion on the structure and elements of Article 7, see Kai Ambos, *Crimes Against Humanity and the International Criminal Court*, in FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY, *supra* note **Error! Bookmark not defined.**, 279, 282-92.

<sup>31</sup> M. Cherif Bassiouni, *Crimes Against Humanity: The Case for a Specialized Convention*, 9 WASH. U. GLOBAL STUD. L. REV. 575, 588–89 (2010). “This vertical relationship between the ICC and its state parties does not extend to a horizontal relationship between the state parties.” *Id.* at 588. See ILC 65th Session Report, *supra* note 22, annex B at 143.

<sup>32</sup> *Supra* note 31.

<sup>33</sup> ILC 65th Session Report, *supra* note 22, annex B at 143. See Ambos, *supra* note 30, at 296.

event appropriate national laws are in place[.]”<sup>34</sup> The Rome Statute also “does not explicitly obligate States Parties to prosecute crimes against humanity”<sup>35</sup>

This limitation has practical consequences. A recent study from the George Washington University Law School’s International Human Rights Clinic notes that “the fact that a substantial number of Rome Statute parties (by one secondary source, more than 50 percent) have not enacted such legislation strongly suggests that not all Rome Statute States feel obligated to implement measures prohibiting the crimes covered by the Rome Statute.”<sup>36</sup> The study further suggests that “only a quarter of States worldwide have some form of universal jurisdiction over [these crimes] *per se*.”<sup>37</sup> There is also a lack of uniformity between existing national definitions of crimes against humanity.<sup>38</sup> Finally, without an extradition treaty, international law does not require a State to surrender individuals to a requesting State.<sup>39</sup> In the United States, extradition may only take place under the authority of a treaty or a statute.<sup>40</sup>

A comprehensive convention thus would increase consistency, encourage national jurisdictions to prohibit and punish crimes against humanity, and prompt collaboration between States.<sup>41</sup>

#### IV. Momentum Exists for New International and Domestic Law

In 1994, Professor M. Cherif Bassiouni called for the negotiation of a new convention on crimes against humanity.<sup>42</sup> More recently, in 2008, a group of international experts launched the

<sup>34</sup> ILC 65th Session Report, *supra* note 22, annex B at 143.

<sup>35</sup> Payam Akhavan, *The Universal Repression of Crimes Against Humanity before National Jurisdictions*, in FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY, *supra* note **Error! Bookmark not defined.**, at 28, at 30–31. The Preamble to the Rome Statute states: “Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes[.]” Rome Statute, Preamble at ¶6, *supra* note **Error! Bookmark not defined.** (While an “implicit duty to prosecute may arguably exist” based on the Rome Statute’s Preamble in paragraph 6 and the principle of complementarity, “[t]his duty is not expressly contained in any of the operative provisions of the Statute”)

<sup>36</sup> See Arturo J. Carrillo & Annalise K. Nelson, *Comparative Law Study and Analysis of National Legislation Relating to Crimes Against Humanity and Extraterritorial Jurisdiction*, 46 GEO. WASH. INT’L L. REV. (forthcoming 2014) at 9 (footnote omitted). (Despite stating that “our survey of secondary sources supports the conclusion that whether a State has ratified or acceded to the Rome Statute has a significant correlation with whether the State has some form of [crimes against humanity] legislation,”)

<sup>37</sup> *Id.* at 29–30.

<sup>38</sup> *Id.* at 3.

<sup>39</sup> CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 261 (2013) (footnote omitted).

<sup>40</sup> *Id.* at 262. See 18 U.S.C. §3181 (2012). See also *Ntakirutimana v. Reno et al.*, 184 F.3d 419 (5th Cir. 1999).

<sup>41</sup> ILC 65th Session Report, *supra* note 22, annex B at 143.

<sup>42</sup> Bassiouni, *supra* note 1, at 457.

*Crimes Against Humanity Initiative* to carry out this objective,<sup>43</sup> Their Committee has finalized a *Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity*.<sup>44</sup> This model treaty is available in seven languages. The Initiative's work has involved hundreds of experts from around the world, and has been publicly supported by more than 75 judges, international prosecutors, former United Nations and government officials, and academics.<sup>45</sup>

In 1996, the International Law Commission's *Draft Code of Crimes Against the Peace and Security of Mankind* included "a formulation [of crimes against humanity] that would heavily influence the incorporation of the crime within the 1998 Rome Statute[.]"<sup>46</sup> In 2013, the Commission placed the topic of a crimes against humanity convention on its Long-term Work Program,<sup>47</sup> and may "move this topic to the active agenda" and appoint a Special Rapporteur in its sixty-sixth session in 2014.<sup>48</sup> The proposal states that "the Commission may be able to adopt a full set of draft articles on first reading before the end of the current quinquennium."<sup>49</sup> As the expert treaty-drafting body of the United Nations,<sup>50</sup> the Commission's recent interest suggests a growing international consensus on the need for this convention.

In the United States, the federal Crimes Against Humanity Act was introduced in June 2009 and promised to be "a significant advancement in closing the impunity gap in U.S. law for

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<sup>43</sup> Sadat, *supra* note 24, app. III, at 455. International Steering Committee members include Professor Leila Sadat, Professor M. Cherif Bassiouni, Ambassador Hans Corell, Justice Richard Goldstone, Professor Juan Méndez, Professor William Schabas, and Judge Christine Van Den Wyngaert. FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY, *supra* note **Error! Bookmark not defined.**, at viii.

<sup>44</sup> See *Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity*, in FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY at 359–402.

<sup>45</sup> See *Washington Declaration on Crimes Against Humanity*, in FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY, *supra* note **Error! Bookmark not defined.**, at 533. See also ILC 65th Session Report, *supra* note 22, annex B at 144 (citing FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY, *supra* note **Error! Bookmark not defined.**).

<sup>46</sup> ILC 65th Session Report, *supra* note 22, annex B at 142 (footnote omitted). See *Draft Code of Crimes Against the Peace and Security of Mankind*, in Rep. of the Int'l Law Comm'n, 48th sess, May 6–July 26, 1996, U.N. Doc. A/51/10; GAOR, 51st Sess., Supp. No. 10, (1996) available at [http://legal.un.org/ilc/documentation/english/A\\_51\\_10.pdf](http://legal.un.org/ilc/documentation/english/A_51_10.pdf) (last visited Dec. 2, 2013).

<sup>47</sup> ILC 65th Session Report, *supra* note 22, at 22, 169–70 (footnote omitted). For the proposal, see *id.* at annex B. based on a proposal by Commission member Sean D. Murphy

<sup>48</sup> Sean D. Murphy, *The International Law Commission's 65th Session (2013)*, OPINIO JURIS (Oct. 28, 2013, 11:49 AM), <http://opiniojuris.org/2013/10/28/international-law-commissions-65th-session-2013/> (last visited Jan. 8, 2014); ILC 65th Session Report, *supra* note 22, annex B at 144.

<sup>49</sup> ILC 65th Session Report, *supra* note 22, annex B at 144.

<sup>50</sup> "The International Law Commission shall have for its object the promotion of the progressive development of international law and its codification." Statute of the International Law Commission art. 1, G.A. Res. 174 (II), U.N. Doc. A/519 (Nov. 21, 1947).

atrocities crimes”<sup>51</sup>, including addressing the fact that “over 1,000 war criminals have found safe haven in the United States.”<sup>52</sup> Twenty-nine organizations, representing “a broad coalition of human rights and religious groups,” wrote a letter supporting the bill.<sup>53</sup> They included a list of crimes “distinct” from genocide and requiring “separate legislation.”<sup>54</sup> Further, in 2011 the Obama Administration released the Presidential Study Directive on Mass Atrocities (PSD-10), which prompted the creation of the interagency Atrocities Prevention Board.<sup>55</sup> The Board is designed “to coordinate a whole of government approach to preventing mass atrocities and genocide”<sup>56</sup> and provides the U.S. government with a ready-made forum to discuss and negotiate a renewed federal crimes against humanity statute.

## V. New Crimes Against Humanity Law is Consistent With Established U.S. and ABA Policy and Practice

Respect for the rule of law and human rights is a core American value.<sup>57</sup> A new crimes against humanity convention is consistent with established U.S. and international policy and efforts to prevent and punish human rights atrocities.

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<sup>51</sup> Scheffer, *supra* note 5, at 40. See S.1346, 111<sup>th</sup> Cong. (2009–10). In 2010, the bill was “[r]eported by Senator Leahy with an amendment in the nature of a substitute.” See S.1346, 111<sup>th</sup> Cong. (2009–10) available at <http://beta.congress.gov/bill/111th-congress/senate-bill/1346?q=%7B%22search%22%3A%5B%22crimes+against+humanity+act%22%5D%7D> (last visited Dec. 9, 2013).

<sup>52</sup> 155 CONG. REC. 16044 (2009).

<sup>53</sup> 155 CONG. REC. 16045–46 (2009). The letter was printed into the record. See *id.*

<sup>54</sup> *Id.* at 16046.

<sup>55</sup> Office of the Press Secretary, The White House, Presidential Study Directive on Mass Atrocities (Aug. 4, 2011) [hereinafter PSD-10], available at <http://www.whitehouse.gov/the-press-office/2011/08/04/presidential-study-directive-mass-atrocities> (last visited Mar. 21, 2014).

<sup>56</sup> *Id.* See Fact Sheet: Obama Administration Leadership on International Human Rights, Dec. 4, 2013, available at <http://www.whitehouse.gov/the-press-office/2013/12/04/fact-sheet-obama-administration-leadership-international-human-rights> (last visited Mar. 21, 2014); Fact Sheet: The Obama Administration’s Comprehensive Efforts to Prevent Mass Atrocities Over the Past Year, May 1, 2013 [hereinafter May 2013 Fact Sheet], available at [http://www.whitehouse.gov/sites/default/files/docs/fact\\_sheet\\_-\\_administration\\_efforts\\_to\\_prevent\\_mass\\_atrocities5.pdf](http://www.whitehouse.gov/sites/default/files/docs/fact_sheet_-_administration_efforts_to_prevent_mass_atrocities5.pdf) (last visited Mar. 21, 2014); Fact Sheet: A Comprehensive Strategy and New Tools to Prevent and Respond to Atrocities, Apr. 23, 2012, available at <http://www.whitehouse.gov/the-press-office/2012/04/23/fact-sheet-comprehensive-strategy-and-new-tools-prevent-and-respond-atro> (last visited Mar. 21, 2014); Remarks by the President at the United States Holocaust Memorial Museum (Apr. 23, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/04/23/remarks-president-untied-states-holocaust-memorial-museum> (last visited Mar. 21, 2014); Fact Sheet: President Obama Directs New Steps to Prevent Mass Atrocities and Impose Consequences on Serious Human Rights Violators, Aug. 4, 2011, available at <http://www.whitehouse.gov/the-press-office/2011/08/04/fact-sheet-president-obama-directs-new-steps-prevent-mass-atrocities-and> (last visited Mar. 25, 2014).

<sup>57</sup> See National Security Advisor Susan E. Rice, Remarks at the Human Rights First Annual Summit, Human Rights: Advancing American Interests and Values (Dec. 4, 2013) [hereinafter National Security Advisor Remarks], available at <http://www.whitehouse.gov/the-press-office/2013/12/04/remarks-national-security-advisor-susan-e-rice-human-rights-advancing-am> (last visited Dec. 19, 2013).

The United States has generally supported the negotiation of international human rights treaties and instruments.<sup>58</sup> The United States voted for the Universal Declaration of Human Rights more than 60 years ago, a testament of its support for fundamental rights.<sup>59</sup> It played an integral role in the establishment and conduct of the Nuremberg Trials and the UN *ad hoc* and hybrid international criminal tribunals, as well as providing support for the International Criminal Court (despite its current non-membership).<sup>60</sup> Although the United States initially had an uneasy relationship with the ICC, it has progressively developed a more cooperative stance, even as a non-State Party.<sup>61</sup> Leading the elaboration and negotiation of a crimes against humanity convention is consistent with historic and current cooperation between the United States and the ICC. The U.S. delegation was “one of the largest” at the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court in 1998 “and was omnipresent in virtually every negotiation concerning the [Rome] Statute’s text.”<sup>62</sup> The United States actively participated at the 2010 Review Conference in Kampala<sup>63</sup> and has attended meetings of the ICC Assembly of States Parties since 2009.<sup>64</sup>

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<sup>58</sup> See, e.g., *United States Ratification of International Human Rights Treaties*, HUMAN RTS. WATCH 5, 14 (July 2009), available at [http://www.hrw.org/sites/default/files/related\\_material/Treaty%20Ratification%20Advocacy%20document%20-%20final%20-%20Aug%202009.pdf](http://www.hrw.org/sites/default/files/related_material/Treaty%20Ratification%20Advocacy%20document%20-%20final%20-%20Aug%202009.pdf) (last visited Dec. 19, 2013) (“During the negotiation of the [Convention on the Rights of the Child], the United States successfully proposed the inclusion of articles designed to prevent child abuse, and to protect freedom of religion, expression, and association” and “[t]he US provided fundamental technical assistance during the [Convention on the Rights of Persons with Disabilities] negotiation and drafting process.”).

<sup>59</sup> See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) reprinted in 1948–49 U.N.Y.B. 524–37.

<sup>60</sup> Christopher “Kip” Hale & Maanasa K. Reddy, *A Meeting of the Minds in Rome: Ending the Circular Conundrum of the U.S.-ICC Relationship*, 12 WASH. U. GLOBAL STUD. L. REV. 581, 583–84, 587–89 (2013) (footnotes omitted). See 155 CONG. REC. 16044 (2009) (describing how “[f]or generations, the U.S. has led the struggle for human rights around the world and has supported holding perpetrators of crimes against humanity accountable” and providing examples of these efforts in Senator Durbin’s statement introducing the Crimes Against Humanity Act).

<sup>61</sup> See Hale & Reddy, *supra* note 60, at 588–89; *US & ICC, Administration Update*, AMERICAN NON-GOVERNMENTAL ORGANIZATIONS COALITION FOR THE INTERNATIONAL CRIMINAL COURT (AMICC), <http://www.amicc.org/usicc/administration> (last visited March 19, 2014) [hereinafter AMICC]. See, e.g., Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, Remarks at a UN Security Council Debate on Peace & Justice, with a Special Focus on the Role of the International Criminal Court (Oct. 17, 2012), available at <http://usun.state.gov/briefing/statements/199261.htm> (last accessed Apr. 25, 2014).

<sup>62</sup> Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 453 (2000).

<sup>63</sup> Review Conference of the Rome Statute in Kampala, Uganda, 11 June 2010

<sup>64</sup> *US & ICC, Administration Update*, AMERICAN NON-GOVERNMENTAL ORGANIZATIONS COALITION FOR THE INTERNATIONAL CRIMINAL COURT (AMICC), <http://www.amicc.org/usicc/administration> (last visited March 19, 2014) [hereinafter AMICC]. See, e.g., Special Briefing of Harold Hongju Koh and Stephen J. Rapp, U.S. Engagement With the ICC and the Outcome of the Recently Concluded Review Conference (June 15, 2010), available at [http://www.state.gov/j/gcj/us\\_releases/remarks/2010/143178.htm](http://www.state.gov/j/gcj/us_releases/remarks/2010/143178.htm) (last accessed Apr. 25, 2014).

Supporting a new crimes against humanity convention is also consistent with recent strategies employed by the United States to prevent atrocities. A May 2013 fact sheet<sup>65</sup> issued by the White House describes these activities, including efforts to obtain information about human rights abusers on U.S. territory, the removal of individuals suspected of committing atrocities, and U.S. assistance with Bosco Ntaganda's<sup>66</sup> voluntary surrender to the International Criminal Court.<sup>67</sup>

The American Bar Association has adopted policies addressing international atrocity crimes and promoting the prosecution of perpetrators who commit these offenses. In 2004, Recommendation 103A recognized the principle of universal criminal jurisdiction<sup>68</sup> in order to “ensure that persons who perpetrate grave international crimes are brought to justice.”<sup>69</sup> In the same year, Recommendation 10-B condemned using torture or other cruel, inhuman or degrading treatment or punishment on individuals within the U.S. government's custody or under its physical control.<sup>70</sup> Recommendation 110 in 2009 endorsed portions of the 2005 World Summit Outcome Document on the Responsibility to Protect doctrine, as well as the recommendations in the Genocide Prevention Task Force's 2008 report.<sup>71</sup> In 2013, Resolution 107A urged nations not to apply statutes of limitation to genocide, crimes against humanity, and serious war crimes.<sup>72</sup>

The negotiation of a new crimes against humanity convention that incorporates the definition of crimes against humanity in the Rome Statute would also reinforce the work of the International Criminal Court. The American Bar Association has consistently supported the ICC,

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<sup>65</sup> See Fact Sheet: Obama Administration Leadership on International Human Rights, Dec. 4, 2013, *available at* <http://www.whitehouse.gov/the-press-office/2013/12/04/fact-sheet-obama-administration-leadership-international-human-rights> (last visited Mar. 21, 2014); Fact Sheet: The Obama Administration's Comprehensive Efforts to Prevent Mass Atrocities Over the Past Year, May 1, 2013 [hereinafter May 2013 Fact Sheet], *available at* [http://www.whitehouse.gov/sites/default/files/docs/fact\\_sheet\\_-\\_administration\\_efforts\\_to\\_prevent\\_mass\\_atrocities5.pdf](http://www.whitehouse.gov/sites/default/files/docs/fact_sheet_-_administration_efforts_to_prevent_mass_atrocities5.pdf) (last visited Mar. 21, 2014)

<sup>66</sup> In 2011 the Obama Administration released the Presidential Study Directive on Mass Atrocities (PSD-10), which prompted the creation of the interagency Atrocities Prevention Board (APB). The APB first met in April 2012 and is designed “to coordinate a whole of government approach to preventing mass atrocities and genocide.” The APB provides the U.S. government with a ready-made forum to discuss and negotiate a renewed federal crimes against humanity statute. Office of the Press Secretary, The White House, Presidential Study Directive on Mass Atrocities (Aug. 4, 2011) [hereinafter PSD-10], *available at* <http://www.whitehouse.gov/the-press-office/2011/08/04/presidential-study-directive-mass-atrocities> (last visited Mar. 21, 2014).

<sup>67</sup> May 2013 Fact Sheet, *supra* note 65, at 3–4.

<sup>68</sup> Recommendation 103A, AM. BAR ASS'N (2004).

<sup>69</sup> Report accompanying Recommendation 103A, AM. BAR ASS'N (2004), at 4.

<sup>70</sup> Recommendation Revised 10-B, AM. BAR ASS'N (2004).

<sup>71</sup> Recommendation 110, AM. BAR ASS'N (2009).

<sup>72</sup> Resolution 107A, AM. BAR ASS'N (2013).

both during the Rome Statute negotiations in 1998 (Recommendation 118B),<sup>73</sup> and following its establishment. In 2001, Recommendation 105C recommended that the United States accede to the Rome Statute<sup>74</sup> and, in 2008, Recommendation 108A urged the U.S. government “to expand and broaden United States interaction with the International Criminal Court[.]”<sup>75</sup>

## VI. Conclusion

Weaknesses in the legal framework governing crimes against humanity have resulted in continued impunity for the perpetrators of these crimes. It is a logical and timely extension of its mission and policies for the American Bar Association to urge the United States to enact federal legislation on crimes against humanity and to actively participate in the negotiation and adoption of a multilateral convention for the prevention and punishment of these offenses.

Respectfully submitted,

Deborah Enix-Ross  
Chair, ABA Center for Human Rights

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<sup>73</sup> *Recommendation 118B*, AM. BAR ASS’N (1998).

<sup>74</sup> *Recommendation 105C*, AM. BAR ASS’N (2001).

<sup>75</sup> *Recommendation 108A*, AM. BAR ASS’N (2008).

## GENERAL INFORMATION FORM

Submitting Entity: ABA Center for Human Rights

Submitted By: Deborah Enix-Ross, Chair

1. Summary of Resolution(s).

RESOLVED, That the American Bar Association urges Congress to enact legislation to prevent and punish crimes against humanity.

FURTHER RESOLVED, That the American Bar Association urges the United States government to take an active role in the negotiation and adoption of a new global convention for the prevention and punishment of crimes against humanity.

2. Approval by Submitting Entity.

Approved by the Center for Human Rights Executive Board, June 9, 2014

3. Has this or a similar resolution been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

Association policies on the International Criminal Court, other human rights treaties, and related human rights issues would be enhanced by the proposed policy, as they all support the rule of law globally, accountability under the law, and the promotion of the legal profession.

5. If this is a late report, what urgency exists which requires action at this meeting of the House? The United Nations International Law Commission and the U.S. Atrocity Prevention Board just recently took up drafting a Crimes Against Humanity convention and legislation, respectively. The ABA's support of such a convention and legislation now will permit the Association to influence their development.

6. Status of Legislation. Crimes Against Humanity legislation is expected to be forthcoming in the next several months and is a priority of the Atrocity Prevention Board.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. If adopted, the Center for Human Rights would be well-positioned to advocate and educate on the ABA's position on Crimes Against Humanity through its International Criminal Court Project, Justice Defenders Program, Business and Human Rights Project, and general work of the Center. The policy position is consistent with the Center's work and mission.

8. Cost to the Association.

Passage of the policy will incur no direct or indirect cost to the Association.

9. Disclosure of Interest.

None known at this time.

10. Referrals.

The Center will disseminate the policy proposal to all interested ABA entities, including the Sections of International Law, Individual Rights and Responsibilities, and the Rule of Law Initiative (ROLI), among others.

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Michael Pates, Director, Center for Human Rights, 1050 Connecticut Ave., NW, Washington, DC 20036; 202.662.1025; [michael.pates@americanbar.org](mailto:michael.pates@americanbar.org)

12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

Deborah Enix-Ross, Chair, Center for Human Rights, c/o Debevoise & Plimpton, 919 Third Avenue, New York, NY 10022; 212.909.6310; [denixross@debevoise.com](mailto:denixross@debevoise.com)

EXECUTIVE SUMMARY1. Summary of the Resolution

RESOLVED, That the American Bar Association urges Congress to enact legislation to prevent and punish crimes against humanity.

FURTHER RESOLVED, That the American Bar Association urges the United States government to take an active role in the negotiation and adoption of a new global convention for the prevention and punishment of crimes against humanity.

2. Summary of the Issue that the Resolution Addresses

Due to the absence of domestic law on the topic, the U.S. can serve as a safe haven for perpetrators of Crimes Against Humanity (CAH), which encompasses a widespread and systematic attack on a civilian population with knowledge of the attack, and includes enumerated offenses of murder, extermination, torture, enslavement, rape and other sexual offenses, apartheid, persecution, and others. While individuals can be prosecuted in the U.S. for genocide and war crimes, they cannot be prosecuted for the commission of CAH *per se*, which is the most common atrocity crime. The lack of a comprehensive convention on CAH undermines the enforcement and cooperation of states in this regard, thus allowing impunity to continue. The lack of domestic law on this topic undermines U.S. leadership on the rule of law internationally and the enforcement of CAH domestically. Likewise, the lack of an international treaty creates large gaps in the international community's ability to prevent and punish the commission of CAH.

3. Please Explain How the Proposed Policy Position will address the issue

By urging the creation of domestic and international convention law on the subject, the law will 'catch up' to the proliferation of CAH and help create a better system of enforcement, domestically and internationally. Domestically, this policy (if heeded) will give jurisdiction to U.S. prosecutors to charge and try alleged perpetrators of CAH, if found in the U.S., for these offenses, rather than rely on some other, lesser charge such as immigration fraud). At the international level, a CAH treaty would, for example, obligate all ratifying states to pass domestic legislation as well as set down rules for cooperation, extradition, and mutual legal assistance in the investigation and prosecution of such crimes.

4. Summary of Minority Views

No minority views are known at this time.