

CRIMES AGAINST HUMANITY DRAFT BILL OF 2009: THE INTERNATIONAL IMPLICATIONS OF ADDRESSING IMPUNITY THROUGH NATIONAL LEGISLATION

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I. INTRODUCTION

U.S. scholars have long been calling for domestic legislation addressing crimes against humanity.¹ Under international law, it is a State’s obligation to “prosecute those responsible for grave breaches of the Geneva

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1. See William J. Aceves & Paul Hoffman, *Pursuing Crimes Against Humanity in the United States: The Need for a Comprehensive Liability Regime*, in JUSTICE FOR CRIMES AGAINST HUMANITY 239, 239 (Mark Lattimer & Philippe Sands eds., 2003). See also Jordan J. Paust, *The Need for New U.S. Legislation for Prosecution of Genocide and Other Crimes Against Humanity*, 33 VT. L. REV. 717, 717 (2009); M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 HARV. INT’L L.J. 83, 101 (2002). (“This is an opportunity to pass appropriate legislation to include these crimes [including crimes against humanity] in Title 18 U.S.C. and make them subject to the jurisdiction of Federal Courts.”).

Conventions.”² Arguably, the United States has been deficient in its ability to prosecute those who have committed grave breaches because the United States cannot try individuals for crimes against humanity unless Congress adopts a statute that punishes the specific offense.³ The vital importance of domesticating international law allows for both the mutual suppression of international crimes and for sovereign nations to maintain jurisdiction over their own citizens who have committed crimes against humanity.⁴

Maintaining jurisdiction over its own citizens has been at the forefront of U.S. concerns and is one of the fundamental reasons the United States has not ratified the Rome Statute of the International Criminal Court (ICC).⁵ Nonetheless, the most compelling reason for passing the Crimes Against Humanity Act of 2009 (Draft Bill)⁶ should be to uphold the “interconnectedness and mutuality between international criminal law and international human rights.”⁷

The narrow focus of this article is on the lack of a comprehensive criminal liability regime with respect to crimes against humanity, since the United States has already “developed a comprehensive civil liability regime.”⁸ Part A discusses how passing the Draft Bill is crucial to U.S. interests in maintaining jurisdiction over its own citizens under the principle of complementarity, the dual criminality principle, and the statute of limitations in federal proceedings. Part B focuses on the variations that exist between the Draft Bill and international norms addressing crimes against humanity. Emphasis will be made on the significance of harmonization between the Draft Bill and the Rome Statute, particularly,

2. S.C. Res. 1261, ¶ 3, U.N. Doc. S/RES/1261 (Aug. 30, 1999), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/248/59/PDF/N9924859.pdf?OpenElement> (last visited Oct. 6, 2010).

3. L. Elizabeth Chamblee, *Post-War Iraq: Prosecuting Saddam Hussein*, 7 CAL. CRIM. L. REV. 1, 5 (2004) (citing Restatement (Third) of the Foreign Relations Law of United States § 404 cmt. b(1) (1987)).

4. See *infra* Part I.A for discussion on the complementarity principle.

5. Richard S. Carden & Leila Nadya Sadat, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 404–17 (2000).

6. Crimes Against Humanity Act of 2009, S. 1346, 111th Cong. (2009), available at <http://www.govtrack.us/congress/billtext.xpd?bill=s111-1346> (last visited Oct. 6, 2010) [hereinafter Draft Bill].

7. George William Mugwanya, *Expunging the Ghost of Impunity for Severe and Gross Violations of Human Rights and the Commission of Delicti Jus Gentium: A Case for the Domestication of International Criminal Law and the Establishment of a Strong Permanent International Criminal Court*, 8 MICH. ST. J. INT’L L. 701, 705–06 (1999). See also Aceves & Hoffman, *supra* note 1, at 239 (domesticating crimes against humanity is “part of a broader movement to end impunity by bringing perpetrators of human rights atrocities to justice”).

8. Aceves & Hoffman, *supra* note 1, at 240.

because the Rome Statute represents the will of 110 nations⁹ and the definition of crimes against humanity is considered definitive.¹⁰ Part C answers the question of whether crimes against humanity necessitate greater severity of punishment versus domestic crimes and compares the various models put forth by the Draft Bill, Professor Paust, and the Rome Statute. And Part II concludes by discussing why incorporating the Draft Bill into U.S. legislation will safeguard U.S. interests, prevent impunity,¹¹ and gradually bring the United States into conformity with the Rome Statute and general international norms.

A. What are U.S. Interests and Obligations to Incorporate Crimes Against Humanity into Federal Domestic Legislation

The United States has historically played a crucial role in the shaping of the Rome Statute. The review conference in Kampala, Uganda in June 2010, presented a unique opportunity for the United States to once more actively engage and help shape the Rome Statute. However, the ICC's procedural guarantees and sufficient checks on the Court's discretion are only meaningful if the United States makes crimes against humanity part of U.S. federal legislation.

1. Complementarity

One of the reasons the United States has not ratified the Rome Statute is the fear of U.S. nationals being haled into court at the ICC.¹² Even though the United States has not ratified the Rome Statute, its international presence in states that are party to the Rome Statute can potentially subject a U.S. national to prosecution by the ICC.¹³ Professor Paust asserts that

9. Fact Sheet, Coalition for International Criminal Court, *World Signatures and Ratification* (Nov. 2009), available at http://www.iccnw.org/documents/Signatures-Non_Signatures_and_Ratifications_of_the_RS_in_the_World_November_2009.pdf (last visited Oct. 6, 2010) ("Currently the Rome Statute of the ICC has 38 Signatories and 110 Ratifications.").

10. Catherine R. Blanchet, *Some Troubling Elements in the Treaty Provisions in the Rome Statute of the International Criminal Court*, 24 MICH. J. INT'L L. 647, 655 (2003) (discussing all States in the negotiation understood "that the Rome Statute's definition of crimes against humanity would be regarded as definitive").

11. See Paust, *supra* note 1, at 728 (noting new legislation addressing crimes against humanity will allow the U.S. to "fulfill its duty to end impunity"). The law will cover abuses such as "widespread murder and rape in Darfur and the Ogaden area of Ethiopia." HUMAN RIGHTS WATCH (HRW), US: SUPPORT LAW ON CRIMES AGAINST HUMANITY 1 (June 24, 2009) [hereinafter HRW].

12. See generally Carden & Sadat, *supra* note 5.

13. Paust, *supra* note 1, at 722-23. See also Jordan J. Paust, *The Reach of ICC Jurisdiction Over Non-Signatory Nationals*, 33 VAND. J. TRANSNAT'L L. 1, 3 (2000), available at

there is no requirement under Article 12 that the “state of nationality of the accused be a party to the treaty or accept the jurisdiction of the Court.”¹⁴ This statement is bolstered by the comments of former U.S. ambassador David Scheffer, who represented the United States at Rome, when he stated that “[u]nder the treaty’s final terms, [the national of] nonparty states would be subjected to the jurisdiction of the Court . . . under Article 12.”¹⁵

Nonetheless, these risks are mitigated by the principle of complementarity but only if the United States is willing to domestically prosecute U.S. nationals for violations of the Rome Statute.¹⁶ However, without codifying crimes against humanity within our domestic code, Article 17—which embodies the complementarity principle—would not apply if the ICC gains jurisdiction over a U.S. national for committing acts amounting to crimes against humanity.

The rule of complementarity in the ICC Statute stands on two main pillars described under Article 17 Issues of Admissibility:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person connected, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.¹⁷

www.law.vanderbilt.edu/publications/journal-of-transnational-law/archives/volume-33-number-1/download.aspx?id=1985 (last visited Oct. 6, 2010); Carden & Sadat, *supra* note 5, at 413 (stating that non-parties to the Statute can refuse to consent to the court’s jurisdiction for acts committed within their territory or nationals who have committed acts in a non-party state who refuses consent. However, the implication is that this does not foreclose state parties to the statute from handing over nationals from non-state parties to the ICC for violations of the Rome Statute that occurred within that state party’s jurisdiction.). *But see* AMICC, Bilateral Immunity Agreements (BIA), http://www.amicc.org/usinfo/administration_policy_BIAs.html (last visited Oct. 6, 2010).

14. Paust, *supra* note 13, at 6.

15. *Id.* at 3 (citing David J. Scheffer, *The United State and the International Criminal Court*, 93 AM. J. INT’L L. 12, 20 (1999)); Carden & Sadat, *supra* note 5, at 412–13 (“[S]ince Nuremberg it has been accepted that, with respect to the establishment of Courts for the trial of international crimes over which there exists universal jurisdiction, States may do together what any one of them could have done separately.”).

16. Bartram S. Brown, *U.S. Objections to the Statute of the International Criminal Court: A Brief Response*, 31 N.Y.U. J. INT’L L. & POL. 855, 878 (1999).

17. Rome Statute of the International Criminal Court, art. 17(1)(a)–(b), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; Brown, *supra* note 16, at 878–79. Sham proceedings result when a country shields an alleged perpetrator, unjustifiably delays prosecution, and ensures that proceedings are not impartial or independent. *Id.* at 879 n.88.

Therefore, to meet the genuineness standard, the United States must “satisfy a vital condition . . . [of] reengineer[ing] its municipal laws to make them compatible with the international cooperative effort to investigate, prosecute, and suppress international crimes . . . defined by the Rome Statute.”¹⁸ Once the Draft Bill is duly incorporated into our domestic framework, the burden on the United States would amount to making a good faith¹⁹ effort in showing that a specific case is being investigated whether or not the United States decides to pursue prosecution.²⁰ This makes sense because the ICC is intended as a stop gap measure for countries that are unwilling or unable to prosecute international crimes.²¹ The principle of complementarity accords with the United Nations mandate that each state be responsible for the prosecution and punishment of its own nationals.²² Additionally, the preamble to the ICC states that it is the “duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”²³

If adherence to the principle of complementarity is vital to the protection of U.S. interests, then there is a real danger if domestic law significantly varies from the Rome Statute.²⁴ Potentially, an argument can be made that the state is unwilling or unable to genuinely prosecute its own nationals for international crimes.²⁵ However, Article 17, defining the rule of complementary jurisdiction, is silent with respect to the consequence of domestic legislation differing or exacting a higher standard of proof than the Rome Statute.²⁶ Thus, if the United States is taking the affirmative step to close the gaps in its international criminal regime, it should also ensure that no cracks remain.

18. Vincent-Joël Proulx, *Rethinking the Jurisdiction of the International Criminal Court in the Post-September 11th Era: Should Acts of Terrorism Qualify as Crimes Against Humanity*, 19 AM. U. INT’L L. REV. 1009, 1154 (2004).

19. Paust, *supra* note 13, at 5. Professor Paust delves into prescriptive versus enforcement jurisdiction and whether that distinction may affect how U.S. nationals are subjected to the ICC jurisdiction; however, further discussion of this topic is beyond the scope of this paper.

20. Proulx, *supra* note 18, at 1154.

21. *Id.* at 1140 (citing Keitner, at 228 n.105).

22. See G.A. Res. 3074, U.N. GAOR, 28th Sess., Supp. No. 30, at 79, U.N. Doc. A/9326 (Dec. 3, 1973). Moreover, the General Assembly called for “[s]tates to assist each other in detecting, arresting, and bringing to trial persons suspected of having committed such crimes. . . .” *Id.*

23. Rome Statute, *supra* note 17, preamble.

24. See HRW, *supra* note 11, at 1 (By ignoring the broadly recognized standard of “widespread or systematic,” the definition in the Draft Bill “could result in a higher hurdle for bringing a charge of crimes against humanity.”).

25. See Rome Statute, *supra* note 17, art. 17(1)(a)–(b).

26. See *id.* art. 17(1)–(3).

Although the United States' biggest concern in 1999 was the ICC's jurisdiction over non-party states,²⁷ a decade of practice should reveal that the ICC strictly adheres to the complementarity regime. Consequently, if states are willing to take effective steps to investigate and potentially prosecute, they have no reason to fear the ICC's jurisdiction.²⁸ Therefore, implementation of the crimes against humanity legislation and recognition of the ICC's complementarity principle may end the United States' undermining of the ICC through "mutual bilateral immunity agreements . . . by which [both parties] pledge not to surrender their nationals"²⁹ to the ICC.

2. Dual Criminality Principle

Another compelling state interest for domesticating international crimes is the principle of dual criminality. Similar to the complementarity principle, a state must be prepared to take the necessary steps for prosecution or defer prosecution to the state seeking extradition.³⁰ If a state lacks adequate mechanisms for prosecution, it can neither try persons accused of international crimes nor can it seek extradition of their own nationals.³¹

Thus, the United States' requests for extradition of either foreign nationals or U.S. nationals who have committed crimes against humanity would be denied if those acts did not fall within the current piecemeal legislation addressing certain specific crimes against humanity.³² This obligation rests in numerous multilateral treaties including the Genocide Convention, of which the United States has ratified.³³ Moreover, Professor

27. Ambassador Scheffer points out that the United States successfully defeated the idea of empowering the ICC with universal jurisdiction but concedes that jurisdiction over non-party states remains. Brown, *supra* note 16, at 869.

28. Three of the four cases currently pending before the court have been State initiated.

29. RICHARD J. GOLDSTONE & ADAM M. SMITH, INTERNATIONAL JUDICIAL INSTITUTIONS: THE ARCHITECTURE OF INTERNATIONAL JUSTICE AT HOME AND ABROAD 113 (Routledge 2009).

30. M. CHERIF BASSIOUNI & EDWARD M. WISE, AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW 3 (Martinus Nijhoff Publishers 1995).

31. Paust, *supra* note 1, at 721.

32. *Id.* at 722.

33. BASSIOUNI & WISE, *supra* note 30, at 3 n.1. See also Jordan J. Paust, *The United States as Occupying Power Over Portions of Iraq and Special Responsibilities Under the Laws of War*, 27 SUFFOLK TRANSNAT'L L. REV. 1, 15 (2003) ("United States has customary and treaty-based obligations to either initiate prosecution of, or to extradite persons who, are reasonably accused of war crimes, genocide, and other crimes against humanity."); Aceves & Hoffman, *supra* note 1, at 249 (citing U.S. Dept. of State, *Initial Report of the United States of America to the UN Committee Against Torture*, ¶¶ 193–94, U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000) [hereinafter Initial Report] (stating that the State

Bassiouni argues that it is an emerging customary doctrine “at least with respect to international crimes.”³⁴

With the United States enmeshed in fighting global terrorism, it behooves the United States, as a potentially aggrieved party, to pass legislation that will allow extradition of terrorists from foreign states so that the individuals responsible for international crimes against the United States can be prosecuted in U.S. federal courts rather than foreign jurisdictions.

3. Statute of Limitations in Federal Proceedings

In 1967, the General Assembly brought to attention the serious gap within municipal laws that have not removed a statute of limitations requirement on crimes against humanity.³⁵ As of today, the United States has not ratified the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (Statutory Limitations Convention).³⁶ Article 1 of the Convention states, no statutory limitations shall apply to crimes against humanity “whether committed in time of war or in time of peace.”³⁷

It is debatable whether the non-applicability of statutory limitations has reached customary status.³⁸ Although the Statutory Limitations Convention has only fifty parties who have ratified the Convention, the Rome Statute with 110 parties, provides for no statutory limitations regarding crimes within the jurisdiction of the Court.³⁹ Nevertheless, it must be noted that the ICC’s jurisdiction on crimes within the Statute only begins once a country ratifies the Rome Statute.

Domestically, this issue has arisen in the federal courts where the Tenth Circuit ruled on a *Bivens* action brought by Vietnamese villagers for

Department adopted the Convention Against Torture legislation in part so that it could implement the principle of *aut dedere aut judicare*).

34. BASSIOUNI & WISE, *supra* note 30, at 5.

35. G.A. Res. 2338 (XXII), at 41–42, U.N. GAOR, 22nd Sess., U.N. Doc. A/RES/2338(XXII) (Dec. 18, 1967).

36. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. Res. 2391 (XXIII), at 40, U.N. GAOR, 23rd Sess., Supp. No. 18, U.N. Doc. A/7218 (Nov. 26, 1968), *entered into force* Nov. 11, 1970 [hereinafter Statutory Limitations Convention].

37. Statutory Limitations Convention, *supra* note 36, art. 1(b).

38. Lisl Brunner, *Leaning on International Law to Prosecute the Past: The Arancibia Clavel Decision of the Argentine Supreme Court*, 10 OR. REV. INT’L L. 243, 263 (2008).

39. Rome Statute, *supra* note 17, art. 29.

violations of the laws of war.⁴⁰ The Court held that since the United States was not a signatory to the Statutory Limitations Convention, it had no jurisdiction to uphold such claims.⁴¹ In contrast, the Inter-American Court of Human Rights has held that even though Chile had not ratified the Convention:

[T]he Court believes that the non-applicability of statutes of limitations to crimes against humanity is a norm of General International Law (*jus cogens*), which is not created by said Convention, but it is acknowledged by it. Hence, the Chilean State must comply with this imperative rule.⁴²

The current Draft Bill discusses that an offense arising under this statute would allow for an “indictment to be found, or information instituted, at any time without limitation.”⁴³ Yet, further clarity on the potential retroactive application⁴⁴ of the Draft Bill would be meaningful. Resolving these procedural and jurisdictional issues will only bolster U.S. interests of prosecuting its own citizens charged with international crimes abroad or foreign nationals responsible for mass atrocities on U.S. soil.

B. Is the Draft Bill Consistent with International Law?

By establishing the importance of integrating crimes against humanity into our domestic code, the focus will now shift to creating greater harmonization between the scope of the Draft Bill and the codification of crimes against humanity in the Rome Statute. Dean William J. Aceves, in discussing crimes against humanity in the civil liability context, posits an

40. *Van Tu v. Koster*, 364 F.3d 1196, 1196 (10th Cir. 2004), *cert. denied*, 543 U.S. 874, 160 (2004).

41. *Id.* at 1198–99.

42. *Almonacid-Arellano Case*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 154, at 62 (Sept. 26, 2006).

43. Draft Bill, *supra* note 6, § 519(d).

44. Brunner, *supra* note 38, at 264 (applying retroactively any statute that prohibits any statutory limitations for prosecuting heinous crimes seems to have less consensus than prospective prosecutions). However, if we argue by analogy, the Arancibia Clavel Argentinean Supreme Court judgment argued that the Statutory Limitations Convention may be applied retroactively if the crime violated was already represented as customary international law; therefore, the Draft Bill potentially has retroactive application depending on when crimes against humanity became part of customary international law. *Id.* at 260. See also Darryl Robinson, *Defining “Crimes Against Humanity” at the Rome Conference*, 93 AM. J. INT’L. L. 43, 43–44 (1999).

important question: whether “U.S. courts will continue to accept Article 7 of the Statute as an appropriate codification of crimes against humanity.”⁴⁵

This question is equally poignant in the criminal liability regime because if the Draft Bill substantially varies from the ICC codification, the potential for variance⁴⁶ in prosecuting crimes against humanity becomes a dangerous possibility. To avoid differing applications of crimes against humanity in differing jurisdictions, it is essential for the Draft Bill to reflect the potentially customary norms reflected in the Rome Statute. Moreover, where the Rome Statute is silent, the judgments of the International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTY and ICTR respectively) prove to be instructive. Additionally, if the Draft Bill significantly or potentially varies from the Rome Statute on defining the scope of crimes against humanity, it will be highlighted in following sections.

1. Widespread “and” Systematic: Danger of Using the Conjunctive versus the Disjunctive

In one of the more surprising aspects of the Draft Bill, the definition of crimes against humanity was applied in the conjunctive (“widespread *and* systematic”) rather than the widely accepted disjunctive definition (“widespread *or* systematic”).⁴⁷ There has been a copious amount of discussion and debate on whether the terms “widespread” and “systematic” should be used in the conjunctive or disjunctive.⁴⁸ Professor Jordan J. Paust

45. Aceves & Hoffman, *supra* note 1, at 266 (citing inconsistent decisions by federal court. For example, in *Cabello v. Fernandez-Larios*, the court chose not to use ICC statute instead referring to International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) statutes; whereas, in *Mehinovic v. Vuckovic* the court relied on the ICC statute to “establish the status of crimes against humanity.”); Professor Sadat notes that crimes against humanity is defined only for the purpose of the Rome Statute and the Statute does not “purport to be a codification of international [law] . . . although the definitions largely reflect existing law and will be universally applied through Security Council referrals to the Court.” Carden & Sadat, *supra* note 5, at 422.

46. HRW, *supra* note 11, at 1 (“The proposed legislation, rooted in existing U.S. criminal law, differs from international definitions of crimes against humanity in other respects.”).

47. Carden & Sadat, *supra* note 5, at 429 (using the disjunctive definition in the Rome Statute was a compromise position between the ICTY Statute, which does not discuss any threshold position and those who advocated for the conjunctive application of the definition); HRW, *supra* note 11, at 1.

48. See Blanchet, *supra* note 10, at 655–61. See also Mugwanya, *supra* note 7, at 724 nn.74–76 (discussing Arab and Asian States who were concerned that the disjunctive test would be over inclusive).

has even argued whether there is a need for terms like “widespread” or “systematic,” since they do not form the customary part of the definition.⁴⁹

Arguably, this debate was seemingly answered by the *Akayesu* Trial Chamber of the ICTR when it succinctly said: crimes against humanity are “part of a widespread *or* systematic attack and need not be part of both.”⁵⁰ It further expounded on the perceived confusion by pointing out that the French version of the Statute worded: “*Dans le cadre d'une adieux generalize et systematic*” was a translation in error because the conjunctive (*et* meaning “and”) went against customary international law.⁵¹ Further support can be found in the case law of the ICTY,⁵² scholars in the field,⁵³ and the International Law Commission.⁵⁴

Ostensibly, Article 7 of the Rome Statute, which adopts the disjunctive use of the definition, “puts an end to [different] terminological variations and seems to be the one which reflects most faithfully the *opinio juris* of the international community about the crime against humanity”⁵⁵

Since this was the first time crimes against humanity had been defined in a multilateral treaty, it was understood that the definition “would be regarded as definitive.”⁵⁶ The United States’ role in strengthening the definition of crimes at the Rome conference provides further substantiation for maintaining the Article 7 definition. Specifically, the United States fought against any narrowing of the definition because other nations hoped to limit their exposure regarding their own domestic human rights practices from the ICC’s jurisdiction.⁵⁷

There are many reasons to remain faithful to the consensus found in international law treaties and statutes that define crimes against humanity in the disjunctive. First, any deviation from international norms, specifically

49. Paust, *supra* note 1, at 727 (noting that certain limitations in the definition of crimes against humanity are not customary).

50. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 579 (Sept. 2, 1998).

51. *Id.* at n.144.

52. Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment, ¶¶ 647–48 (May 7, 1997).

53. Leila Sadat argues for the disjunctive use while McCormack and Robertson believe the definition should be read in the conjunctive. Mugwanya, *supra* note 7, at 702; Blanchet, *supra* note 10, at 659 nn.101–03. *But see* Blanchet, *supra* note 10, at 659 n.104.

54. Report of the International Law Commission on the Work of its Forty-ninth Session, U.N. G.A.O.R., 49th Sess., Supp. No. 10, U.N. Doc. A/49/10, at 76 (Nov. 8, 1994).

55. Eric David, *The Contribution of International Tribunals to the Development of International Criminal Law*, in JUSTICE FOR CRIMES AGAINST HUMANITY 354, 359 (Mark Lattimer & Philippe Sands eds., 2003). GOLDSTONE & SMITH, *supra* note 29, at 111 (ICC has “codified much of international humanitarian law that had been developed at the ICTY and ICTR.”).

56. Blanchet, *supra* note 10 (citing McCormack & Robertson, at 655 n.44).

57. Brown, *supra* note 16, at 865.

the Rome Statute, can lead to irregularity in the prosecution of crimes against humanity in different jurisdictions.⁵⁸ This only serves to undermine the legitimacy of holding those responsible for these reprehensible acts. Second, prosecuting crimes against humanity in U.S. courts is not merely a domestic matter, since it is humanity as a whole that has been harmed by the act. Therefore, consistent prosecution and sentencing is vital so that there is no distortion in the notion of justice.⁵⁹ Third, advocating for a conjunctive definition only creates greater hurdles for effective prosecution in the United States because it creates a higher threshold for accountability.⁶⁰ This can lead to prosecutorial unwillingness to bring charges of crimes against humanity before the relevant tribunal. And finally, for the United States to faithfully remain in compliance with its treaty obligations, it should not deviate from widely held and codified international norms.⁶¹

In the context of crimes against humanity, the ICTR adopted the following definitions of “widespread” and “systematic:”

[W]idespread may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims . . . [while] the concept of ‘systematic’ may be defined as thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources.⁶²

Additionally, the Court did not require that the policy be formally adopted by the state but at least “some kind of preconceived plan or policy” would have to exist to define the attack as “systematic.”⁶³

In defining “widespread” and “systematic,” the Draft Bill lacks similar clarity. Nonetheless, it recognizes that for an attack to be widespread it

58. See Marco Roscini, *Great Expectations: The Implementation of the Rome Statute in Italy*, 5 J. INT'L CRIM. JUST. 493, 512 (2007) (discussing the problem of prosecuting international crimes because of inconsistencies between Italian domestic legislation and the Rome Statute).

59. See Aceves & Hoffman, *supra* note 1, at 268 (existing criminal liability regime with respect to crimes against humanity “minimizes the gravity of these crimes by failing to differentiate common crimes and more serious violations of international law”).

60. HRW, *supra* note 11, at 1.

61. *But see* Blanchet, *supra* note 10, at 658–61 (motivating factor for defining crimes against humanity in the conjunctive, as argued by some scholars, is that in order to have a widespread attack there has to be high level organization and planning that accompanies the wide ranging attack).

62. *Akayesu*, Case No. ICTR-96-4-T, ¶ 580.

63. *Id.* ¶ 580.

must contain a multiplicity of victims⁶⁴ and for it to be systematic it must be in furtherance of a “policy of a State or armed group.”⁶⁵ Accordingly, the major obstacle which must be resolved is the deviation from international case law, treaties, and statutes in using the terms “widespread” and “systematic” in the conjunctive.

2. The Necessity of Defining the Scope of a “Civilian Population”

In the definitions section of the Draft Bill,⁶⁶ the scope of a civilian population remains undefined. Previously, I have argued⁶⁷ that the term “civilian population” should be expanded to include soldiers *hors de combat* as victims of crimes against humanity, since Article 5 of the ICTY Statute⁶⁸ seeks to ensure that the “primary object of the attack is not a legitimate military target.”⁶⁹ Furthermore, since soldiers *hors de combat* are no longer taking direct part in hostilities, they are “similarly situated to ‘civilians’ with respect to their protected status.”⁷⁰ Therefore, by categorizing soldiers *hors de combat* as “civilians” for the limited purpose of Article 5, no danger exists for undermining the principle of distinction because both civilians and soldiers *hors de combat* are illegitimate military targets.⁷¹ While the legislative history of important international statutes

64. Draft Bill, *supra* note 6, § 519(e)(8).

65. *Id.* § 519(e)(7).

66. *Id.* § 519(e).

67. See generally Hansdeep Singh, *Critique of Mrkšić Trial Chamber Judgment: A Re-Evaluation on Whether Soldiers Hors de Combat Are Entitled to Recognition as Victims of Crimes Against Humanity*, 8 THE LAW & PRAC. OF INT’L CTS. & TRIBUNALS (2009).

68. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S.C. Res. 827, art. 5, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute] (defining crimes against humanity).

69. Prosecutor v. Mrkšić, Case No. IT-95-13/1-A, Judgment, ¶ 23 (May 5, 2009) (citing Prosecution Appeal Brief, ¶¶ 16, 26).

70. Singh, *supra* note 67, at 290–91 (citing Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), arts. 41, 51, 8 June 1977, 1125 U.N.T.S. 3); Common Article III of the Third and Fourth Geneva Conventions addresses protections for civilians and *hors de combat*. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GCIV]; Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GCIII]).

71. *Id.* at 289–91; Carden & Sadat, *supra* note 5, at 430 (discussing the confusion over the term “civilian population” and that the “unseemly distinctions between civilian and non-civilian victims of atrocities . . . are indefensible from a moral perspective, and incomprehensible as a question of common sense”).

militate for an expansive definition of “civilian population, support for this interpretation is also found in the judgments of the ICTR, foreign jurisdictions, and Nuremberg.”⁷²

Recently, the *Mrkšić* Appeals Chamber at the ICTY was seized with two questions by the Prosecutor:

- (i) Article 5 of the Statute does not require that individual victims must be civilians but only that the crimes take place as part of a widespread or systematic attack against a civilian population; and
- (ii) In determining whether the civilian population is the primary object of the attack, all non-participants in the hostilities, including persons *hors de combat*, should be regarded as civilians.⁷³

Soon after the Prosecution’s submission, the Prosecution dropped its appeal of the second question, namely, that non-participants, specifically persons *hors de combat*, should be regarded as civilians under Article 5 in light of the *Martić* Appeal Judgment. The *Martić* Appeals Chamber held that the “term civilian in [Article 5 context] did not include persons *hors de combat*.”⁷⁴ Nonetheless, the court took a more nuanced position in holding that persons *hors de combat* could be victims of crimes against humanity if “crimes were committed against them . . . as part of a widespread or systematic attack against the civilian population.”⁷⁵

In addressing the question posited by the prosecution, the *Mrkšić* Appeals Chamber followed the *Martić* Appeals Chamber’s reasoning. The *Mrkšić* Appeals Chamber citing the *Martić* Appeals Judgment found that “under customary international law, persons *hors de combat* can also be victims of crimes against humanity.”⁷⁶ Unfortunately, the *Mrkšić* Appeals Chambers did not provide the full gamut of protections for persons *hors de combat* because the Court left unchanged the finding that under Article 5 the term “civilian” did not include persons *hors de combat*.⁷⁷

The practical result of the *Mrkšić* Appeals Chamber judgment was that the summary execution of approximately 200 Croatian men was not

72. See generally Singh, *supra* note 67.

73. *Mrkšić*, Case No. IT-95-13/1-A, ¶ 20.

74. Prosecutor v. Martić, Case No. IT-95-11-A, Judgment, ¶ 302 (Oct. 8, 2008).

75. *Id.* ¶ 314.

76. *Mrkšić*, Case No. IT-95-13/1-A, ¶ 29 (citing *Martić* Appeals Judgment, ¶¶ 311, 313).

77. *Id.* ¶ 35 (The court notes that the prosecution dropped this portion of the Appeal based on the ruling by the *Martić* Appellate Judgment.).

considered a crime against humanity.⁷⁸ The Court based its rationale on the finding that the Serbian armies actions “were directed against members of the Croatian armed forces . . . and [that the summary executions] lacked the required nexus” to the attacks against civilian population in Vukovar.⁷⁹

Regrettably, “[b]y denying recognition to those soldiers *hors de combat* who were brutally massacred . . . as victims of crimes against humanity, we allow the callousness and discriminatory nature of the act to be masked and absorbed into the excesses of war.”⁸⁰ In describing the unlawful killings of Jews and resistance fighters in France, Advocate General Döntenwille illuminated the futility in discriminating between victims by stating: “[t]o accept a distinction between the victims would be to play the game of the perpetrator of the crime in the arbitrary discrimination which he operated in relation to the human race.”⁸¹

Although there is no absolute consensus on this matter, there is a definitive shift towards greater protections for non-combatants both in the interpretations of international humanitarian law (IHL) and human rights law. Thus, the Draft Bill should define the scope of a “civilian population” within the framework recently laid out by the *Mrkšić* Appeals Chamber or adopt the more expansive definition that recognizes persons *hors de combat* as civilians strictly for purposes of defining a “civilian population.”

3. Exclusion of Gender as an Identifiable Group Under Persecution & Rape as a Separate Form of Crimes Against Humanity

The Draft Bill seeks to protect specific groups from persecution. These groups include: national, ethnic, racial, or religious groups.⁸² Conspicuously missing from the list is any mention of groups identified by gender, sexual orientation, or disability. Our focus here will be limited to gender because of its inclusion (as an identifiable group under persecution) within the Rome Statute,⁸³ the inclusion of rape as a grave international crime, and the expansive use of rape as a weapon of war.⁸⁴

78. *Id.* ¶ 42.

79. *Id.*

80. Singh, *supra* note 67, at 295.

81. *Id.* at 247 (citing *Cour de Cassation (Criminal Chamber) Federation Nationale des Deortes et Internes Resistants et Patriotes and Others v. Barbie*, 78 I.L.R. 125, 147 (1985)).

82. Draft Bill, *supra* note 6, § 519(a)(7).

83. Rome Statute, *supra* note 17, art. 7(1)(h) (including gender as an identifiable group; where the persecution of such group rises to the level of a crime against humanity).

84. Accord HUMAN RIGHTS WATCH, SUCCESS STORY: STOPPING RAPE AS A WEAPON OF WAR IN THE CONGO (2009), <http://www.hrw.org/en/news/2009/09/18/stopping-rape-weapon-war-congo>

Over the past decade, the call for ending impunity against women has been extensive. Both the ICTY and ICTR have recognized that gender crimes have often been subsumed within the excesses or spoils of war.⁸⁵ The ICTR was the first international tribunal to specifically recognize rape as a crime against humanity and found the rapes perpetrated in Rwanda rose to the level of genocide.⁸⁶ In *Akayesu*, the court unequivocally stated that rape constitutes “one of the worst ways of [harming] the victim, as he or she suffers both bodily and mental harm.”⁸⁷

Similarly, sexual violence in the context of the war in the Balkan region was a primary motivating factor in the establishment of the ICTY.⁸⁸ In *Furundzija*, the Appeals Chamber did not categorize rape as a subset of outrages against personal dignity but elevated it to a standalone crime.⁸⁹ Moreover, in *Kunarac*, the ICTY held sexual slavery to constitute a crime against humanity.⁹⁰ Building on these judgments, the hope is that subsequent cases will re-affirm the notion that gender crimes, by themselves, fall within grave breaches of the Geneva Conventions.⁹¹

At the ICC, embedded in the Rome Statute, gender crimes are separately enumerated in Article 7 and 8, which discuss crimes against humanity and war crimes.⁹² The Rome Statute also includes numerous categories of gender crimes beyond rape, which include: “sexual slavery,⁹³ enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.”⁹⁴ Additionally, the ICC’s

(last visited Sept. 26, 2010); HUMAN RIGHTS WATCH, SOLDIERS WHO RAPE COMMANDERS WHO CONDONE (2009), <http://www.hrw.org/en/node/84366/section/7> (last visited Sept. 26, 2010).

85. The International Military Tribunals (IMT) stands in direct contrast to contemporary tribunals in their lack of recognition of rape as an international crime. Richard J. Goldstone & Estell A. Dehon, *Engendering Accountability: Gender Crime Under International Criminal Law*, 19 NEW ENG. J. PUB. POL’Y 121, 122–23 (“[R]ape was placed on the same footing as plunder, and was considered to be an inevitable consequence of war.”).

86. *Id.* at 122 (citing *Akayesu*, Case No. ICTR-96-4-T, ¶¶ 685–95, 706).

87. *Id.* at 121 (quoting *Akayesu*, Case No. ICTR-96-4-T, ¶ 731).

88. *Id.* at 122 (citing Prosecutor v. Anto Furundzija, Case No. IT-95-17/1-A, Judgment, ¶ 201 (July 21, 2000)).

89. *Id.* at 126–27.

90. Goldstone & Dehon, *supra* note 85, at 129.

91. *Id.* at 127. Recognition must also be given to NGOs, women’s rights organizations, and the fearlessness of female judges at the ICTY and ICTR to illuminate gender crimes in indictments, to elicit detailed and often visceral testimony, and to facilitate vindication for victims by creating an invaluable historical record. *Id.* at 124–25, 135.

92. Rome Statute, *supra* note 17, arts. 7(1)(g)–(h), 8(2)(c)(iv).

93. Goldstone & Dehon, *supra* note 85, at 135.

94. Rome Statute, *supra* note 17, art. 7(1)(g).

inclusion of gender discrimination and persecution as a separate prohibited crime under crimes against humanity re-affirmed the advances made in the *Delalic* judgment at the ICTY.⁹⁵ And finally, as previously mentioned, the ICC has intelligently built in flexibility into the Statute. This foresight potentially allows other identifiable groups who are not specifically delineated in the Rome Statute, to find redress since the Statute includes persecution against “any identifiable group” or on “other grounds that are universally recognized as impermissible.”⁹⁶

As seen through the ICTR, ICTY, and ICC, gender crimes have evolved to gain recognition as grave crimes. Ultimately, for the reign of impunity to end, specifically in the context of civil wars, “gender crimes in international criminal law will [have to] be resolutely replaced by . . . accountability, deterrence, and prevention.”⁹⁷ One must not forget that the U.S. delegation fought relentlessly to incorporate sexual assault into the Rome Statute.⁹⁸ Therefore, the absence of gender crimes as both a standalone crime and category of persecution is a blatant move backwards, which only recounts the callousness of past historical oversight.⁹⁹

C. Severity of Punishment for Crimes Against Humanity

When constructing a framework for punishing the most egregious of crimes, a fundamental question arises: “should crimes against humanity be punished more severely than common crimes or other violations of international law?”¹⁰⁰ The Draft Bill sets the term of imprisonment not to exceed twenty years, “but if the death of any person results,”¹⁰¹ then any term of years or life imprisonment would be justified for actual violation, attempted violation, or conspiracy to violate the conditions of the Draft Bill.

Professor Paust posits his own sentencing scheme for an act amounting to a crime against humanity. He lays forth that any punishment should be no more than fifty years unless the offense results in death, then life

95. Goldstone & Dehon, *supra* note 85, at 135.

96. Rome Statute, *supra* note 17, art. 7(1)(g).

97. Goldstone & Dehon, *supra* note 85, at 140.

98. Aceves & Hoffman, *supra* note 1, at 244 (citing Ambassador David J. Scheffer, *Fourteenth Waldemar A. Solf Lecture in International Law: A Negotiator's Perspective on the International Criminal Court*, 167 MIL. L. REV. 1, 16–17 (2001)).

99. The only discussion of gender based crimes in the Draft Bill is under the section of “special maritime and territorial jurisdiction of the United States.” Draft Bill, *supra* note 6, § 519(a)(2)(A)–(C).

100. Aceves & Hoffman, *supra* note 1, at 266.

101. Draft Bill, *supra* note 6, § 519(b)(1)–(2).

imprisonment.¹⁰² The variation between Professor Paust's sentencing scheme and the Draft Bill arises when defining the upper limit for an offense that rises to crimes against humanity but does not result in death. Professor Paust's upper limit of fifty years seems to take into consideration the heightened nature of the crime and the attachment of no more than a ten million dollar fine recognizes that these acts are often perpetrated by high level governmental officials or the State itself. Both these penalty regimes differ from the ICC requirements. For Article 5 crimes that fall within the jurisdiction of the ICC, punishment is: "(a) Imprisonment for a specified number of years, which may not exceed a maximum of thirty years; or (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person."¹⁰³

One interesting variation of the ICC Statute from either the Draft Bill or Professor Paust's position is the punishment of life imprisonment irrespective of whether the offense resulted in death, as long as the action was sufficiently grave.¹⁰⁴ This allows for greater flexibility in meting out the most severe punishment by recognizing that the offense against humanity can be equally horrific when crimes of rape, forced pregnancy, deportation, torture, and enslavement result.¹⁰⁵

Regarding the levying of fines, the ICC has discretion to seek "forfeiture of proceeds, property and assets derived directly or indirectly from that crime"¹⁰⁶ Again, the ICC's formula is inherently flexible and is not bound by arbitrary figures, which are often wholly inadequate to determine the extent of damage, both on person and property.

Hence, the Draft Bill, which makes no effort to quantify the amount of the fine, would be better served by borrowing from the expansive language of the Rome Statute. Justice is furthered by allowing the court ample discretion to effectively punish and restore some semblance of restitution to the victims. Finally, the Draft Bill adheres to international law norms by its exclusion of the death penalty. It has been said that for a court to "award death to such a man, on the ground of compensatory justice, is to trivialize, in a manner most grievous, the crucifixion of a whole people."¹⁰⁷

102. Paust, *supra* note 1, at 727.

103. Rome Statute, *supra* note 17, art. 77(1)(a)-(b).

104. *Id.* art.77(1)(b).

105. *See generally* Rome Statute, *supra* note 17, art. 7.

106. *Id.* art. 77(2)(b).

107. William A. Schabas, *War Crimes, Crimes Against Humanity, and the Death Penalty*, 60 ALB. L. REV. 733, 765 (1997) (citing VICTOR GOLLANCZ, *THE CASE OF ADOLF EICHMANN* 57 (1961)).

II. CONCLUSION

For the Draft Bill to become a reality, Congress¹⁰⁸ must recognize that closing the gap in U.S. legislation directly protects U.S. interests.¹⁰⁹ Adherence to the ICC's principle of complementarity provides an ideal balance between state sovereignty and the necessity to punish international crimes. However, this principle is only triggered by the domestication of international crimes. Implementation of such legislation will allow the United States to prosecute alleged perpetrators, end impunity, and have the necessary flexibility to navigate between prosecution, extradition, and the complementarity regime.¹¹⁰

In 2010, the ICC re-engaged the issue of terrorism at the Review Conference, "with a view to their ultimate inclusion in the jurisdiction of the Court."¹¹¹ Assuming terrorism is incorporated into the jurisdiction of the ICC, U.S. interests of prosecuting potential terroristic acts abroad will be severely curtailed without adequate domestic legislation.¹¹² Ambassador Scheffer has summarized the current situation by asserting that our outdated criminal code and Uniform Code of Military Justice "will deprive the United States of its 'first line of defense' against ICC jurisdiction."¹¹³

108. According to StateNet, which tracks and reports on pending legislation, the chances of the Draft Bill passing through the various legislative stages is minimal: Senate Committee (11%); House Committee (5%); Senate Floor (7%); House Floor (5%). These are extremely ominous predictions and further support the contention that we need a more concerted effort by advocacy groups to foster the idea that it is in everyone's interest to pass this legislation.

109. "Adherence to the Rome treaty could provide greater options for protections of U.S. nationals than nonadherence." Paust, *supra* note 13, at 15.

110. Paust, *supra* note 1, at 728.

111. Carden & Sadat, *supra* note 5, at 406 (citing *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Annex I, Res. F, U.N. Doc. A/CONF.183/10 (1998)).

112. Aceves & Hoffman, *supra* note 1, at 240 (citing for similar criticisms, *see generally* Douglass Cassel, *Empowering United States Courts to Hear Crimes Within the Jurisdiction of the International Criminal Court*, 35 NEW ENG. L. REV. 421 (2001); Mark S. Zaid, *Will or Should the United States Ever Prosecute War Criminals?: A Need for Greater Expansion in the Areas of Both Criminal and Civil Liability*, 35 NEW ENG. L. REV. 447 (2001); Douglass Cassel, *The ICC's New Legal Landscape: The Need to Expand US Domestic Court Jurisdiction to Prosecute Genocide, War Crimes, and Crimes Against Humanity*, 23 FORDHAM INT'L L.J. 378 (1999)).

113. Proulx, *supra* note 18, at 1158. Recently, the United States has ordered the trial of Khalid Sheik Mohammad and four others to proceed in federal court in the Southern District of New York. Charlie Savage, *Accused 9/11 Mastermind to Face Civilian Trial in N.Y.*, N.Y. TIMES, Nov. 13, 2009, available at <http://www.nytimes.com/2009/11/14/us/14terror.html> (last visited Oct. 16, 2010). Absent from the charges being brought against Mr. Muhammad will be conspiracy to commit crimes against humanity and crimes against humanity themselves. Unfortunately, the United States misses a crucial opportunity to elevate these crimes and signify to the world that humanity collectively has suffered from

Going forward, if we are to see ourselves as partners with the ICC in curtailing international crimes, it becomes our responsibility to prosecute such crimes, recognizing that international institutions “remain limited in their ability to address crimes against humanity.”¹¹⁴

Furthermore, looking to the language of the Draft Bill, a concerted effort is necessary in expanding protections for vulnerable populations (*i.e.* persons *hors de combat* and women) while tailoring the Draft Bill’s language to be more consistent with international norms. Currently, the Draft Bill deviates from international norms in fundamental ways. First, by advocating for a conjunctive definition of what constitutes a crime against humanity, the United States potentially places a higher evidentiary burden on the prosecution than is required under international law. This not only risks undermining the legitimacy of any judgment, but also creates greater difficulties in even attempting to prosecute international crimes. Second, clarification on the scope of a “civilian population” and arguing for an expansive definition, consistent with international law, will bolster protections for persons *hors de combat*. And finally, failure to include gender as a protected group is a glaring oversight that warrants immediate changes to the Draft Bill. By bearing witness to the maliciousness in which women are continually dehumanized to gain strategic leverage in war, it would be incomprehensible if we fail to move both domestic and international law towards protecting women from these discriminatory effects.

Ultimately, a Draft Bill that is aligned with international norms will make domestic courts more responsive to international law and allow the United States to play a vital role in shaping international jurisprudence. Deviation from accepted norms will only leave the United States more isolated and susceptible to international jurisdiction. If the United States is not prepared to partner with the ICC and the 110 nations who have ratified the Rome Statute, it must at least be responsive to ICC’s increasingly global impact. This Draft Bill holds significant promise and foreshadows the United States’ acceptance of collective responsibility in holding

these events. See also Aceves & Hoffman, *supra* note 1, at 268 (“It minimizes the gravity of crimes by failing to differentiate common crimes and more serious violations of international law.”). Furthermore, prosecution of crimes against humanity would entail the development of international law jurisprudence in U.S. domestic courts. By domesticating crimes against humanity, the United States can either prosecute international crimes domestically or allow the ICC to have jurisdiction. Proulx, *supra* note 18, at 1085 n.323 (citing David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT’L L.J. 47, 49–50 (2002) (“asserting that the ICC is a very useful tool in prosecuting future acts of international terrorism that may constitute crimes under the ICC, and suggesting that the United States explore the utility of the ICC because an effort to dismantle the ICC would be incompatible with the United States’ war on terrorism, given its value in prosecuting acts of terrorism”).

114. Aceves & Hoffman, *supra* note 1, at 268.

accountable those who have perpetrated the most serious international crimes.