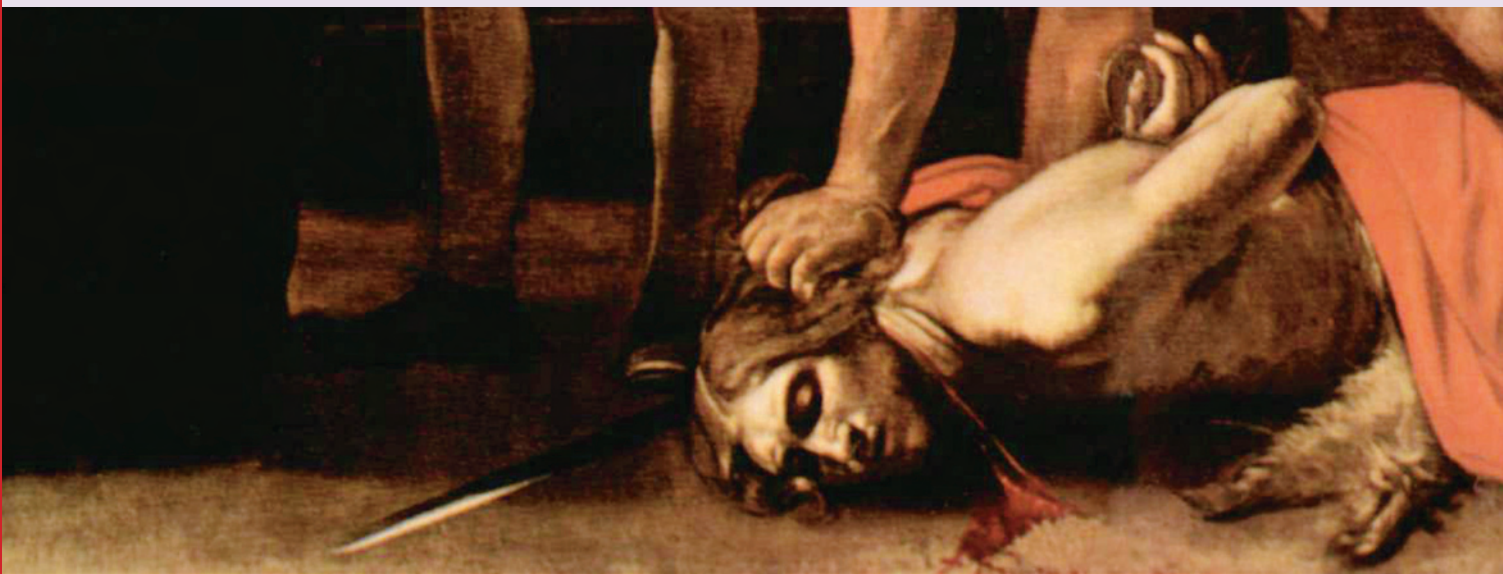




On the Proposed Crimes Against Humanity Convention

Morten Bergsmo and SONG Tianying (editors)



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U.S. Role in the Prevention and Prosecution of and Response to Crimes Against Humanity

Mary Kate Whalen*

How we as a country treat suspected perpetrators of serious human rights abuses in the United States sends an important message to the world about our commitment to human rights and the rule of law.¹

11.1. Introduction

In the aftermath of World War II, the international community rallied to implement international law structures to prevent and punish genocide, war crimes and atrocities against civilian populations through enactment of international conventions such as the Convention on the Prevention and Punishment of the Crime of Genocide ('Genocide Convention')² and the four Geneva Conventions³. Over the past 20 years, international tribunals

* **Mary Kate Whalen** received her *juris doctor* from Suffolk University Law School and a Masters of Law with a National Security Law certificate from Georgetown University Law School. She has practiced in both the private and public sectors in the United States including the Department of Homeland Security, Transportation Security Administration, and Drug Enforcement Administration. The positions set forth in this chapter are those of the author in her personal capacity and do not necessarily represent official positions of the U.S. government. All Internet references were last accessed on 4 October 2014.

¹ Richard Durbin, U.S. Senator, Chairman, Subcommittee on Human Rights and the Law of the U.S. Senate Judiciary Committee, "No Safe Haven: Accountability for Human Rights Violators in the United States", Hearing before the Subcommittee on Human Rights and the Law of the Committee on the Judiciary, United States Senate, 110th Cong., 1st Sess., Serial No. J-110-63, 14 November 2007 ('No Safe Haven Part I'), Opening Statement of Hon. Richard J. Durbin, A U.S. Senator from the State of Illinois.

² U.N. General Assembly, Prevention and Punishment of the Crime of Genocide, 9 December 1948, A/RES/260, in UNTS, vol. 78, p. 277, 12 January 1951.

³ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949; Geneva Convention for the Amelioration of the Conditions of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949; Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949; Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949.

and special courts have been established for Rwanda, the former Yugoslavia, Liberia and Sierra Leone, among others, to prosecute individuals and government leadership for commission of atrocity crimes. Despite these efforts, incidents of crimes against humanity and other atrocities continue to emerge and often continue unabated in regions such as Darfur, Kenya, Gaza, Sri Lanka, Myanmar, and the Democratic Republic of the Congo.

Political uprisings such as the Arab Spring, and resulting civil wars by factions battling for leadership or leadership vacuums have resulted in increased incidents of human rights violations in countries like Libya, Syria, Iraq and Yemen – countries with governments either unwilling or unable to prevent attacks against their civilian populations in general or specific groups within the general population. The atrocities committed within these regions do not all fall within the current international legal framework for prosecutions for perpetrators of such crimes or for government officials establishing policies promoting or supporting such crimes. Most recently, atrocities are being committed by transnational terrorist organizations, including the Islamic State of Iraq and the Levant ('ISIL')⁴ in Syria and Iraq and Boko Haram in Nigeria.

In August 2010, the Crimes Against Humanity Initiative, a non-governmental initiative comprised of a number of senior experts on international criminal law conducting a study of international law regarding crimes against humanity and drafting a multilateral treaty prohibiting such crimes, unveiled a draft proposed convention.⁵ The Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity ('Proposed Convention')⁶ would establish a legal framework for prosecution of perpetrators of crimes against humanity as defined under Article 7 of the Rome Statute of the International Criminal Court ('ICC Statute').⁷

⁴ Also referred to as the Islamic States of Iraq and Syria or ISIS; see, *e.g.*, Washington Post, Ishaan Tharoor, "ISIS or ISIL? The debate over what to call Iraq's terror group", 18 June 2014.

⁵ Washington University Law, "Work Begins on Specialized Convention on Crimes Against Humanity", available at <http://law.wustl.edu/news/pages.aspx?id=7194>.

⁶ The Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity, Washington University Law, Whitney R. Harris World Law Institute, Crimes Against Humanity Initiative, see Annex 1.

⁷ Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, adopted 17 July 1998.

In a recent report on the status of the Proposed Convention, the Crimes Against Humanity Initiative noted that the U.S. government had not taken a position on a treaty governing crimes against humanity. The report further noted that the U.S. government “is largely unaware of the work of the initiative and the call for the conclusion and adoption of a new international treaty to prevent and punish the commission of crimes against humanity”.⁸

On 18 July 2014, the U.N. International Law Commission voted to add the drafting of a treaty to address crimes against humanity to its active agenda.⁹ In its report to the U.N. General Assembly, the International Law Commission directed Member States to report on the following by 30 January 2015:

- (a) whether the State’s national law at present expressly criminalizes “crimes against humanity” as such and, if so:
- (b) the text of the relevant criminal statute(s);
- (c) under what conditions the State is capable of exercising jurisdiction over an alleged offender for the commission of a crime against humanity (e.g. when the offense occurs within its territory or when the offense is by its national or resident); and
- (d) decisions of the State’s national courts that have adjudicated crimes against humanity.¹⁰

The United States does not yet have a domestic law expressly criminalizing ‘crimes against humanity’ as defined under Article 7 of the ICC Statute or as contemplated under the Proposed Convention. U.S. federal law, however, provides several options for prosecution of persons suspected of human rights crimes, including underlying offenses in the international law definition of ‘crimes against humanity’. This chapter ex-

⁸ Leila Nadya Sadat, *A Comprehensive History of the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity*, 2010, Washington University Law, Whitney R. Harris World Law Institute, Crimes Against Humanity Initiative, p. 39, available at <http://law.wustl.edu/harris/cah/docs/EnglishTreatyFinal.pdf>.

⁹ Washington University Law, “UN International Law Commission to Elaborate New Global Convention on Crimes Against Humanity Following Experts Meeting in Geneva”, available at <http://law.wustl.edu/news/pages.aspx?id=10225>.

¹⁰ Report of the International Law Commission, 66th Session, 5 May–6 June and 7 July–8 August 2014, General Assembly Official Records, 69th Session, Supplement No. 10, A/69/10, Chapter III, p. 9, para. 34.

plores the status of U.S. laws and legislative efforts regarding the prevention and punishment of and response to atrocity crimes, as well as the limitations under current U.S. law.

11.2. Proposed Convention and ICC Statute Provisions

The Proposed Convention adopts the definition of ‘crimes against humanity’ set forth under Article 7 of the ICC Statute, defining the offense to mean:

any of the following acts when committed as a 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 sterilization, 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 or other grounds that are universally recognized as impermissible under international law;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid; or
- (k) Other inhumane acts of similar character intentionally causing great suffering or serious injury to body or physical health.

The Proposed Convention, as currently drafted, would extend jurisdiction for prosecution of crimes against humanity beyond the ICC States Parties and the limits of the ICC or international criminal tribunals to provide universal jurisdiction (although not mandatory) for this offense, by allowing any State Party to capture and prosecute a perpetrator of crimes

against humanity regardless of the geographic location of the crimes or the nationality of the perpetrator or victim.¹¹ Further, the Proposed Convention would eliminate immunities from prosecution traditionally available for heads of State and other government officials.¹²

The Proposed Convention would abolish statutes of limitation on prosecution of crimes against humanity.¹³ In addition, it would not allow States Parties to ratify the Convention contingent upon any reservation.¹⁴

11.3. U.S. Legislative Efforts Regarding Human Rights Violations

The United States has long supported international efforts to establish necessary legal frameworks for the prevention and punishment of human rights violations. The United States, along with its allies, established International Military Tribunals at Nuremberg and Tokyo after World War II to prosecute perpetrators of war crimes, crimes against humanity and crimes against the peace.¹⁵ The United States continues to support international tribunals established to address the commission of genocide, crimes against humanity and other human rights violations in places such as the former Yugoslavia, Rwanda, and Sierra Leone.

The United States, however, does not have domestic legislation that expressly criminalizes the commission of ‘crimes against humanity’, as that term is defined under the ICC Statute and the Proposed Convention. U.S. legislators have attempted to implement federal legislation. Although legislative efforts pertaining to a specific statute for crimes against humanity have not been successful, the United States has established or ex-

¹¹ See *supra* note 6, Article 10(3) of the Proposed Convention states:

Each State Party shall likewise take such measures as may be necessary to establish its competence to exercise jurisdiction over the offense of crimes against humanity when the alleged offender is present in any territory under its jurisdiction, unless it extradites or surrenders him or her to another State in accordance with its international obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognized.

¹² *Ibid.*, Article 6 and Explanatory Notes.

¹³ *Ibid.*, Article 7 and Explanatory Notes.

¹⁴ *Ibid.*, Article 23.

¹⁵ U.S. Department of State, Office of the Historian, “Milestones: 1945–1952”, available at <https://history.state.gov/milestones/1945-1952/nuremberg>.

panded jurisdiction pertaining to the prosecution of perpetrators of certain human rights law violations.

11.3.1. Subcommittee on Human Rights and the Law Hearings Leading to Legislations

The first decade of the 21st century saw significant U.S. legislative activity regarding domestic human rights law. In January 2007, the U.S. Senate Committee on the Judiciary formed a new subcommittee, Human Rights and the Law ('Human Rights Subcommittee'), charged with congressional oversight of U.S. enforcement and implementation of human rights laws.¹⁶ From 2007 through 2009, the Human Rights Subcommittee held a series of hearings regarding U.S. human rights policy and laws.¹⁷

Several of these hearings illuminated the lack of jurisdiction for U.S. prosecution of crimes against humanity. In particular, during the November 2007 hearing on the enforcement of human rights laws in the United States ('No Safe Haven: Accountability for Human Rights Violators in the United States'), panellists from the U.S. Department of Justice and Immigration and Customs Enforcement, and U.S. Department of Homeland Security were questioned regarding the limitations on their respective agencies to prosecute foreign nationals suspected of committing atrocity crimes when the suspects were located within the United States.¹⁸ To the extent U.S. law criminalized certain international human rights law violations, such as genocide, the jurisdiction of U.S. courts was limited to prosecution of U.S. citizens, nationals, and lawful permanent residents (collectively referred to hereinafter as 'U.S. persons') or to actions committed on U.S. territories or against U.S. persons. U.S. law at that time did

¹⁶ The Subcommittee on Human Rights and the Law was created by Patrick Leahy, Chairman of the Senate Judiciary Committee in 2007, available at www.judiciary.senate.gov/about/chairman. The Subcommittee was subsequently subsumed into the current Subcommittee on the Constitution, Civil Rights and Human Rights, see Subcommittee on The Constitution, Civil Rights and Human Rights, available at www.judiciary.senate.gov/about/subcommittees.

¹⁷ See, e.g., "Genocide and the Rule of Law"; S. Hrg. 110-46, Serial No. J-110-9, 5 February 2007; "Legal Options to stop Human Trafficking", S. Hrg. 110-42, Serial No. J-110-24, 26 March 2007; "Casualties of War: Child Soldiers and the Law", S. Hrg. 110-176, Serial No. J-110-29, 24 April 2007; No Safe Haven Part I, see *supra* note 1; "From Nuremberg to Darfur: Accountability for Crimes Against Humanity", S. Hrg. 110-786, Serial No. J-110-102, 24 June 2008.

¹⁸ *Ibid.*, No Safe Haven Part I, Transcript, p. 13.

not allow for the prosecution of perpetrators of atrocities committed outside the U.S. or against non-U.S. persons, even when the perpetrator was located in the United States.

The Subcommittee members were particularly concerned that such limitations in U.S. law not only restricted the United States from holding perpetrators of atrocity crimes accountable, but, more importantly, such loopholes promoted the United States as a safe haven for the perpetrators of such crimes. The Subcommittee members and a number of panellists pointed to the case of Marko Boskić, a Bosnian national who was able to obtain lawful immigration status – first as a refugee and subsequently as a lawful permanent resident – in the United States, despite his involvement in the 1995 Srebrenica massacre in Bosnia.¹⁹ Chairman Durbin of the Subcommittee questioned:

Why is it that the only thing we could find to charge this man with was visa fraud. It is reminiscent of convictions of Al Capone for tax fraud. It sounds to me like we were searching for anything to find him guilty of instead of the obvious. [...] Boskic admitted to killing many Bosnian civilians in Srebrenica. Under current law, is it possible to prosecute Boskic for these crimes in the United States?

The U.S. Department of Justice stated:

If there were no American victims or [the crimes] were not perpetrated by a U.S. national, sitting here today, it is difficult to come up with a potential charge that we could charge him with.²⁰

The Subcommittee's concern was echoed by Senator Benjamin Cardin, who noted:

I hope that we can work together to figure out how we can come up with the strongest possible laws in this country, consistent with our international obligations, to make it clear that the United States will not only [...] prevent a safe haven for those who have committed human rights violations, but will hold accountable individuals who are under our control,

¹⁹ See *U.S. v. Boskic*, 549 F. 3d 69, 71, U.S. Court of Appeals for the First Circuit 2008 (affirming district court conviction for making false statements on his applications for refugee status and permanent residency in the United States).

²⁰ Sigal P. Mandelker, Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice, No Safe Haven Part I, Transcript, p. 13, see *supra* note 1.

[...] who have violated international norms, committed war crimes, genocide and other types of human rights violations. I wanted to make sure that the point is clear in our record that it is not just departing these individuals or taking away their naturalized citizenship. It is holding them accountable for the violations of human rights.²¹

In his written statement for the record, David Scheffer, former U.S. War Crimes Ambassador to the United Nations, expressly recommended, *inter alia*, that the United States amend the domestic law to address crimes against humanity:

Filling the gaps in American law pertaining to atrocity crimes would demonstrate that the United States has the confidence to reject impunity for such crimes and to hold its own nationals to account as well as foreign nationals over whom U.S. courts should be exercising personal jurisdiction. The United States would no longer be a safe haven in reality or as potential destination for untold numbers of perpetrators of atrocity crimes. Amending and thus modernizing [the U.S. Criminal Code] in the manner proposed in this testimony would signal the end to exceptionalism in atrocity crimes and place the United States on equal footing with many of its allies which have already recast their criminal law to reflect the reality of international criminal and humanitarian law in our own time.²²

These hearings directly resulted in significant changes in U.S. laws pertaining to human rights through bipartisan legislation including the Genocide Accountability Act of 2007,²³ the Child Soldiers Accountability Act of 2008,²⁴ and the William Wilberforce Trafficking Victim Protection Reauthorization Act of 2008, which, among other things, closed loopholes in U.S. law by vesting federal courts with jurisdiction to prosecute indi-

²¹ *Ibid.*, p. 17.

²² *Ibid.*, Written Testimony, p. 31, David Scheffer, “Gaps in U.S. Law Pertaining to Atrocity Crimes”; also Transcript, p. 20 (Recommending, *inter alia*, that the United States “amend the Federal criminal code so that it enables federal criminal courts to more effectively and unambiguously prosecute crimes against humanity and war crimes that are already codified in the statutes of the international and hybrid criminal tribunals and are defined as part of customary international law”).

²³ Pub. L. 110–150, 121 Stat. 1821, 10 December 2007.

²⁴ Pub. L. 113–340, 3 October 2008.

viduals found within the United States for activities occurring outside of the United States.

In 2008, based on testimony obtained from the prior human rights hearings, the Human Rights Subcommittee convened the first congressional hearing specifically directed towards U.S. law and policy on crimes against humanity.²⁵ As noted by the Subcommittee Chairman:

By signalling to perpetrators of genocide that they will not find a safe haven in the United States, the Genocide Accountability Act moved us a little closer to fulfilling our pledge of “never again”. We should take the next step and make sure that those who commit crimes against humanity cannot escape accountability in America, but we must go further and ensure the perpetrators of crimes against humanity cannot escape accountability anywhere in the world.²⁶

Testimony presented at the hearings included examples of persons who obtained safe haven in the United States despite having committed atrocities. Of particular note was the case of Pol Pot, leader of the Khmer Rouge who became available for prosecution in 1997 when his military forces turned on him.²⁷ As noted by the witness,

the U.S. government wanted to bring him to justice and discovered that our own law didn’t make it possible to prosecute him here. The administration at that time tried desperately to find another government that would prosecute Pol Pot and was unable to do so before he died a year later.²⁸

11.3.2. Draft Crimes Against Humanity Act of 2009

On 24 June 2009, Senator Richard Durbin introduced to the Senate Judiciary Committee legislation entitled ‘[A] bill to penalize crimes against

²⁵ “From Nuremberg to Darfur: Accountability for Crimes Against Humanity”, Senate Hearing 110-786, Hearing before the Subcommittee on Human Rights and the Law of the Committee on the Judiciary, United States Senate, One Hundred Tenth Congress, Second Session, 24 June 2008.

²⁶ *Ibid.*, Opening Statement of Hon. Richard J. Durbin, A U.S. Senator from Illinois, Transcript, p. 4.

²⁷ *Ibid.*, Questioning of Professor Diane Orentlicher, Washington College of Law, American University, Washington, District of Columbia, Transcript, pp. 16–17.

²⁸ *Ibid.*, p. 17.

humanity and for other purposes'. The bill, referred to as the 'Crimes Against Humanity Act of 2009' ('2009 Act'),²⁹ proposed to amend the U.S. Federal Criminal Code³⁰ to establish a new Chapter 25A 'Crimes Against Humanity' for consideration by the U.S. Senate. At that time, the Subcommittee had recently successfully navigated the Genocide Accountability Act of 2007 and the Child Soldier's Accountability Act of 2008 through bipartisan congressional approval and enactment into law. The 2009 Act however did not gain momentum and was not introduced to the full Senate for approval. The provisions of the proposed legislation remain instructive as to potential U.S. direction for future legislation.

The 2009 Act proposed to establish a federal criminal offense making it unlawful for "any person to commit or engage in, as a part of a widespread and systemic attack directed against any civilian population, and with knowledge of the attack", a listing of crimes mirroring, with some exceptions, the activities enumerated under the definition of 'crimes against humanity' set forth in the ICC Statute.³¹ Accordingly the definitional language in the 2009 Act also would have generally tracked the language of the Proposed Convention, subject to the exceptions noted below. The 2009 Act proposed criminal penalties of a fine and/or up to 20 years imprisonment for any person convicted of committing one of the enumerated offenses directly or found to have attempted or conspired to commit such offenses.³² For offenses resulting in the death of an individual would have been subject to imprisonment for any number of years including a life sentence.³³

11.3.2.1. The 2009 Act: Departures from the 'Crimes Against Humanity' Definition in the ICC Statute and Proposed Convention

The 2009 Act differed from the ICC Statute's definition of 'crimes against humanity' in several aspects. First, where the ICC Statute defines crimes against humanity as pertaining to activities committed "as part of a widespread *or* systematic attack directed against any civilian population",³⁴ the

²⁹ Senate (S.) 1346, 111th Congress, 1st Sess., 24 June 2009, Congressional Record Vol. 155, No. 96, pp. S7011–S7012.

³⁰ Title 18 U.S.C. Parts I–V 'Crimes and Criminal Procedure'.

³¹ S. 1346, § 519(a); ICC Statute, Article 7, see *supra* note 7.

³² S. 1346, § 519(b).

³³ *Ibid.*

³⁴ ICC Statute, Article 7, see *supra* note 7 (emphasis added).

2009 Act would have required a finding that the alleged activities were committed “as part of a widespread *and* systematic attack”.³⁵ By requiring a finding of both factors as a basis for prosecution, the 2009 Act would have set a higher standard than exists under the ICC Statute or as contemplated under the Proposed Convention.

Second, although Article 7 of the ICC Statute includes the crime of “enforced disappearance”, the 2009 Act did not prohibit or define “enforced disappearance of persons”. Instead, the 2009 Act listed “arbitrary detention” as an underlying offense, defined to mean:

imprisonment or other severe deprivation of physical liberty except on such grounds and in accordance with such procedure as are established by the law of the jurisdiction where such imprisonment or other severe deprivation of physical liberty took place.³⁶

The 2009 Act also limited the definition of “attack directed against any civilian population” to mean “a course of conduct in which a civilian population is a primary rather than an incidental target”. Although there is no narrative in the congressional record discussing or debating the specific provisions of the 2009 Act, it is likely that the failure to include “enforced disappearance” as an enumerated offense, the limitation on the definition of “arbitrary detention”, and the qualification regarding actions against civilian populations were intended to safeguard U.S. military and civilian government personnel involved in U.S. counterterrorism activities following the 11 September 2001 attacks, U.S. war time efforts in Iraq and Afghanistan during this period, and in particular the detention at the U.S. Naval Station in Guantanamo Bay and other international detention facilities of persons suspected of terrorist activities or support of same against the United States.

11.3.2.2. The 2009 Act: Broad Jurisdiction

The 2009 Act would have provided U.S. prosecutors with relatively broad jurisdictional authority. Jurisdiction for most federal crimes is limited to offenses committed by U.S. citizens, nationals or lawful permanent residents for offenses committed against U.S. persons or property. The 2009 Act, however, would have authorized jurisdiction not only over any U.S.

³⁵ S. 1346, § 519(a) (emphasis added).

³⁶ *Ibid.*, § 519(e)(1).

citizen, national or lawful permanent resident, but also over an alleged offender who was a stateless person with habitual residence in the United States; persons simply present in the United States regardless of their nationality.³⁷ The 2009 Act also provided jurisdiction for offenses committed wholly or partially within the United States.³⁸ Thus, enactment of the Act would have permitted the United States to prosecute suspected perpetrators of crimes against humanity when the suspects were present in the United States regardless of nationality or residence and notwithstanding the geographic location of the crimes as long as the suspect was present in the United States at the time of arrest and prosecution or, regardless of presence at time of arrest, had committed the alleged offenses wholly or partially within the United States. The 2009 Act can be said to have prescribed universal jurisdiction for crimes against humanity as the Proposed Convention would require.

11.3.2.3. Other Aspects Compared with the Proposed Convention

The 2009 Act was silent on, and thus did not expressly authorize, prosecution of military or civilian officials with command authority and responsibility.³⁹ The 2009 Act also did not seek to eliminate immunities or exceptions for heads of State or other officials.⁴⁰

The 2009 Act, however, would have been consistent with the prohibition against statutes of limitation set forth under Article 7 of the Proposed Convention. Under U.S. federal criminal law, prosecutors must file an indictment to prosecute individuals for non-capital federal crimes no less than five years from the date of the commission of the offense.⁴¹ The 2009 Act would have removed such a time limitation pertaining to the criminal prosecution of offenses defined under the Act.⁴²

³⁷ S. 1346, § 519(c).

³⁸ *Ibid.*

³⁹ Proposed Convention, Article 5, see *supra* note 6.

⁴⁰ *Ibid.*, Article 6.

⁴¹ Title 18 U.S.C. § 3282.

⁴² S. 1346, § 519 (d).

11.3.3. Draft Crimes Against Humanity Act of 2010

As noted above, the 2009 Act died in Senate Subcommittee. In July 2010, an amended bill was introduced as a substitute for the 2009 Act.⁴³ The ‘Crimes Against Humanity Act of 2010’ (‘2010 Act’)⁴⁴ was introduced to the U.S. Senate on 21 July 2010, with no narrative or discussion set forth in written record. The 2010 Act also died in Committee. To date, there is no congressional record reflecting any further official activity regarding the 2010 Act or any further proposed domestic legislation to criminalize crimes against humanity. The changes to the language of the 2009 bill, however, are informative as to the United States’ potential legislative efforts regarding crimes against humanity in the future.

The 2010 Act struck the language in the 2009 Act pertaining to “arbitrary detention” in its entirety. Further, the 2010 Act provided that the Act would not have criminalized activities conducted pursuant to the laws of war.⁴⁵ These provisions no doubt were due to concerns that U.S. military personnel or other U.S. government officials could be held liable under that language as a result of U.S. policies of detaining suspects in U.S. military prisons – either in Guantanamo Bay, Baghram Air Base in Iraq, or through the U.S. use of secret CIA detention facilities abroad.

In addition, the 2010 Act if enacted, would have had a more limited jurisdictional reach than the 2009 Act. The 2010 legislation expressly limited the jurisdiction of federal courts to U.S. nationals, resident aliens, and stateless persons who habitually reside in the United States; and struck language authorizing the jurisdiction over non-U.S. persons merely present in the United States. The 2010 provisions thus would not have authorized the United States to prosecute a foreign national present in the United States for crimes committed outside of the United States and therefore would not have served to discourage perpetrators of crimes against humanity from seeking refuge in the U.S. due to safe havens found in gaps in U.S. criminal laws.

The 2010 Act also sought to limit prosecution unless the U.S. Attorney General certified in writing, after consultation with the Secretary of

⁴³ S. 1346RS (Reported in Senate), 111th Congress, 2d Sess., 21 July 2010, Congressional Record Vol. 156, No.108, p. S6078.

⁴⁴ A copy of the text of the 2010 Act is available at <https://www.govtrack.us/congress/bills/111/s1346/text>.

⁴⁵ *Ibid.*

State and Secretary of Homeland Security that no foreign jurisdiction was prepared to prosecute the suspects for the conduct forming the basis of the offense; and that prosecution by the United States “is in the public interest and necessary to secure substantial justice”. Further, once these factors were met, prosecution would only be authorized if the Secretaries of State and Homeland Security and the Director of National Intelligence did not object to such prosecution.⁴⁶

The 2010 Act maintained the 2009 Act’s language requiring commission of covered offenses as part of a “widespread *and* systematic” attack.⁴⁷ However, the 2010 Act defined both terms in a limiting manner. “Systemic” was proposed to mean “pursuant to or in furtherance of the policy of a country or armed group. To constitute a policy, the country or armed group must have *actively* promoted the policy”.⁴⁸ The proposed legislation would have defined “widespread” to mean “involving not less than 50 victims”.⁴⁹

The 2010 Act was consistent with the 2009 Act in its refusal to limit immunities available to foreign heads of State, government officials, or persons with command responsibility for commission of offenses constituting crimes against humanity.

11.4. Existing U.S. Law Authorizing Prosecution of and Other Responses to Human Rights Violations

As demonstrated above, the United States does not have any federal or state law that explicitly criminalizes the offense of crimes against humanity or provides jurisdiction for prosecution of a person charged with commission of crimes against humanity as defined under the ICC Statute or contemplated under the Proposed Convention. Despite the lack of specific legislation, the United States has a number of legal authorities that allow for the prosecution of persons suspected of committing human rights violations, including commission of certain offenses delineated as crimes against humanity under the ICC Statute and thus supporting in part the intent of the Proposed Convention.

⁴⁶ *Ibid.*, Section 2(e).

⁴⁷ *Ibid.*, section 2(a) (emphasis added).

⁴⁸ *Ibid.*, section 2(i)(7) (emphasis added).

⁴⁹ *Ibid.*, section 2(i)(8).

U.S. law governing the prosecution of human rights violations generally reflect the same core principles and considerations. First, that the responsibility to prevent and respond to crimes against humanity and prosecution of persons suspected of committing atrocities lies first and foremost with the State where the actions are committed. Second, the United States is bound by the terms of the U.S. Constitution and accordingly will not bind itself to a treaty or other international agreement, or enact legislation implementing the same, which is incompatible with constitutional law, including due process protections afforded under the Constitution and the recognition of the laws of the individual U.S. states regarding traditional ‘common crimes’. Third, the United States, with control over the largest military forces in the world has a responsibility to its military and support personnel deployed internationally, both in times of war and for those deployed for peacekeeping purposes.

U.S. law, accordingly, looks to the originating States to handle prosecution as the first line of action for punishment for those committing crimes against humanity or related atrocities. Where such States have failed or refused to prosecute these offenses, the United States’ first priority is to prevent the use of the territories of the United States as a safe haven by those fleeing prosecution in their own countries for human rights violations. The arsenal available for this purpose includes authorizing: prosecution for a limited number of offenses that constitute human rights violations under international law for perpetrators located within the United States, including U.S. military personnel and contractors; prosecution for immigration and visa fraud; and civil penalties to provide a monetary remedy for victims of human rights abuses against individuals and corporations responsible for such offenses. U.S. immigration laws also bar admission to persons who commit certain human rights violations, including genocide, war crimes, recruitment of child soldiers, and human trafficking.

11.4.1. U.S. Law Criminalizing Genocide

U.S. law authorizes criminal prosecution of certain crimes set forth under treaties to which the United States is a party. Specifically, the U.S. has enacted legislation to implement its responsibilities as a State Party to, among others, the Genocide Convention, the four Geneva Conventions, and the Convention Against Torture and Other Cruel, Inhuman or Degrad-

ing Treatment or Punishment ('CAT')⁵⁰. Under these provisions, for example, U.S. federal law authorizes the prosecution of persons who commit genocide, including those who have perpetrated such crimes outside the United States against non-U.S. nationals as long as the perpetrator is present in the territory or jurisdiction of United States. Accordingly, perpetrators of these crimes cannot look to the United States as a safe haven from prosecution for activities conducted outside of the United States.

The Genocide Convention was adopted by the United Nations General Assembly on 9 December 1948, and entered into force on 12 January 1951. The United States signed the treaty on 11 December 1948. Although President Harry S. Truman submitted the treaty to the U.S. Senate for approval in June 1949, the treaty ultimately languished for almost 40 years.⁵¹ The U.S. Senate consented to ratification on 19 February 1986, subject to several conditions, including the declaration that the U.S. President would not deposit the instrument of ratification until the United States enacted implementing legislation. It was not until 4 November 1988 that President Ronald Reagan signed the Genocide Convention Implementation Act of 1987 into law implementing the Genocide Convention and binding the United States to the Genocide Convention, subject to U.S. reservations, understandings and declarations.⁵²

The U.S. Genocide Act mirrors the definition of 'genocide' under the Genocide Convention and Article 6 of the ICC Statute – despite the fact that the United States is not a party to the ICC Statute. Under the Genocide Act,⁵³ as amended by the Genocide Accountability Act of 2007, U.S. courts have jurisdiction to prosecute perpetrators of genocide committed outside of the territory of the United States as long as the alleged offender is present in the United States or the offense is against a U.S. person.⁵⁴ The statute, however, does not provide jurisdiction for a U.S. court to prosecute a non-U.S. person located outside of the United States

⁵⁰ The Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 10 December 1984, S. Treaty Doc. No. 100-20 (1988), in UNTS, vol. 1465, p. 85.

⁵¹ New York Times, Steven V. Roberts, "Reagan Signs Bill Ratifying UN Genocide Pact", 5 November 1988, available at <http://www.nytimes.com/1988/11/05/opinion/reagan-signs-bill-ratifying-un-genocide-pact.html>.

⁵² Pub. L. 100-606, § 2(a), 4 November 1988, 102 Stat. 3045.

⁵³ Title 18 U.S.C. § 1091.

⁵⁴ 18 U.S.C. §§ 1091(e), 2242 (c), and 1596.

for actions not directly against a U.S. person. It is not surprising, therefore, that the United States has not prosecuted anyone under this statute to date.

11.4.2. U.S. Laws Authorizing Prosecutions for Crimes Included in Article 7 of the ICC Statute and as Defined in the Proposed Convention

Notwithstanding the lack of U.S. law authorizing prosecution of crimes against humanity, the United States has laws in place to authorize prosecution for a number of offenses enumerated under the definition of ‘crimes against humanity’ adopted by the ICC Statute and the Proposed Convention.

11.4.2.1. Torture

The United States signed the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in April 1988 and ratified the treaty in October 1994. The CAT, among other actions, requires its States Parties to take such measures as necessary to criminalize acts falling under the definition of “torture” set forth in the treaty and to prevent acts of torture within their jurisdictions.⁵⁵

The U.S. ratification was subject to a series of reservations, understandings, and declarations, including a declaration that Articles 1 through 16 of the treaty are not self-executing and therefore would require enactment of domestic legislation to implement the treaty.⁵⁶ The U.S. ratification also was conditioned upon an understanding that narrows the definition of “torture” as it applies to the United States. The definition of “torture” under the CAT means “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for” purposes enumerated under the treaty. The U.S. Senate’s advice and consent in approving the ratification of the CAT was contingent on the express understanding that:

⁵⁵ CAT, Articles 4 and 5(2), see *supra* note 50.

⁵⁶ U.S. reservations, declarations, and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01, 10 October 1990, available at <http://www1.umn.edu/humanrts/usdocs/tortres.html>.

[I]n order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) *the threat of imminent death*; or (4) *the threat that another person will imminently be subjected to death*, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.⁵⁷

This understanding is implemented in the definition of “torture” codified under U.S. domestic law in the Torture Act, title 18 U.S.C. § 2340 and 2340A. Accordingly, although U.S. law criminalizes torture, one of the enumerated offenses under the ICC Statute and thus meets the spirit of the Proposed Convention, the U.S. definition of torture does not track directly with the scope of criminalized activity under the Proposed Convention.

The Torture Act provides a criminal penalty of fine or imprisonment of not more than 20 years upon conviction of the crime of torture. However, if the victim died as a result of the torture, the potential term of incarceration was limited only to life in prison.⁵⁸ Furthermore, an individual who conspires to commit torture also is subject to the same penalties as the individual committing the activity amounting to torture.⁵⁹

The United States has only prosecuted and convicted one individual under the Torture Act. In October 2008, Charles McArthur Emmanuel (‘Emmanuel’, also known as Chuckie Taylor, Roy M. Belfast, Jr., and Charles Taylor, Jr.) became the first, and at the time of writing only, person convicted by the United States under the Torture Act. Emmanuel, who was born in the United States, is the son of former Liberian dictator Charles Taylor.⁶⁰ Emmanuel was convicted of five counts of torture,

⁵⁷ *Ibid.* (emphasis added).

⁵⁸ Title 18 U.S.C. § 2340A(a).

⁵⁹ *Ibid.*

⁶⁰ Charles Taylor resigned in 2003 following the end of the civil war in Liberia. He ultimately left Liberia and subsequently was extradited to The Hague to stand trial for crimes

among other charges, related to offenses he committed as a leader and member of Liberia's Anti-Terrorism Unit ('ATU'), including, *inter alia*, torture of refugees from Sierra Leone seeking refuge in Liberia.⁶¹ The United States Court of Appeals for the Eleventh Circuit upheld Emmanuel's conviction upon appeal finding that he was subject to prosecution under U.S. law implementing the Convention Against Torture, for acts of torture he committed in Liberia before Liberia became a signatory to the CAT: "The Supreme Court made clear long ago that an absent United States citizen is nonetheless personally bound to take notice of the laws [of the United States] that are applicable to him and to obey them".⁶² Emmanuel was sentenced to 97 years in prison in the United States.⁶³

11.4.2.2. Additional Crimes

The U.S. Criminal Code authorizes prosecution for the following crimes which track with those contained in the internationally accepted definition of 'crimes against humanity':

- Peonage,⁶⁴
- Enticement into Slavery,⁶⁵
- Involuntary Servitude,⁶⁶
- Forced Labor,⁶⁷
- Trafficking with Respect to Peonage, Slavery, Involuntary Servitude, or Forced Labor,⁶⁸ and
- Sex Trafficking of Children or by Force, Fraud, or Coercion.⁶⁹

against humanity in the Special Court for Sierra Leone. See *Belfast v. United States*, 2012 WL 7149532, *3 (S.D.Fla., 2012 (unreported)) (U.S. District Court for the Southern District of Florida denying Emmanuel's motion to vacate convictions under the Torture Act).

⁶¹ *U.S. v. Belfast*, 611 F.3d 783, 794 (11th Cir., 2010).

⁶² *Ibid.*, at 810, citing *Blackmer v. United States*, 284 U.S. 421, 438 (1932).

⁶³ U.S. Department of Justice, Press Release, 9 January 2009, available at <http://www.justice.gov/opa/pr/roy-belfast-jr-aka-chuckie-taylor-sentenced-torture-charges>.

⁶⁴ Title 18 U.S.C. § 1581.

⁶⁵ Title 18 U.S.C. § 1583.

⁶⁶ Title 18 U.S.C. § 1584.

⁶⁷ Title 18 U.S.C. § 1589.

⁶⁸ Title 18 U.S.C. § 1590.

⁶⁹ Title 18 U.S.C. § 1591.

The U.S. Federal Criminal Code provides jurisdiction over perpetrators of these crimes who are U.S. nationals or lawful permanent residents or an offender present in the United States regardless of nationality.⁷⁰ U.S. courts, however, cannot prosecute a person under this section if a foreign government has prosecuted or is prosecuting person for the same conduct, unless approved by the U.S. Attorney General or his delegate.⁷¹

11.4.2.3. Limitations to Prosecuting Crimes Against Humanity under U.S. Criminal Law

U.S. jurisprudence has long recognized that the criminal laws of the United States are meant to apply only within the territorial jurisdiction of the United States with very limited exceptions:

The presumption against extraterritoriality can be overcome only by clear expression of Congress' intention to extend the reach of the relevant Act beyond those places where the United States has sovereignty or has some measure of legislative control.⁷²

Thus, the jurisdiction of federal courts to prosecute perpetrators of crimes consistent with international law is understood to be limited to crimes with a nexus to the United States, that is, where a U.S. citizen, national or lawful permanent resident is either the victim or suspected perpetrator, or the offense is committed on U.S. soil, unless the U.S. Congress has expressly provided broader jurisdiction.

Accordingly, although U.S. federal and state laws establish subject matter jurisdiction to prosecute individuals for commission of crimes such as murder, rape and unlawful imprisonment, these courts lack personal jurisdiction over perpetrators unless the victim or suspect is a U.S. person or the offense has been committed within the United States. Further, these so-called "common crimes" are committed by and against individuals and do not have the magnitude contemplated in the ICC Statute and the Proposed Convention.

⁷⁰ Title 18 U.S.C. § 1596(a).

⁷¹ *Ibid.*, (b).

⁷² See *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (U.S. Supreme Court 2010) (holding that anti-fraud provision of the U.S. Securities Exchange Act did not apply extraterritorially to provide cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges) (citations omitted).

In addition, the U.S. Constitution prohibits enactment of *ex post facto* laws, that is, a law that retroactively criminalizes conducts.⁷³ U.S. law, therefore, may prevent prosecution of human rights violations preceding their criminalization under the U.S. law despite their criminalization under international treaties, even if the U.S. was a party to those treaties at the time. Similarly, U.S. law limits the ability of a court to prosecute acts committed outside of the time period set by the applicable statute of limitation. Finally, U.S. law traditionally recognizes immunities accorded to foreign heads of State and other foreign government officials⁷⁴ and thus would preclude prosecution of those responsible for establishing policies directing or supporting commission of crimes against humanity or those with command responsibility for same.⁷⁵

Notwithstanding these limitations, U.S. law retains substantive legal mechanisms to punish perpetrators of crimes against humanity.

11.4.3. Military Extraterritorial Jurisdiction Act

The United States also has laws in place for the prosecution of violent crimes in occupied countries committed by U.S. military and support personnel. Prior to 2000, a jurisdictional gap existed that allowed former service members to escape prosecution for offenses committed on foreign

⁷³ U.S. Constitution, Article I, section 9, cl. 3 (“No Bill of Attainder or *ex post facto* Law shall be passed”).

⁷⁴ The U.S. Foreign Sovereign Immunity Act (‘FSIA’), 28 U.S.C. § 1604 *et seq.*, codified U.S. common law providing that provides that “a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States” except as provided in the Act. Therefore, if a defendant is a “foreign State” within the meaning of the Act, then the defendant is immune from jurisdiction unless one of the exceptions set forth under the FSIA applies. See *Samantar v. Yousuf*, 560 U.S. 305, 313–314 (U.S. Supreme Court, 2010), citing 28 U.S.C. §§ 1605–1607 (enumerating exceptions).

⁷⁵ See, e.g., *Manoharan v. Rajapaksa*, 711 F.3d 178, 180 (U.S. Court of Appeals for the District of Columbia Circuit 2013) (holding that the sitting president of Sri Lanka was immune from civil suit under the U.S. Torture Victims Protection Act brought by relatives of alleged victims of extrajudicial killings in Sri Lanka); *Yousuf v. Samantar*, 699 F.3d 763, 769 (U.S. 4th Cir. 2012) (holding high-ranking government official immune from civil action under the TWPA and Alien Tort Statute brought by natives of Somalia seeking to impose liability against and recover damages for alleged acts of torture and human rights violations committed against them by government agents).

service.⁷⁶ The Military Extraterritorial Jurisdiction Act ('MEJA')⁷⁷ enacted in 2000 provides:

Whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States –

- (1) while employed by or accompanying the Armed Forces outside the United States; or
- (2) while a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice), shall be punished as provided for that offense.

In 2009, former U.S. Army member Steven D. Green was convicted under MEJA of the sexual assault of a 14-year-old Iraqi girl and the murder of the girl and her family committed by Green and two other service members while stationed in Iraq. Green was sentenced to five consecutive terms of life imprisonment in the United States.⁷⁸ He later committed suicide in prison.

11.4.4. Visa/Naturalization Fraud Prosecution

Despite the scorn for reliance on immigration and visa fraud exhibited by U.S. Senate Subcommittee members and witnesses during the human rights hearings in 2007 through 2009, prosecution for such offense continues to be the most prolific prosecutorial tool against perpetrators of crimes against humanity located within the United States. Although prosecution for these crimes has been criticized as a 'slap on the wrist' for such heinous activities, the U.S. has been successful in obtaining criminal convictions and significant prison terms for immigration related offenses. Following conclusion of the perpetrator's sentence, the U.S. may buy time to co-ordinate the extradition of the individual to the country with jurisdiction to prosecute human rights violations. At a minimum, the U.S. can revoke citizenship, lawful permanent residence, or a visa status granted based on fraud, and remove the individual from the United States, thus

⁷⁶ *United States v. Green*, 654 F.2d 637, 645 (U.S. Court of Appeals for the Sixth Circuit 2011), citing, H.R. Rep. No. 106–778, part 1, at 5 (2000).

⁷⁷ Title 18 U.S.C. § 3261.

⁷⁸ *Green*, at 645, see *supra* note 76.

detering individuals from using the United States as a safe haven from prosecution for human rights violations in their countries of origin.

One high profile example was the aforementioned prosecution of Marko Boskić, referenced in the 2007 U.S. Senate Subcommittee hearing ‘No Safe Haven: Accountability for Human Rights Violators in the United States’. In 2002, Boskić, while in Germany, submitted an application to the U.S. seeking classification as a refugee.⁷⁹ The application asked questions about his past military service, criminal convictions, and basis for seeking admission to the United States as a refugee.⁸⁰ Boskić was granted refugee status and admitted to the United States based on the information set forth in his application.⁸¹ He subsequently immigrated to the United States taking up residence in Massachusetts.⁸² In 2001, he filed and was approved for an adjustment of status to that of a lawful permanent resident.⁸³ The application form for that adjustment also included questions about past military service and criminal history.⁸⁴

Following Boskić’s admission to the United States, investigators for the International Criminal Tribunal for the former Yugoslavia (‘ICTY’) uncovered evidence identifying him as a member of a military unit – the 10th Sabotage Detachment of the Army of the *Republika Srpska* – suspected of war crimes and other atrocities during the 1995 Srebrenica massacre in Bosnia.⁸⁵ U.S. authorities, acting on the information from the ICTY, subsequently initiated an investigation and determined that Boskić had committed immigration fraud by failing to disclose on his applications seeking refugee status and later adjustment of status to permanent resident by failing to disclose his prior military service in Bosnia and a prior criminal record.⁸⁶ Boskić was arrested in August 2004.⁸⁷ In 2006, he

⁷⁹ *United States v. Boskic*, 545 F.3d 69, 73, 1st Cir. 2008 (affirming conviction for immigration fraud).

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ “War crimes suspect charged in Boston, Peabody man tied to Bosnia mass execution”, available at http://www.boston.com/news/local/articles/2004/08/27/war_crimes_suspect_charged_in_boston/?page=full.

was convicted in federal court for visa fraud and sentenced to 63 months incarceration in federal prison.⁸⁸ The U.S. also revoked his lawful permanent resident status.

Following Boskić's conviction and incarceration, U.S. Immigrations and Customs Enforcement initiated removal proceedings. On 18 February 2010, an immigration judge ordered Boskić removed to Bosnia and Herzegovina,⁸⁹ where he was prosecuted and convicted pursuant to a plea bargain for crimes against humanity on 20 July 2010. He is currently serving 10 years in prison.⁹⁰

11.5. U.S. Policy Regarding Crimes Against Humanity

U.S. officials traditionally have viewed genocide, mass atrocities, and other international human rights issues as matters of moral imperative. More recently, U.S. leaders and policy makers have begun to recognize the potential impact of international conflicts and in particular the potential national security vulnerabilities realized from the commission of atrocity crimes. In February 2010, Dennis C. Blair, Director of National Intelligence, for the first time raised the issue of the potential threat to U.S. national security from genocide and mass atrocities in Africa and Asia during congressional testimony on the U.S. government's annual threat assessment.⁹¹ Shortly thereafter, the White House issued the first National Security Strategy for the Administration of President Barack Obama noting the potential threat to U.S. security interests from global instability leading to commission of widespread atrocity crimes. It states:

From Nuremberg to Yugoslavia to Liberia, the United States has seen that the end of impunity and the promotion of justice are not just moral imperatives; they are stabilizing forces in international affairs. The United States is thus working to strengthen national justice systems and is

⁸⁸ *Ibid.*

⁸⁹ U.S. Immigration and Customs Enforcement, "Bosnian-Serb suspect removed –Suspect participated in murder of thousands of Bosnian Muslim men and boys", 27 April 2010, available at <http://www.ice.gov/news/releases/1004/100427washingtondc2.htm>.

⁹⁰ JURIST, "Bosnia court convicts Serbian war crimes suspect of crimes against humanity", 20 July 2010, available at <http://jurist.org/paperchase/2010/07/bosnia-court-convicts-serbian-war-crimes-suspect-for-crimes-against-humanity.php>.

⁹¹ Foreign Policy, "How Genocide is a National Security Threat", 28 February 2010, available at http://www.foreignpolicy.com/articles/2010/02/26/how_genocide_became_a_national_security_threat.

maintaining our support for ad hoc international tribunals and hybrid courts. Those who intentionally target innocent civilians must be held accountable, and we will continue to support institutions and prosecutions that advance this important interest. Although the United States is not at present a party to the Rome Statute of the International Criminal Court (ICC), and will always protect U.S. personnel, we are engaging with State Parties to the Rome Statute on issues of concern and are supporting the ICC's prosecution of those cases that advance U.S. interests and values, consistent with the requirements of U.S. law.⁹²

On 4 August 2011, U.S. President Barack Obama announced a comprehensive strategy to strengthen the United States' ability to prevent mass atrocities and human rights violations.⁹³ The strategy included the following:

- Issuance of a Presidential Proclamation suspending entry of immigrants and non-immigrants of persons who participate in serious human rights and humanitarian law violations.⁹⁴
- Creation of an interagency Atrocities Board. In so doing the President noted that “the United States still lacks a comprehensive policy framework and corresponding interagency mechanism for preventing and responding to mass atrocities and genocide. This has left us ill-prepared to engage early, proactively, and decisively, to prevent threats from evolving into large scale civilian atrocities”.⁹⁵ He further noted the options available to the United States range from economic actions to diplomatic intervention and both non-combat

⁹² National Security Strategy, The White House, May 2010, p. 48, available at <http://whitehouse.gov>.

⁹³ The White House, Office of the Press Secretary, “Fact Sheet: President Obama Directs New Steps to Prevent Mass Atrocities and Impose Consequences on Serious Human Rights Violators”, 4 August 2011, available at <http://www.whitehouse.gov/the-press-office/2011/08/04/fact-sheet-president-obama-directs-new-steps-prevent-mass-atrocities-and>.

⁹⁴ The White House, Office of the Press Secretary, “Presidential Proclamation – Suspension of Entry as Immigrants and Nonimmigrants of Persons who Participate in Serious Human Rights and Humanitarian law Violations and Other Abuses”, 4 August 2014, available at <http://www.whitehouse.gov/the-press-office/2011/08/04/presidential-proclamation-suspension-entry-immigrants-and-nonimmigrants->.

⁹⁵ *Ibid.*

military actions or direct military intervention.⁹⁶ The Atrocities Prevention Board was launched on 23 April 2012.⁹⁷

In July 2014, President Obama issued an Executive Order to provide additional flexibility for the United States to target persons contributing to the conflict in the Democratic Republic of the Congo, including new criteria to be used to sanction persons involved in the conflict. The Executive Order also conformed U.S. practices to the criteria established in recent Security Council Resolutions.⁹⁸

In September 2014, President Obama took the unusual step of taking the lead on obtaining multi-national approval of a U.N. Security Council Resolution authorizing military action to stop the spread of ISIL – an action with both important national and global security purpose as well as humanitarian intervention.⁹⁹ The U.S. Congress subsequently authorized the use of U.S. military force, in conjunction with other international efforts.

11.6. Conclusion

The United States currently does not have a specific federal law criminalizing crimes against humanity. The U.S., however, continues to take steps in law and policy to partner with its international allies to respond to incidents of atrocities committed against civilian populations. Recent legislative attempts to address crimes against humanity, that is, the Crimes Against Humanity Acts of 2009 and 2010, highlight controversies over issues such as inclusion of certain underlying crimes, jurisdiction, command responsibility, and immunities. A delicate balance need to be sought between sovereign interests, including protecting overseas U.S. personnel, and ending impunity. Notably the latest draft Act of 2010 regressed from the 2009 Act in the strength to punish. It is worth emphasizing that those controversial issues must be addressed thoroughly in future legislation to effectuate the fight against impunity.

⁹⁶ *Ibid.*

⁹⁷ United States Institute of Peace, “Obama Announces Formation of the Atrocities Prevention Board”, available at <http://www.usip.org/publications/obama-announces-formation-the-atrocities-prevention-board>.

⁹⁸ The White House, Office of the Press Secretary, “Executive Order Regarding the Democratic Republic of the Congo”, available at <http://www.whitehouse.gov/the-press-office/2014/07/08/executive-order-regarding-democratic-republic-congo>.

⁹⁹ U.N. Security Council, S/RES/21768 (2014), 24 September 2014.

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On the Proposed Crimes Against Humanity Convention

Morten Bergsmo and SONG Tianying (editors)

This anthology is about the need for and nature of a convention on crimes against humanity. It uses the Proposed Convention on the Prevention and Punishment of Crimes Against Humanity as an important reference point. 16 authors discuss how such a convention may consolidate the definition of crimes against humanity, and develop measures for their prevention and punishment, decades after the conclusion of the Genocide Convention and Geneva Conventions. The authors include Leila N. Sadat, Eleni Chaitidou, Darryl Robinson, María Luisa Piqué, Travis Weber, Julie Pasch, Rhea Brathwaite, Christen Price, Rita Maxwell, Mary Kate Whalen, Ian Kennedy, SHANG Weiwei, ZHANG Yueyao and Tessa Bolton. It contains a preface by late Judge Hans-Peter Kaul and a foreword by Hans Corell.

The book is inspired by the rationale of crimes against humanity to protect against the most serious violations of fundamental individual rights, and its realization especially through domestic mechanisms. Such consciousness calls upon appropriate definition and use of contextual elements of the crime, effective jurisdiction for prevention and prosecution, and robust inter-State co-operation. The book considers individual State experiences in combating crimes against humanity. It underlines the importance of avoiding that the process to develop a new convention waters down the law of crimes against humanity or causes further polarisation between States in the area of international criminal law. It suggests that the scope of the obligation to prevent crimes against humanity will become a decisive question.

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effective legislative, administrative, judicial and other measures in accordance with the Charter of the United Nations to prevent and punish the commission of crimes against humanity in any territory under its jurisdiction or control.

A. Crimes against humanity

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Each State Party shall adopt such legislative and other measures as may be necessary to establish crimes against humanity as serious offenses under its criminal law, as well as its military law, and make such offenses punishable by appropriate penalties which take into account the grave nature of those offenses, the harm committed, and the individual circumstances of the offender. In addition, such a person may be barred from holding public rank or office, be it military or