

## **RESOLUTION 02-10-2008**

### **DIGEST**

#### Criminal Law: Crimes Against Humanity

Adds Penal Code section 418, which creates a new criminal offense of Crimes against Humanity.

### **RESOLUTIONS COMMITTEE RECOMMENDATION**

#### **DISAPPROVE**

#### History:

No similar resolutions found.

#### Reasons:

This resolution adds Penal Code section 418, which creates a new criminal offense of Crimes against Humanity. This resolution should be disapproved because the proposed statute, while laudable in its intent, is vague, overbroad, and the proposed punishment is at odds with California sentencing law.

This resolution proposes to define a new substantive crime of “crimes against humanity,” by articulating a list of criminal acts which are committed as part of a “widespread or systematic attack directed against any civilian population.” The rationale for the proposal is twofold: 1) that by creating a substantive state law addressing crimes against humanity, it may prevent the assertion of jurisdiction by the International Criminal Court (which will not act if a case has been the subject of a genuine investigation or prosecution before a competent domestic court); and 2) that crimes against humanity should be identified as unacceptable everywhere, including California.

The International Criminal Court (ICC) is an independent, permanent court that tries persons accused of the most serious crimes of international concern, namely genocide, crimes against humanity and war crimes. The ICC is based on a treaty, joined by 105 countries (though the United States is not one of them). The jurisdiction of the ICC is complementary to national courts, which means that the ICC will only act when countries themselves are unable or unwilling to investigate or prosecute.

While creating a new substantive California crime of crimes against humanity may further the policy of the ICC in deferring to domestic prosecutions, and while crimes against humanity are indeed unacceptable anywhere in the world, including California, the proposed language of the statute contains language that is ill-defined, vague, and overbroad. The punishment section of the proposed statute does not comport with California’s established determinate and indeterminate sentencing structure. As such, it should, in its present form, be disapproved.

### **TEXT OF RESOLUTION**

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to add California Penal Code section 418, to read as follows:

1    §418  
2    (a) Whoever, as part of a widespread or systematic attack directed against any  
3    civilian population, with knowledge of the attack, commits:  
4    (1) murder;  
5    (2) extermination;  
6    (3) enslavement;  
7    (4) the deportation or forcible transfer of population;  
8    (5) unlawful imprisonment or other severe deprivation of physical liberty in  
9    violation of fundamental rules of international law;  
10   (6) torture;  
11   (7) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced  
12   sterilization, or any other form of sexual violence of comparable gravity;  
13   (8) persecution against any identifiable group or collectivity on political, racial,  
14   national, ethnic, cultural, religious, gender, or other grounds that are universally  
15   recognized as impermissible under international law;  
16   (9) enforced disappearance of persons; or  
17   (10) other inhumane acts of a similar character intentionally causing great  
18   suffering, or serious injury to body or to mental or physical health;  
19   or any attempts to commit these acts, shall be punished as provided in subsection (c).  
20   (b) Whoever directly or indirectly incites another to violate subsection (a) shall be  
21   fined not more than \$1,000,000 or imprisoned for not more than ten (10) years, or both.  
22   (c) The punishment for an offense under subsection (a) is (1) a fine of not more  
23   than \$1,000,000 or (2) imprisonment life or a lesser term, or both a fine and imprisonment.

(Proposed new language underlined; language to be deleted stricken)

**PROPOSERS:** William Aceves, Parounag Astourian, T. Sean Butler, Mariam Chivitchian, Nicholas Connon, Adam Jaffe, Aren Kavcioglu, Russell Kerr, Constance Kim, Martin Perlberger

**STATEMENT OF REASONS:**

Existing Law: Neither the federal government nor California has codified crimes against humanity, although there are some similarities to both RICO and CCE crimes.

This Resolution: Would make crimes against humanity a crime that can be prosecuted by state or local authorities. This resolution would add a new penal code section to include crimes against humanity, currently a crime under international law, as a crime under California law. The acts which are part of the systematic or widespread attack on a civilian population are mostly crimes now, and this resolution would add a different penalty for the separate crime of committing those acts as part of a widespread or systematic attack on a civilian population, much like the RICO statute adds different penalties than the underlying “predicate acts.”

The Problem: Crimes against humanity are among the most serious of crimes against the international community, require that the criminal conduct be part of a widespread or systematic attack on a civilian population, and many terrorist acts fall within the definition of crimes against humanity, but can’t be prosecuted in state courts. Also, crimes against humanity are within the

subject matter jurisdiction of the International Criminal Court. One of the policies of the International Criminal Court is to promote domestic prosecutions in courts that should normally assert jurisdiction. This policy is found in the “complementary” jurisdiction of the International Criminal Court. A case is “inadmissible” before the International Criminal Court if there is or has been a genuine investigation and/or prosecution before a competent domestic court. The International Criminal Court is supposed to be court that will act only when national courts fail to prosecute individuals accused of the most serious of crimes against the international community.

Allowing prosecution of crimes against humanity in California courts promotes the policy of domestic prosecutions first, with the International Criminal Court acting only when national courts fail. It also demonstrates the policy of California that crimes against humanity should not go unpunished, and that those who are involved in the commission of crimes against humanity must be held accountable.

#### **IMPACT STATEMENT:**

This resolution does not affect any other law, statute or rule.

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**RESPONSIBLE FLOOR DELEGATE:** T. Sean Butler

#### **COUNTERARGUMENTS**

##### **THE BAR ASSOCIATION OF SAN FRANCISCO**

The Bar Association of San Francisco is concerned that local District Attorneys could use the proposed statute, which is clearly well intentioned, in unintended ways. With the lure of draconian penalties provided by the proposed statute, we are concerned about use of this statute in lieu of more traditional statutes in order to obtain leverage against defendants in traditional domestic crimes involving organized crime, such as prostitution rings engaged in international human trafficking or international gambling rings. We can not ignore the severity of the proposed harsh penalties when reviewing a statute that could become “the darling of the prosecutor’s nursery,” to paraphrase the description of the RICO statute nearly thirty years ago due to its then substantial ratcheting up of penalties and expansive jurisdictional reach. Further, although this proposal may be well-intentioned, it may never be used as intended for practical reasons. If used as intended to prosecute crimes abroad going under-prosecuted in international forums, investigation and prosecution expenses would be prohibitive. Therefore practical budgetary limitations would likely deter any local DA from devoting scarce resources to the prosecution of, say, the Chinese leadership for their Tibetan atrocities or sponsorship of genocide in Darfur. Yet, the statute’s lure, with “darling” penalties designed for the punishment of such defendants such as the Chinese leadership might well be too tempting for prosecutors to eschew. We envision creativity by prosecutors ... bent on misuse of the statute as a bludgeon against perpetrators of traditional domestic crimes. We would hope for a re-draft of this

proposal to limit its use against unintended targets; further, a re-draft would have to identify funding sources for the investigations and prosecutions of the intended heinous perpetrators abroad.

### **ORANGE COUNTY BAR ASSOCIATION**

This resolution should be disapproved because every crime listed, if committed in this state, is covered in the Penal Code of the State of California. In addition, every crime is already covered in the Penal Code if it originated in the state. Also, all these crimes are addressed, if they are perpetrated in every other state - in laws of those states. It is not clear in this resolution why there is a need to codify these crimes in state law. These crimes, if committed in or outside the United States, are already covered under Federal as well as International law.

The proponent states the crimes against humanity are within the subject matter jurisdiction of the International Criminal Court. The policy is to promote domestic prosecution where the court should normally assert jurisdiction. Federal as well as state law already provides for these prosecutions. Even if the International Criminal Court refuses to take jurisdiction, there is already sufficient Federal and state law that does have jurisdiction. This is absolutely a duplication of law which lacks the teeth of international and Federal law.

In addition, state law lacks the enforcement mechanisms of treaties or trade embargos which serve to back up the force of international and federal law. Even if you allow these resolutions to become law there would not be sufficient resources to make them effective. While this resolution is admirable in its intent, it raises serious jurisdictional issues that threaten to cloud what is really being attempted. These crimes need the real strength of international and Federal law. They should be left to those who carry the most effective force.

### **SAN DIEGO COUNTY BAR ASSOCIATION**

This resolution would make crimes against humanity punishable by state or local authorities. Although crimes against humanity are among the most serious crimes against the international community, they are already punishable under international law. Moreover, both the state and federal governments have ample laws within their penal codes to deal with murder, slavery, torture, rape, etc. It is possible that this resolution, which would give state and local authorities a vehicle by which to prosecute foreign (and perhaps domestic) governments and heads of states for conduct outside California's jurisdiction, would be determined to be unconstitutional.