

## RESOLUTION 02-11-2008

### DIGEST

#### Criminal Law: Include Crime of Genocide

Adds Penal Code section 422.9, which creates a new California criminal offense of genocide.

### RESOLUTIONS COMMITTEE RECOMMENDATION

#### DISAPPROVE

#### History:

No similar resolutions found.

#### Reasons:

This resolution adds Penal Code section 422.9, which creates a new criminal offense of genocide. 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 “genocide,” by articulating a list of criminal acts which are committed “with the intent to destroy, in whole or in substantial part, a national, ethnic, racial or religious group.” The rationale for the proposal is twofold: 1) that by creating a substantive state law addressing genocide, 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 genocide 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 genocide may further the policy of the ICC in deferring to domestic prosecutions, and while genocide is 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 422.9, to read as follows:

1    §422.9

2           (a) Whoever, with the intent to destroy, in whole or in substantial part, a national,  
3 ethnic, racial, or religious group, as such:  
4           (1) kills members of that group;  
5           (2) causes serious bodily harm or injury to members of that group;  
6           (3) causes permanent impairment of the mental faculties of members of the group;  
7           (4) subjects the group to conditions of life that are intended to cause the physical  
8 destruction of the group in whole or in part;  
9           (5) imposes measures intended to prevent births within the group; or  
10           (6) transfers by force children of the group to another group;  
11 or any attempts to commit these acts, shall be punished as provided in subsection (c).  
12           (b) Whoever directly or indirectly incites another to violate subsection (a) shall be  
13 fined not more than \$1,000,000 or imprisoned for not more than ten (10) years, or both.  
14           (c) The punishment for an offense under subsection (a) is (1) a fine of not more  
15 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 Cannon, Adam Jaffe, Aren Kavcioglu, Russell Kerr, Constance Kim, Martin Perlberger

#### **STATEMENT OF REASONS:**

Existing Law: The United States became a party to the Genocide Convention November 25, 1988, and 18 USC Section 1091 is the implementing legislation, adding the crime of genocide as a federal crime. Genocide is among the most serious of crimes against the international community. If the federal government did not prosecute an individual accused of genocide, there is no reason a state could not bring charges against the accused, if the conduct has been made a crime in that state.

This Resolution: Would make genocide a crime that can be prosecuted by state or local authorities pursuant to state law. This resolution would add a new penal code section to include genocide, currently a crime under international law, as a crime under California law. The acts which are committed with the requisite element of intent are mostly crimes now, and this resolution would add a different penalty for the separate crime of committing those acts with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, much like the RICO statute adds different penalties than the underlying “predicate acts.”

The Problem: Genocides continue this year, in various locations. Genocide is perhaps the paradigm of an international crime. The difference between genocide and the underlying acts is the element of intent with respect to a national, ethnic, racial or religious group. But if one were accused of committing genocide, and either the perpetrator was found in California, or one of the victims was from California, there is no current state law which makes genocide a crime in California.

Genocide is also a crime 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 genocide 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 and the United States that genocide should never occur again, but if and when it does, those who are involved must be held accountable.

#### **IMPACT STATEMENT:**

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

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#### **COUNTERARGUMENTS**

##### **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 genocide a crime that can be prosecuted by state or local authorities. Although genocide is among the most serious crimes against the international community, it are already punishable under federal and international law. Moreover, California has ample laws within its penal codes to enhance the underlying genocide offenses when they are targeted at specific ethnic, religious, and/or racial groups. 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.