AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

S. HRG. 110–548

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

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

NOVEMBER 14, 2007

Serial No. J–110–63

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

43–914 PDF WASHINGTON : 2008

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00001 Fmt 5011 Sfmt 5011 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

COMMITTEE ON THE JUDICIARY

PATRICK J. LEAHY, Vermont, *Chairman*

EDWARD M. KENNEDY, Massachusetts	ARLEN SPECTER, Pennsylvania
JOSEPH R. BIDEN, JR., Delaware	ORRIN G. HATCH, Utah
HERB KOHL, Wisconsin	CHARLES E. GRASSLEY, Iowa
DIANNE FEINSTEIN, California	JON KYL, Arizona
RUSSELL D. FEINGOLD, Wisconsin	JEFF SESSIONS, Alabama
CHARLES E. SCHUMER, New York	LINDSEY O. GRAHAM, South Carolina
RICHARD J. DURBIN, Illinois	JOHN CORNYN, Texas
BENJAMIN L. CARDIN, Maryland	SAM BROWNBACK, Kansas
SHELDON WHITEHOUSE, Rhode Island	TOM COBURN, Oklahoma

BRUCE A. COHEN, *Chief Counsel and Staff Director*
MICHAEL O'NEILL, *Republican Chief Counsel and Staff Director*

SUBCOMMITTEE ON HUMAN RIGHTS AND THE LAW

RICHARD J. DURBIN, Illinois, *Chairman*

EDWARD M. KENNEDY, Massachusetts	TOM COBURN, Oklahoma
JOSEPH R. BIDEN, JR., Delaware	JON KYL, Arizona
RUSSELL D. FEINGOLD, Wisconsin	LINDSEY O. GRAHAM, South Carolina
BENJAMIN L. CARDIN, Maryland	JOHN CORNYN, Texas
SHELDON WHITEHOUSE, Rhode Island	SAM BROWNBACK, Kansas

JOSEPH ZOGBY, *Chief Counsel*
MARY CHESSER, *Republican Chief Counsel*

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00002 Fmt 5904 Sfmt 5904 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

	Page
Coburn, Hon. Tom, a U.S. Senator from the State of Oklahoma, prepared statement	92
Durbin, Hon. Richard J., a U.S. Senator from the State of Illinois	1
prepared statement and attachment	94
Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont, prepared statement	109

WITNESSES

Arce, Juan Romagoza, M.D., Executive Director, La Clínica del Pueblo, Washington, D.C. (translated from Spanish by Sally Hanlon)	24
Forman, Marcy M., Director, Office of Investigations, Immigration and Customs Enforcement, Department of Homeland Security, Washington, D.C.	6
Mandelker, Sigal P., Deputy Assistant Attorney General, Criminal Division, Department of Justice, Washington, D.C.	4
Merchant, Pamela, Executive Director, Center for Justice and Accountability, San Francisco, California	21
Scheffer, David, Mayer Brown/Robert A. Helman Professor of Law, Northwestern University School of Law, Chicago, Illinois	19

QUESTIONS AND ANSWERS

Responses of Dr. Juan Romagoza Arce to a question submitted by Senator Durbin	33
Responses of Marcy M. Forman to questions submitted by Senators Kyl and Durbin	34
Responses of Sigal P. Mandelker to questions submitted by Senators Durbin and Kyl	51
Responses of Pamela Merchant to questions submitted by Senators Durbin and Kyl	60
Responses of David Scheffer to questions submitted by Senators Durbin and Kyl	72

SUBMISSIONS FOR THE RECORD

Amnesty International USA, statement	78
Arce, Juan Romagoza, Executive Director, La Clínica del Pueblo, Washington, D.C., statement	88
Forman, Marcy M., Director, Office of Investigations, Immigration and Customs Enforcement, Department of Homeland Security, Washington, D.C., statement	98
Human Rights Watch, New York, New York, statement	105
Mandelker, Sigal P., Deputy Assistant Attorney General, Criminal Division, Department of Justice, Washington, D.C., statement	111
Merchant, Pamela, Executive Director, Center for Justice and Accountability, San Francisco, California, statement	122
Scheffer, David, Mayer Brown/Robert A. Helman Professor of Law, Northwestern University School of Law, Chicago, Illinois, statement	131

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00003 Fmt 5904 Sfmt 5904 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

NO SAFE HAVEN: ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATORS IN THE UNITED STATES

WEDNESDAY, NOVEMBER 14, 2007

U.S. SENATE,
SUBCOMMITTEE ON HUMAN RIGHTS AND THE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Subcommittee met, pursuant to notice, at 10 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Richard J. Durbin, Chairman of the Subcommittee, presiding.

Present: Senators Durbin and Cardin.

OPENING STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. This hearing will come to order. Welcome to "No Safe Haven: Accountability for Human Rights Violators in the United States." This is the fifth hearing of the Judiciary Committee's recently created Subcommittee on Human Rights and the Law.

Unfortunately, our Ranking Member, Senator Coburn, has a scheduling conflict and will not be able to join us today, but I can tell you based on previous hearings how strongly he feels about the mission of this Subcommittee.

After a few opening remarks and a video, we will turn to our valuable witnesses.

First, an update on the activities of this Subcommittee. This is the first time in Senate history that there has been a Subcommittee focused on human rights and the law. This year, we held the first congressional hearings on the law of genocide and child soldiers. We have also held hearings on human trafficking and the impact of the so-called "material support" bar on victims of serious human rights abuses coming to and staying in the United States.

I want to thank Senator Patrick Leahy, the Chairman of the Senate Judiciary Committee, for giving me the opportunity of creating this Subcommittee and for being so supportive all along the way.

I have been joined by Senator Coburn in proposing legislation to hold accountable perpetrators who have committed genocide, human trafficking, and the use or recruitment of child soldiers. The Genocide Accountability Act passed the Senate unanimously and, after being reported last week by the House Judiciary Committee,

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00005 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

is awaiting action on the House floor. The Trafficking in Persons Accountability Act and the Child Soldiers Accountability Act have both been reported unanimously by the Senate Judiciary Committee. I look forward to working with my colleagues to enact these proposals into law as soon as possible.

I said at the outset that the purpose of this Subcommittee was not lamentation but legislation. We need to enact laws that will further our purposes rather than just lamenting either the past or present state of the world.

Today is another first. This is the first ever congressional hearing on the enforcement of human rights laws in the United States.

The end of the last century was marked by horrific human rights abuses in places such as Bosnia and Rwanda. The early years of this century have seen ongoing atrocities committed in places like Darfur and Burma. While a growing number of perpetrators of human rights abuses have been held accountable, a much larger number of perpetrators have escaped accountability.

Some of these human rights violators have fled to the United States. It is almost inconceivable that our Nation has become a safe haven for some of the most notorious war criminals. It is hard to believe that it has become a hideout for these hideous henchmen who have been involved in war crimes around the world.

A growing number of perpetrators of human rights abuses have been held accountable in international, hybrid and state tribunals. A much larger number have escaped.

In the Subcommittee's last hearing, we discussed how our immigration laws prevent some victims of human rights abuses from finding refuge in the United States. What a cruel irony that we have constructed laws that exclude victims but somehow have allowed those who are responsible for these hideous acts to find sanctuary in our midst.

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. The late Simon Wiesenthal, the world's leading hunter of ex-Nazis and those who were involved in the Holocaust, often said the appropriate response to human rights violations is "justice, not vengeance."

I am going to show a brief but graphic video we created for this hearing. I have always tried to do that so that we could put our actions today in the context of recent history.

[Videotape played.]

Senator DURBIN. Our country has a long and proud tradition of providing refuge to victims of persecution. These victims hope to leave behind the terrible abuses they have suffered in their countries of origin and begin a new life in the United States. They should not have to come across those who tortured them, as Edgegayehu Taye did at the hotel in Atlanta, Georgia, where she worked as a waitress. One day, she walked out of an elevator and saw Kelbesso Negewa, the man who had supervised her torture in Ethiopia, who was working as a bellhop at the same hotel. These victims should not have to fear retaliation or threat of retaliation for speaking out against those who persecuted them, as one of our

witnesses today, Dr. Juan Romagoza Arce, and many like him have experienced.

I want to commend the Justice Department and the Department of Homeland Security for their efforts to hold accountable human rights violators who seek safe haven in our country. But we have to do more. During today's hearing, we will explore what the Government can do to identify, investigate, and prosecute suspected perpetrators. We will also explore what the U.S. Government is doing to prevent those perpetrators from coming to the United States.

To my knowledge—and I will stand corrected if the testimony shows otherwise—there has only been one indictment in the United States of a suspected perpetrator for committing a serious human rights abuse. That is unacceptable, and we have to ask why. Why do so many suspected human rights abusers seek safe haven in our Nation? Are we doing enough as a Government and as a people with existing authority? Are new laws granting our Government greater authority and jurisdiction necessary?

Torture is the only serious human rights violation that is a crime under U.S. law if committed outside the United States by a non-U.S. national. That is why Senator Coburn and I have introduced legislation to give our Government authority to prosecute individuals found in the United States who have participated in genocide, human trafficking, and the use or recruitment of child soldiers anywhere in the world. I hope this hearing will shed light on whether additional loopholes in the law hinder effective human rights enforcement.

The United States has a proud tradition of leadership in promoting human rights. By holding perpetrators of serious human rights abuses found in the United States accountable, we will demonstrate our commitment to upholding the human rights principles we have long advocated.

Now we turn to our first panel of witnesses for their opening statements. I want to note for the record that, for reasons I do not understand, our Subcommittee did not receive the written statements from these witnesses until 5 p.m. last night. Judiciary Committee rules require witness testimony to be submitted at least 24 hours in advance of a hearing. Because the subject matter of this hearing is so important, I want to go ahead with these witnesses and their testimony, but I urge them to provide their written statements in advance in the future so we can at least review them and be in a better position to ask important questions.

Each witness will have 5 minutes for an opening statement, and their complete statements will be made part of the record.

First, we will swear in the witnesses, which is the custom and tradition of the Committee. I would ask them both to stand. Do you affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Ms. MANDELKER. I do.

Ms. FORMAN. I do.

Senator DURBIN. Let the record reflect that both witnesses answered in the affirmative.

Our first witness, Sigal Mandelker, is here to represent the Justice Department. Since July of 2006, she has served as Deputy Assistant Attorney General in the Criminal Division. She oversees the Office of Special Investigations and the Domestic Security Section—the two Justice Department offices with primary responsibility for prosecuting serious human rights violators. Since 2002, she has held a number of senior positions in the administration, including counselor to the Department of Homeland Security Secretary Michael Chertoff, Counsel to the Deputy Attorney General, and Special Assistant to then-Assistant Attorney General of the Criminal Division, Michael Chertoff. Ms. Mandelker clerked for Supreme Court Justice Clarence Thomas and Judge Edith Jones on the Fifth Circuit Court of Appeals, received her bachelor's degree from the University of Michigan and her law degree from the University of Pennsylvania.

Ms. Mandelker testified at the Subcommittee's first hearing, on genocide and the rule of law, so this is her second appearance before us. Welcome back. The floor is yours.

STATEMENT OF SIGAL P. MANDELKER, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Ms. MANDELKER. Thank you, Chairman Durbin, and thank you for inviting me to testify today. It is a great honor to testify before this Subcommittee once again to discuss what I consider to be a mission of the highest importance. Both as the Deputy Attorney General in the Criminal Division who oversees two key participants in that mission—the Domestic Security Section and the Office of Special Investigations—and also a child of Holocaust survivors, I am pleased to address the Department of Justice's ongoing efforts against the perpetrators of genocide, war crimes, and crimes against humanity. I am particularly pleased to testify alongside Marcy Forman from ICE who has been a key partner in our efforts.

It is auspicious to testify before this Subcommittee today, November 14th, a date of considerable importance both in the perpetration and in the fight against human rights violations. It was on November 14th of 1935 that the Third Reich issued the first regulations implementing the notorious Nuremberg laws. Exactly 10 years later, after millions had already been massacred, the International Military Tribunal convened in Nuremberg, Germany. And precisely a half-century later, history repeated itself when the International Criminal Tribunal for the former Yugoslavia issued its first indictments for genocide arising out of the Srebrenica massacre.

With this history in mind, as you know, Mr. Chairman, we are all compelled to think carefully and more strategically about how we can best use our tools and resources to ensure, first, that history does not repeat itself once again; and, second, that human rights violators do not find refuge in this country.

At the Department of Justice's Criminal Division, where I work, we have five sections that work principally to accomplish this mission. First, as I mentioned, the Domestic Security Section and the Office of Special Investigations. We also have the Office of International Affairs, the Office of Overseas Prosecutorial Training, De-

velopment, and Assistance, and the International Criminal Investigative Training Assistance Program. We are continually taking new steps to enhance our capabilities and to maximize our resources.

So, for example, we have recently refocused the mission of the Domestic Security Section so that it now has two primary missions: one, working on human rights violator cases; and, two, working on immigration fraud cases. And, of course, there is some overlap between the two.

Similarly, OSI has refocused its work to accomplish the new mission that Congress gave us in 2004, namely, denaturalization of individuals who commit genocide, extra judicial killings, and torture. And the Assistant Attorney General for the Criminal Division has recently appointed a senior counsel to work principally on human rights-related issues.

Of course, we cannot accomplish this mission alone, and we work very closely with the U.S. Attorney's Offices, ICE, and the FBI, as well as the State Department.

We pursue this mission on multiple fronts. First, we seek to prevent perpetrators from entering the country. Indeed, we have helped the Department of Homeland Security in stopping more than 180 suspected World War II criminals at U.S. ports of entry and have prevented them from entering the country. As recently as August of this year, for example, CBP inspectors at JFK Airport prevented a former SS officer from entering the United States. Among the Nazi perpetrators who have been excluded is Franz Doppelreiter, a convicted Nazi criminal who was stopped in November 2004 at the Atlanta airport. He admitted under questioning at the airport that he had physically abused prisoners at the notorious Mauthausen concentration camp while serving in the SS.

Second, we take proactive measures to identify persons who have, unfortunately, gained entry to the United States under the misimpression that the United States will be a safe haven for them. Where we can do so, we bring criminal charges or take other appropriate law enforcement actions. Where we cannot bring criminal charges or where justice would be better served by ensuring that these individuals stand trial elsewhere, we seek to arrest and extradite or transfer these individuals so that they can stand trial abroad; or if they have become citizens, to denaturalize them and accomplish their departure through administrative removal proceedings.

Just recently, an immigration judge in Chicago ordered that Osyp Firishchak be removed from the United States for his role in a Ukrainian police unit that assisted in the annihilation of over 100,000 Jews in Nazi-occupied Lvov, Poland, during World War II.

Last, acting principally in conjunction with the Department of State, we continue to take important initiatives aimed at enhancing the capacity of foreign governments and international tribunals to investigate and prosecute criminal cases against participants in genocide, war crimes, and crimes against humanity.

Each of these areas—identification, exclusion, criminal prosecution, extradition, denaturalization, removal, and foreign capacity building—form our comprehensive approach.

In conclusion, Mr. Chairman, I would like to express to you and to the Subcommittee the Department of Justice's appreciation for your leadership and this opportunity to discuss the Government's ongoing efforts to ensure that justice is aggressively pursued both here and abroad on behalf of the victims of mass atrocities. We are very grateful for the tools that Congress has provided us. Most important, we are committed to continuing to expand our already vigorous efforts to promote fulfillment of the tragically unkept promise of Nuremberg: that no man, woman, or child anywhere will ever again be subjected to the cruel ravages of genocide, war crimes, and crimes against humanity.

Thank you, Mr. Chairman.

[The prepared statement of Ms. Mandelker appears as a submission for the record.]

Senator DURBIN. Thank you, and thank you for your public service. I can tell from your introduction that it extends beyond your professional responsibility and certainly has touched your family personally, so thank you so much.

Ms. MANDELKER. Thank you, Mr. Chairman.

Senator DURBIN. Our next witness, Marcy Forman, is here to represent the Department of Homeland Security. Ms. Forman is Director of the Office of Investigations for U.S. Immigration and Customs Enforcement, known as ICE. In this capacity, she oversees the Human Rights Violators and Public Safety Unit, the Department of Homeland Security office with primary responsibility for investigating suspected human rights violators. Before taking this position, Ms. Forman was Deputy Assistant Director of the Financial Investigations Division of the ICE Office of Investigation. Ms. Forman has over 27 years of law enforcement experience, a master's of science from National-Louis University and a bachelor of science degree from American University.

Thank you for joining us, and please proceed with your testimony.

STATEMENT OF MARCY M. FORMAN, DIRECTOR, OFFICE OF INVESTIGATIONS, IMMIGRATION AND CUSTOMS ENFORCEMENT, DEPARTMENT OF HOMELAND SECURITY, WASHINGTON, D.C.

Ms. FORMAN. Thank you, Chairman. Before discussing our Human Rights Violators Program, I would like to take you back to July 16, 1995. On that date, eight men from an elite unit of the Bosnian Serb Army participated in an almost unimaginable atrocity in Srebrenica, a farm village in Bosnia and Herzegovina. According to one of the perpetrators, between 1,000 and 1,200 male civilians were executed in a 5-hour period. The civilians were lined in groups of ten to fifteen and were summarily executed. The perpetrator, named Marko Boskic, who is depicted on this poster to my right, was one of the participants in this atrocity.

In late 2002, ICE special agents learned that Marko Boskic was residing in the United States. This discovery resulted in a nearly 2-year investigation conducted by ICE and the FBI and substantiated Boskic's involvement in the murder of 1,000 to 1,200 civilians. In an interview, Boskic admitted that he actually pulled the trigger resulting in the deaths of many civilians. On July 12, 2006,

Boskic was convicted of visa fraud and later sentenced to 63 months in a Federal prison. Upon completion of his sentence in the United States, it is anticipated he will face charges for his atrocities in Bosnia.

It is my privilege to appear before you today to discuss ICE's comprehensive efforts against human rights violators. ICE is a U.S. law enforcement agency that is at the forefront of investigating human rights violators involved with genocide, torture, persecution, and extra judicial killings.

In 2003, ICE created the Human Rights Violators and Public Safety Unit and the Human Rights Law Division to investigate and litigate cases involving human rights violations. Contributing to the ICE effort is our Victim/Witness Program, which includes over 300 victim/witness coordinators who are trained to address the needs of the victims of these horrific acts.

ICE has over 140 active investigations and is pursuing over 800 leads and removal cases involving suspects from approximately 85 different countries. These cases are predominantly focused on Central and South America, Haiti, the Balkans, and Africa, and represent cases in various stages of investigation, prosecution, or removal proceedings. From fiscal year 2004 to date, ICE has made over 100 human rights-related arrests and obtained 57 indictments and 28 convictions. From fiscal year 2004, ICE has removed 238 human rights violators from the United States.

Due to the fact that human rights violations and atrocities have occurred abroad, law enforcement is often unable to assert U.S. jurisdiction for the substantive crime. In some cases, our ability to apply criminal charges that could have been levied in the U.S. may have expired due to the statute of limitations. In these situations, ICE applies our administrative authorities to ensure that human rights violators are investigated and removed from the United States.

For example, in September 2005, the ICE office in Phoenix, Arizona, investigated and arrested 20 former Bosnian Serb military members who allegedly belonged to units that were active during the Srebrenica massacre. The 5-year statute of limitations relating to criminal visa fraud or false statements had expired on seven of the 20 violators arrested. ICE was able to use its administrative authorities to arrest and place the seven offenders into administrative removal proceedings.

Successful human rights violations investigations and prosecutions could not be achieved without partnering with other law enforcement agencies, non-governmental organizations, and foreign governments. These investigations require ICE to travel the world to find evidence and locate and interview victims and witnesses. ICE has established a global network through over 50 ICE offices in 39 countries, which has allowed us to foster strong international relationships. ICE partners with many U.S. Government agencies, including the Department of Justice, who is with us today.

ICE has established relationships with the United Nations-sponsored International Criminal Tribunal for the Former Yugoslavia and for Rwanda, and the Special Court for Sierra Leone. As I speak before the Committee today, one member of my staff, Richard Butler, is at the ICTY in The Hague, where he is preparing to testify

as a Subject Matter Expert on the role of military forces and the responsibilities of their commanders for war crimes that occurred in Srebrenica. Mr. Butler spent 6 years as a military expert at the ICTY, and ICE is fortunate to now have him on our staff.

The following is another example that highlights our international cooperation in human rights violations. On April 1, 2007, ICE arrested Ernesto Barreiro for visa fraud charges. Barreiro, a former Argentine army officer, was wanted by Argentinean authorities for commanding a clandestine torture facility operated by the military in the 1970s. As the chief of the La Perla detention camp, Barreiro is alleged to have been involved in at least a dozen cases of torture, kidnapping, or extra judicial killings. Barreiro was successfully prosecuted in the Eastern District of Virginia and upon completion of his sentence will be deported back to Argentina.

The results that ICE has obtained in human rights violators cases often do not reflect the significant commitment of resources and time to these types of investigations. These cases are unique.

In most cases, the atrocities committed by the targets of our investigations happened years or even decades earlier.

Many of the atrocities have occurred in remote locations and have caused displacement of the victim population, resulting in many victims and witnesses scattered around the world.

Many cases rely on documentary evidence to show where military or security units were located when atrocities were committed. Foreign military or other government records are often not available or, worse yet, have been destroyed. And law enforcement must, therefore, attempt to identify victims or witnesses wherever they may be.

Human rights violators represent the worst of humanity. ICE is committed to dedicating the resources necessary to investigate, present for prosecution, and remove from the U.S. those individuals who have participated in these atrocities in order to ensure that the United States does not become a safe haven for human rights violators.

Thank you, and thank you for having me at this hearing.

[The prepared statement of Ms. Forman appears as a submission for the record.]

Senator DURBIN. Well, thank you both for your testimony, and, without objection, Senator Leahy's statement for the record will be entered into the official record of this proceeding.

Ms. Forman, we are going to hear testimony today from Dr. Juan Romagoza about horrific torture that he suffered in El Salvador. A U.S. court held that two former Salvadorean generals were responsible for his torture in a civil suit. Today, those two individuals responsible for his torture are living freely in Florida.

Why has the Department of Homeland Security not sought to remove these human rights abusers from our country?

Ms. FORMAN. I am not totally familiar with those circumstances. I would have to get back to you and get you an answer on that question.

Senator DURBIN. I hope you will.

Ms. FORMAN. I will.

Senator DURBIN. Let me ask you, has the Department of Homeland Security ever sought to remove someone from the United

States on the basis of his or her command responsibility for serious human rights abuses like torture or extra judicial killing?

Ms. FORMAN. I am not aware based on those conditions. I know each case is evaluated on a case-by-case basis, but I do not know specifically for that particular reason.

Senator DURBIN. So do you know whether command responsibility is taken into consideration as one of the reasons for your Department to act?

Ms. FORMAN. I do not believe that is one of the conditions at this time.

Senator DURBIN. Can you tell me, do you know the reasoning behind that?

Ms. FORMAN. No, I do not.

Senator DURBIN. Ms. Mandelker, you testified that the Justice Department is "committed to bringing criminal prosecutions against individuals for substantive human rights-related violations." In December 2006, the Justice Department indicted Chuckie Taylor for the crime of torture. I understand this is the first indictment the Justice Department has ever brought under the 1994 Torture Statute and the first it has ever brought for a substantive human rights violation.

If our Department of Justice is committed to prosecuting human rights cases, why have we only had one human rights prosecution?

Ms. MANDELKER. Mr. Chairman, that is a very good question, and I can tell you that we are certainly committed to investigating and prosecuting more of these cases. You may be aware that we recently superseded in the Chuckie Taylor case bringing charges related to additional victims and acts of torture.

I can also tell you that it is often the case that these sorts of cases are time-intensive, resource-intensive. They principally involve—or really solely involved incidents that occurred overseas, often distant in the past, and they involve foreign documents. We have to undertake to translate those documents, find witnesses. But we are committed to doing so.

Of course, we have brought charges against individuals who we believe have committed human rights violations, whether we have brought them for visa fraud—we have the Nazi program in which we have denaturalized, I believe, over 100 individuals. But from experience, we know these are difficult cases to bring. What we are trying to do now at the Justice Department is think through strategically how we can attack this problem from a more sort of coordinated, and how can we ensure that we are committing the resources that we need to, to bring additional cases. That—

Senator DURBIN. So—go ahead.

Ms. MANDELKER. That is why, for example, as I mentioned, we have refocused the mission of the Domestic Security Section. That is why the Office of Special Investigations is taking on this new mission, and we are taking that mission very seriously.

Senator DURBIN. So going beyond the obvious evidentiary challenges and the challenges of having the staff to reach the goal of a successful prosecution, do you face legal obstacles?

Ms. MANDELKER. Sure, Mr. Chairman. As you know, first and foremost we can only prosecute individuals based within a particular time period, whether it is because of the statute of limita-

tions or we can only prosecute those individuals for violations that occurred after enactment. So that in and of itself would be a challenge.

Senator DURBIN. We will have a suggestion from a later witness here to eliminate from U.S. law all statutes of limitation for atrocity crimes. What is your position on that recommendation?

Ms. MANDELKER. Mr. Chairman, I would have to get back to you on that particular question. I do not know that we have a formal administration view. But I am happy to take that question back and to get back to you.

Senator DURBIN. We will also have testimony that many nations around the world, friends and allies of the United States, have recently codified these war crimes and crimes characterized as atrocities so that they can be prosecuted within their own countries more effectively. Do you feel that this would give you additional tools to deal with these wrongdoers?

Ms. MANDELKER. If we were to amend those current—

Senator DURBIN. If we were to codify these war crimes as crimes within the United States.

Ms. MANDELKER. I see. Well, as you know, we do have a war crimes statute. That statute only reaches U.S.—where the perpetrator was a U.S. national or the victim was a U.S. national.

Again, I would have to look at the specifics of a particular legislative proposal. I am happy to do so. Certainly it is going to be the case that if we have expanded statutory authority, we would be able to potentially bring more charges. But I cannot speak to any particular legislative proposal in the abstract. We are happy to take a look at anything that you would provide.

Senator DURBIN. I mentioned the case of Dr. Romagoza, who will be testifying, and it involved two former Salvadorean generals who were found liable under civil law and who continue to live in the United States without criminal prosecution. Has the Department of Justice considered criminal prosecution against these two individuals?

Ms. MANDELKER. Mr. Chairman, I am not aware that we have considered criminal prosecution. As with Ms. Forman, I am happy to take a look at those circumstances. Of course, you need to take a look at each case for its individual facts and circumstances to make any kind of a determination as to whether or not such a person would be eligible for prosecution under a human rights violation.

Senator DURBIN. I would like you to get back to me.

You testified about the case of Kelbessa Negewo—I am sorry if I mispronounced it—who was accused of serious human rights abuses in Ethiopia and found safe haven in Atlanta, Georgia. Negewo was the first person to be charged under the 2004 law making torture and extra judicial killing grounds for removal from the United States.

How many other individuals have been charged under this law?

Ms. MANDELKER. I am sorry. Under the—

Senator DURBIN. Under this law making torture and extra judicial killing grounds for removal.

Ms. MANDELKER. I would defer to my colleagues at the Department of Homeland Security since that is a matter—

Senator DURBIN. That is right. Ms. Forman, do you know?

Ms. FORMAN. I do not have a specific number, but we have deported a number of individuals involved to their home country for prosecution. The Bosnian case that I had mentioned, where the seven of the 20 were removed for administrative proceedings, two of those individuals are currently facing prosecution in Bosnia.

Senator DURBIN. Do either of you have any idea of a reasonable range of the number of individuals in the United States today who are suspected of involvement in war crimes?

Ms. MANDELKER. I do not have a specific number, Mr. Chairman. I think it would be—

Senator DURBIN. Just an estimate. The video presentation said 1,000?

Ms. MANDELKER. Yes.

Senator DURBIN. We will have testimony later that it is larger. Do you have any idea?

Ms. MANDELKER. I noted that number, and I wondered actually where it came from, and I would be interested to see where it came from. I can tell you that we have a number of ongoing investigations into individuals who have become citizens and have either potentially committed previously genocide, torture, or extra judicial killings. But it would be inappropriate for me to give you a number. I simply do not have one.

Senator DURBIN. Ms. Forman, you testified that from fiscal year 2004 to the present, ICE has made over 100 human rights-related arrests, obtained 57 indictments, and 28 convictions, and removed 238 human rights violators from the United States. How many of those arrests, indictments, convictions, and removals were for human rights violations? How many were for immigration violations?

Ms. FORMAN. I would have to get back to you with the specific numbers broken down that way. But I will tell you many of these individuals—these cases are very difficult to prove, the substantive violation. And on the criminal cases, more often than not many of these individuals were charged with either immigration fraud, visa fraud, or false statements.

Senator DURBIN. My staff, incidentally, tells me, Ms. Mandelker, that the number of 1,000 investigations and deportation cases was provided by the Department of Homeland Security.

I would like to ask you, Ms. Forman, in how many of the 238 removals did you obtain assurances that the suspected human rights abuser would be prosecuted in his or her home country?

Ms. FORMAN. That, too, I will have to get back with you. We have had successes, but I do not have a specific number for you.

Senator DURBIN. How large is the Human Rights Violators and Public Safety Unit?

Ms. FORMAN. The headquarters component is approximately five people, but our agents, we have approximately 5,600 agents in our special agent in charge field offices. Many of those individuals are assigned to work these cases.

Senator DURBIN. How many at any given time would be assigned to work these cases?

Ms. FORMAN. It all depends on—these cases are very complex, so normally it would be—we would have a unit that is dedicated, and

the whole unit could be dedicated to the investigation, if that is what it took, plus our foreign arm, our foreign attache offices who are pursuing the leads for us.

Senator DURBIN. Are we talking in terms of dozens or hundreds?

Ms. FORMAN. On a particular individual, it usually is—if we are searching for one or two, it could be two or three at one given time, dedicated full-time to pursuing the investigation.

Senator DURBIN. Your estimate, your Department estimate, is that we are talking about a possible range of 1,000 people who could be investigated. When you look at all the ongoing investigations at any given time in the Department of Homeland Security, how many staffers would be dedicated to those investigations?

Ms. FORMAN. Well, some of these investigations do not reach our—due to statute of limitations, do not reach the criminal level, so the criminal investigators—I mean, the cadre—we have 26 special agent in charge offices. Each office has a component that works these types of cases, and we have the Human Rights Law Division in headquarters who addresses the administrative removal.

Senator DURBIN. Would there be more than 100 or fewer, at any given time, involved in all of the investigations?

Ms. FORMAN. I would say the combination between the Legal Division, the agents, and the detention removal folks, probably at a given time about 100. It could be up to 100.

Senator DURBIN. Ms. Mandelker, you testified that two lead Justice Department offices in human rights enforcement are the Office of Special Investigations and the Domestic Security Section. How large is the OSI and how large is DSS?

Ms. MANDELKER. The Office of Special Investigations has up to 30 individuals on staff. That is a combination of lawyers, historians who have become experts in the various regions, paralegals and other administrative staff.

The Domestic Security Section has approximately 14 trial attorneys.

Senator DURBIN. How many DSS attorneys focus on enforcing human rights laws?

Ms. MANDELKER. Mr. Chairman, as I mentioned, we have refocused recently the mission of the Domestic Security Section along two fronts: one is the human rights violators front, and one is immigration-related violations. At any given time the number of trial attorneys assigned to any particular mission might vary, but it is roughly, I would say, a 50/50 split.

That said, there is also often overlap. We also, of course, work very closely with our colleagues in the U.S. Attorney's Offices on many of these cases.

Senator DURBIN. So about seven attorneys would be focused on human rights violations?

Ms. MANDELKER. That is approximately right.

Senator DURBIN. Is it true that OSI's jurisdiction extends only to denaturalization cases?

Ms. MANDELKER. Civil and criminal denaturalization.

Senator DURBIN. Has the Department considered creating an office to focus exclusively on human rights enforcement?

Ms. MANDELKER. Not that I am aware of, Mr. Chairman. But, again, we have recently taken this move to refocus the Domestic

Security Section. I should mention that the Office of Special Investigations has also recently assisted on some of the visa fraud cases that we have brought against Bosnian Serbs who lied on their immigration forms. So OSI is principally focused on denaturalization, but we have participated in some other cases as well.

Senator DURBIN. Ms. Forman, you told us about this case of Marko Boskic who was convicted of visa fraud. He had been involved in the Srebrenica massacre involving a substantial number of people, and it turns out that he was prosecuted for visa fraud instead of serious human rights abuses.

I would like either one of you to tell me—probably Ms. Mandelker would be appropriate. 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. Why is that?

Ms. MANDELKER. Mr. Chairman, I actually was not at the Department at the time the charges were brought in the Boskic case. You know, I can tell you that in any particular case we look at the facts and circumstances and the possible charges that we can bring, and we are, of course, always committed to bring the most readily provable charges that would subject the individual to the highest penalties. But I cannot comment on a specific case.

Senator DURBIN. Well, then, let's go to the general question. 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?

Ms. MANDELKER. Again, Mr. Chairman, it would very much depend on the facts and circumstances of a particular case.

Senator DURBIN. Well, OK. The crime did not occur in the United States, and let's assume for the sake of discussion there were no American victims. Could he be prosecuted in the United States?

Ms. MANDELKER. If there were no American victims or they were not perpetrated by a U.S. national, sitting here today, it is difficult for me to come up with a potential charge that we could charge him with.

Senator DURBIN. So if the crime were genocide of Bosnian nationals committed by a Bosnian who was seeking safe haven in the United States, you do not believe we have a law that we could prosecute him for.

Ms. MANDELKER. That is correct, Mr. Chairman.

Senator DURBIN. I see that Senator Cardin is here, and I have gone way over 5 minutes, and I want to give him a chance to ask before I ask a few more questions. Senator Cardin?

Senator CARDIN. Well, first, Senator Durbin, thank you for holding this hearing. One of the reasons I was so pleased about the creation of this Subcommittee was to be able to focus on the human rights issues and how we can be more effective in dealing with human rights internationally.

I certainly am very concerned about the issue you raised in your last question about America being a safe haven for those who have committed human rights violations in another country, then tried to avoid accountability by coming to our own country. That is unac-

ceptable, and I thank you for your leadership in pursuing bills that deal with that.

I want to deal with one of the bills that you are the sponsor of, and that is the trafficking issue. In trafficking, the United States has taken a strong international leadership position. I am very proud of the work that has been done in the OSCE, the Helsinki Commission, on promoting strong enforcement of laws to fight trafficking and to have zero tolerance in regards to trafficking.

My question basically deals with the difficulty in sometimes dealing with the receiving countries. The United States is a receiving country of people who are trafficking, and I know that we have strong laws to deal with that. But I come back to the point as to whether our laws are effective in dealing with all of the players that are involved in trafficking and whether we can strengthen those laws. Senator Durbin has a bill to do that. And what has your experience been as far as effectively being able to investigate international networks which the United States is part of in trafficking of women or trafficking of labor?

Ms. MANDELKER. Senator Cardin, as you may know, the responsibility for trafficking lies within two divisions of the Department of Justice:

The Civil Rights Division, which is responsible for the trafficking of adults, and they are also responsible for forced labor cases. So I would defer to the Civil Rights Division with respect to part of that question.

We also have in the Criminal Division the Child Exploitation and Obscenity Section, which is responsible for child sex trafficking. And we have brought a number of trafficking cases that we actually consider to be domestic prostitution cases, which also qualify as child sex trafficking cases.

We certainly need to do more. As you are probably aware, it is often the case that these are extremely difficult cases to bring because much of the activity, in fact, occurs overseas. We work very closely with ICE in that mission. We are committed to doing those cases. They are very important cases.

In fact, I was recently in Bangkok, Thailand, and I had a briefing on sex tourism. These are terrible, terrible crimes. These children, whether in the United States, brought into the United States, or victimized overseas, are among the most vulnerable victims, children who are subject to sexual exploitation. They are difficult cases, but they are well worth the resources when you think about the victims, when you think about helping them can get on the course to a better life, and when you think about the need to bring these traffickers to justice so that they cannot victimize children again.

Senator CARDIN. Well, I agree completely with what you just said. I would feel a little more comfortable, though, if you could outline what additional tools would be helpful, either in change of law so that some of the venue issues or limitation issues that may be hindering your ability to pursue these cases are more effectively handled by our laws; and, second, whether you have the resources necessary, considering the complexity of these types of cases, they multi-state jurisdictional; and, last, whether we need stronger at-

tention in the international diplomatic areas to pursue these types of cases.

It has been brought to my attention that in some of the trafficking cases it has not gotten the type of attention in the country in which the traffickers originate, and that whether we need to put more international diplomacy to these issues.

Ms. MANDELKER. Senator, as to your latter question, as I am sure you are aware, the State Department is, in fact, very engaged internationally in terms of bringing attention to this important issue. And we also have, of course, within the Criminal Division individuals who participate in training overseas. We work cases with our partners, law enforcement partners overseas. I think, frankly, that Congress is a very important and strong partner in this effort because we must all collectively send the message that this activity will not be tolerated. The more cases that we bring, frankly, the more publicity that we bring to light on these types of cases, the more that individuals understand that there is accountability if they do commit these terrible crimes. I think it is very important that we collectively send that public message.

With respect to resources, of course, we are very grateful for the resources that the Congress has given to the Department of Justice, and we are committed to using those resources effectively and to dedicating the appropriate resources to these sorts of cases.

With respect to legislation, I sitting here today cannot give you a formal position on any particular piece of legislation, but we are always happy to work with the Congress on looking at legislation and looking at changes to the law if necessary.

Senator CARDIN. And please do not misconstrue my questions. I am proud of the leadership that the United States has played on fighting trafficking. I think we have raised this issue at the highest levels internationally, have placed high priority on it, have made significant progress internationally in dealing with it, have changed the attitudes within our military facilities where they are located in the host countries to deal with the issues. So I think we have done a lot to bring this issue forward. But I think more can be done, and I would very much encourage the type of activity within your agency to give us help as to where are the problems you are confronting and what we can do to try to deal with that. This is a continuing effort, and we need to continuously raise these issues.

There are a lot of countries that we have very friendly relations with that are not doing what they need to do in this area.

Thank you, Mr. Chairman.

Senator DURBIN. Thank you very much, Senator Cardin.

Ms. Forman, I understand that ICE is developing a Human Rights Tracking Center to collect information on human rights abusers and war criminals. What does the Department of Homeland Security currently do to ensure that human rights violators do not enter the country in the first place?

Ms. FORMAN. We work collectively with our partners. The center that we are proposing to create—we have not created it yet—would be a one-stop shopping for human rights violators, a repository. So the subject matter experts, the attorneys, the historians, the investigators, and all other relevant parties would be in one spot, and

it would be a repository for a list that have already been identified all over the world of human rights violators so we can address it at the front end before these individuals working with our foreign counterparts, with the State Department, with our partners at DHS and DOJ to ensure these individuals do not get visas to come into this country.

Senator DURBIN. Ms. Mandelker, you testified that extensive efforts have been made to identify and exclude participants in genocide and other heinous mass atrocity crimes. You stated specifically that our Government has successfully stopped more than 180 suspected World War II criminals at the border. How many modern-day war criminals has our Government stopped at the border?

Ms. MANDELKER. Chairman Durbin, I would have to defer to CBP for that answer. We are—

Senator DURBIN. CBP would be?

Ms. MANDELKER. Customs and Border Protection, since they are responsible for the entrants at ports of entry. However, I do know that we are continually working to try to identify more individuals who can be entered into the border control system to ensure that such individuals are not permitted to enter the country. We certainly can and must do more, and we are thinking through carefully how we can enhance the number of individuals who are indeed entered into those systems.

Senator DURBIN. Ms. Forman, can you answer that question?

Ms. FORMAN. No. I would have to get back to you.

Senator DURBIN. OK. The premise of this hearing is that, unfortunately, as Senator Cardin also noted, the United States has become a safe haven for notorious war criminals. That is certainly something that is a matter of great concern to all of us.

Do you share my concern, after listening to your responses, of how limited our commitment is to changing this? When we talk about a handful of lawyers at the Department of Justice, or no more than 100 people in your Department of Homeland Security involved in this, I am afraid it leads one to believe that this is not a serious commitment. And when we hear of the obvious gross injustice of two Salvadorean generals who have been found liable in a civil court for torture, living safely in Miami without prosecution, it has to lead me to the conclusion that we are not serious about this. If we were serious, I think our laws would be changing. I think there would be more people focused on it.

Would you like to tell me I am wrong?

Ms. MANDELKER. Well, Mr. Chairman, I share your strong and deep commitment to this issue, and what I can tell you is that within my capability and within my resources, we are dedicating a number of individuals in this fight. There is no question that it is unacceptable for this country to be a safe haven for human rights violators, and so we are, again, constantly thinking strategically how we can maximize our resources.

So, for example, while I have a limited number of attorneys in the two sections that I noted—and, of course, we do have three other sections who work principally overseas who are also committed to this issue and are doing a lot of very good work—we need to export our expertise to the U.S. Attorney's Offices. And so we are thinking about—or we are putting together a training course

so that we can enlist additional U.S. Attorneys, prosecutors, to this fight. We do have a number of Assistant U.S. Attorneys who have been very helpful in this endeavor, but we need to maximize—there is no question that we need to maximize our resources. There is no question that we need to do more training. And I am particularly pleased, frankly, Mr. Chairman, to be at the Department of Justice at this time when there is a Subcommittee that is so dedicated to this issue and where we have the capability to expand our capabilities.

But I share your concern, Mr. Chairman.

Senator DURBIN. Ms. Forman?

Ms. FORMAN. What I can comment is when ICE has these types of investigations—I mentioned the 5,600 special agents—we will dedicate all the necessary resources to go after these individuals, both domestic and foreign, and what it takes to track these individuals down, certainly recognizing that we have human trafficking responsibilities and so forth. But there are cases we will dedicate the resources necessary to go after these individuals.

Senator DURBIN. Thank you, and—

Senator CARDIN. Could I ask a question, if you would yield?

Senator DURBIN. Certainly.

Senator CARDIN. Thank you. Because I understand your efforts to deport individuals who come in under fraudulent circumstances, and the laws are pretty clear about that. If you have the resources, you can be successful in dealing with that, including those who have been naturalized as far as their citizenship is concerned.

But Senator Durbin asked a question a little bit earlier that had me concerned, and that is, if you have a non-American who is in this country who has committed or is alleged to have committed a human rights violation that would be a violation of our laws, but not involving an American, that we would be limited as to what we could do to hold that person accountable under current law. And there are bills here that strongly support holding accountable individuals who have violated international human rights standards, war crimes, genocide, those types of activities. I am concerned that just by allowing that person to leave our country, that person may escape accountability.

Now, I am sensitive to the issues that we have with other countries as to their sovereignty and the right to prosecute in their countries and our relationships with other countries and how Americans will be treated in other countries. But it seems to me that when we are dealing with serious human rights violations, we need to strengthen our ability to hold criminally accountable those who have committed war crimes, particularly where the native country is not prepared to do that.

So I just really want to underscore the point that Senator Durbin has said. 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 we will prevent a safe haven for those who have committed human rights violations, but will hold accountable individuals who are under our control, they are in our country, who have violated international norms, who have committed war crimes, genocide and other types of human rights viola-

tions that are—not only do we want them out of our country, we want them held accountable. We want these people held accountable.

Thank you, Mr. Chairman, for that, but I wanted to make sure that point is clear in our record, that it is not just deporting these individuals or taking away their naturalized citizenship. It is holding them accountable for the violations of human rights.

Senator DURBIN. Senator Cardin, thank you, and thanks to Ms. Forman and Ms. Mandelker for being our first panel at this important hearing. We are going to continue to work with you. I hope that you will get back to us. We will send you some written questions, and I hope you will get back to us on some of the questions that you needed additional time to prepare answers.

Thank you very much.

Ms. FORMAN. Thank you.

Ms. MANDELKER. Thank you.

Senator DURBIN. I now invite our second panel to the table. While they are taking their seats, I am going to give an introduction for each of them in the interest of time. Included in this panel is Ambassador David Scheffer, the Mayer Brown/Robert A. Helman Professor of Law, and Director of the Center for International Human Rights at Northwestern University School of Law. From 1997 to 2001, Ambassador Scheffer was the U.S. Ambassador at Large for War Crimes Issues. In this capacity, he negotiated and coordinated U.S. support for the establishment and operation of international and hybrid criminal tribunals and U.S. responses to atrocities throughout the world. He also headed the Atrocities Prevention Inter-Agency Working Group. Ambassador Scheffer recently held visiting professorships at Northwestern Law, the highly respected Georgetown University Law Center, and George Washington University Law School. He graduated from Harvard College, Oxford University, and the Georgetown University Law Center.

Our next witness in the panel will be Pamela Merchant. Since 2005, Ms. Merchant has been the Executive Director of the Center for Justice and Accountability, a nonprofit legal organization dedicated to ending torture and other severe human rights abuses. She spent 8 years as a Federal prosecutor with the U.S. Department of Justice. Recently, she was Special Counsel to the California Attorney General. Ms. Merchant graduated with honors from Georgetown University and Boston College School of Law. We thank her for joining us.

And our final witness is Dr. Juan Romagoza Arce, the Executive Director of La Clínica del Pueblo, a public health clinic which provides free, comprehensive health care and education services to the poor and uninsured in Washington, D.C. Dr. Romagoza was born in El Salvador and, as part of his medical training, set up medical clinics and provided health education to the underserved in the poor areas of San Salvador and neighboring communities.

In December 1980, Dr. Romagoza was detained and tortured for 22 days at the National Guard headquarters in San Salvador. His torture has permanently deprived him of his ability to perform surgery. After his release from prison, he fled El Salvador and arrived in the United States in 1983.

In 1999, Dr. Romagoza and two co-plaintiffs brought a civil suit against Generals Garcia and Vides Casanova for torture and other human rights abuses. In July 2002, a Federal jury returned a verdict against the generals, holding them responsible for the torture of Dr. Romagoza and his fellow plaintiffs.

Dr. Romagoza has received many awards, including the Community Health Leadership Award from the Robert Wood Johnson Foundation, and was named one of Washingtonian Magazine's Washingtonians of the Year in 2005 for his work with La Clínica del Pueblo.

It is an honor to have you, Doctor, as well as the other witnesses on this panel, before us today. And as I mentioned earlier, it is customary for us to administer an oath. I ask you all to please stand and raise your right hand. Do you affirm the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. SCHEFFER. I do.

Ms. MERCHANT. I do.

Dr. ROMAGOZA. I do.

Senator DURBIN. Thank you very much. The record will indicate that you answered in the affirmative.

Professor Scheffer, before you start, I read your statement, and I also read the accompanying document, over 30 pages. But it was very good, and I thank you for it. It really put a number of issues in perspective and helped me in preparing questions for the earlier witnesses. I would now like to invite you to speak for about 5 minutes. Your entire statement will be made part of the record, and then we will follow with the other two members of the panel before we ask questions.

STATEMENT OF DAVID SCHEFFER, MAYER BROWN/ROBERT A. HELMAN PROFESSOR OF LAW, NORTHWESTERN UNIVERSITY SCHOOL OF LAW, CHICAGO, ILLINOIS

Mr. SCHEFFER. Thank you. I wish to thank you, Chairman Durbin, and Senator Coburn and Senator Cardin and all the other members of this Subcommittee for this opportunity.

Senator Durbin, I am very proud to live and work in Illinois. I understand that Senator Coburn is unable to be with us today, but I want to note for the record that I take great pride in being born and raised in Norman, Oklahoma.

From 1997 to 2001, I was the Ambassador at Large for War Crimes Issues. While I served and in the years since, I always maintained that war crimes work is and must remain nonpartisan and bipartisan, and I believe this Subcommittee proves that point in spades.

After all that has been experienced since the precedents of the Nuremberg and Tokyo Military Tribunals and the scores of cases prosecuted by the international criminal tribunals during the last 15 years, one would be forgiven to assume that surely, in the United States, the law is now well established to enable U.S. courts—criminal and military—to investigate and prosecute the full range of genocide, crimes against humanity, and war crimes—what I call "atrocity crimes"—that have been codified in treaty law, prosecuted before the international criminal tribunals, and well estab-

lished as customary international law. That, however, is not the case. The fact remains that as we approach 2008, the United States remains a safe haven under too many circumstances for perpetrators of atrocity crimes.

Unfortunately, U.S. Federal criminal law has become comparatively antiquated during the last 15 years in its coverage of atrocity crimes as international criminal law has evolved significantly during that period. The prospects of U.S. courts exercising jurisdiction, whether it be subject matter, territorial, personal, passive nationality, or protective jurisdiction, over atrocity crimes under current law remain relatively poor. In contrast, the United Kingdom, Australia, Canada, Germany, New Zealand, Argentina, Spain, and South Africa have leapt ahead of the United States in terms of their national courts being able to investigate and prosecute the full range of atrocity crimes. France, Japan, Mexico, Switzerland, Finland, Sweden, Brazil, and Norway are in the process of legislating incorporation of atrocity crimes into their respective criminal codes.

Under too many scenarios, the United States remains an available safe haven for war criminals and atrocity lords who need not fear prosecution before U.S. courts for the commission of atrocity crimes if they reach U.S. territory, either legally or illegally. The notable exception has been the sole case, the Emmanuel "Chuckie" Taylor case, prosecuted under the criminal torture statute.

But there has been some progress. I applaud the bipartisan work of this Subcommittee during 2007 with the Genocide Accountability Act, the Child Soldiers Accountability Act, and the Trafficking in Persons Accountability Act. This set of legislation, if enacted into law, would close critical gaps in U.S. law regarding the current inability to prosecute such crimes under certain circumstances.

Unfortunately, this legislation composes only a fraction of atrocity crimes. Generally absent from U.S. law is the kind of jurisdictional regime that would provide the most pragmatic sphere of coverage to ensure that perpetrators of atrocity crimes cannot find safe haven in the United States. Current U.S. law in atrocity crimes typically exhibits a narrow range of jurisdiction covering actions of U.S. citizens, although not necessarily if such action takes place abroad, or crimes which occur on U.S. territory. I will summarize my recommendations as follows:

The United States must eliminate any possibility that it would remain a safe haven for war criminals and atrocity lords who reach American shores and seek to avoid accountability for atrocity crimes.

Two, enact the Genocide Accountability and Child Soldiers and Trafficking in Persons Accountability Acts of 2007 so that key gaps in Federal law are filled.

Three, eliminate from U.S. law most or all statutes of limitations for atrocity crimes.

Four, 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.

Finally, recognize that until such amendments to Title 18 of the U.S. Code are enacted, the United States has an antiquated criminal code. Further recognize that the United States stands at a comparative disadvantage with many of its major allies which have modernized their national criminal codes in recent years with incorporation of the atrocity crimes in part so as to shield their nationals from investigation and prosecution by the International Criminal Court by demonstrating national ability to prosecute such crimes and, thus, invoke the court's principle of complementarity.

Paradoxically, even as a non-party to the Rome Statute of the International Criminal Court, the United States today essentially stands more exposed to its jurisdiction than do American allies which have modernized their criminal codes. Such modernizing exercises also reflect their pragmatic choice to minimize the exposure of the nationals of such nations to the scrutiny of international criminal tribunals because national courts will be able to carry that responsibility.

My final comment: 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. The United States would no longer be a safe haven in reality or as a potential destination for untold numbers of perpetrators of atrocity crimes. Amending and thus modernizing Title 18 in the manner proposed in this testimony would signal the end to exceptionalism in atrocity crimes and place the United States on an equal footing with many of its allies which already have recast their criminal law to reflect the reality of international criminal and humanitarian law in our time.

Thank you, and I would be happy to take any questions.

[The prepared statement of Mr. Scheffer appears as a submission for the record.]

Senator DURBIN. Thank you, Professor, and we will have questions when we have completed this panel.

Ms. Merchant, as I mentioned earlier, is with the Center for Justice and Accountability, and I note in her background that she is the winner of the third Thomas J. Dodd Prize in International Justice and Human Rights. I am sure that Chris Dodd, who is so proud of his father's service to our country, and recently published a book relative to correspondence that his father sent back from Nuremberg, will be glad to know that you are here, and I will tell him that. So please proceed with your statement.

STATEMENT OF PAMELA MERCHANT, EXECUTIVE DIRECTOR, CENTER FOR JUSTICE AND ACCOUNTABILITY, SAN FRANCISCO, CALIFORNIA

Ms. MERCHANT. Thank you very much. Chairman Durbin, Senator Cardin, thank you so much for inviting the Center for Justice and Accountability and our client, Dr. Juan Romagoza Arce, to testify before this historic Subcommittee on Human Rights and the Law. It is truly an honor to be here today, and thank you so much for your leadership on this very, very important issue.

The Center for Justice and Accountability is a nonprofit legal organization dedicated to ending torture and seeking justice. In the past 10 years, we have brought cases in the United States against

human rights abuses from Bosnia, Chile, China, El Salvador, Haiti, Honduras, Indonesia, Peru, and Somalia. Therefore, we have a very unique perspective on this issue and ability to offer insights here today.

We were founded by a torture treatment therapist who had a client who had been in a Bosnian detention camp and suffered extraordinary re-traumatization when he ran into his torturer in San Francisco. So the basis of our work is to provide an access for survivors to be able to confront their abusers and hold them accountable in court.

As the Chairman has noted, the United States is a country that, while we have been particularly welcoming to survivors of torture, we also have become a haven for human rights abusers. It is estimated that over 400,000 survivors of politically motivated torture currently reside in the United States and that roughly 1,000 human rights abusers are here as well. And these abusers often live in the exact same community as their victims, which causes extreme anxiety and undermines justice and accountability movements in their home country.

I would like to briefly address three of the issues that I raised in my written testimony: One is the need for more criminal prosecution; two is the importance of command responsibility theory of liability in criminal prosecutions and removal proceedings; and then some suggested legislative reforms.

The United States should make the criminal prosecution of human rights abusers, either in the home country of the human rights violator or in the United States, a top priority. Today, as we have heard, the vast majority of human rights enforcement efforts in this country are removals and related prosecutions for lying on immigration forms.

Criminal prosecutions are the most important form of accountability for victims of human rights abusers. The strongest message that the United States can send to human rights abusers around the world is that we will criminally prosecute them here when their home country will not. The fact that there has been only one case brought under the criminal torture statute in 13 years is troubling, and this needs to change.

The next basis for prosecution, which we support if the criminal laws are inadequate, is for lying on immigration forms. That should be a second step.

Finally, if there are inadequate grounds for prosecution, then deportation should be considered, but only in the context of the broader human rights agenda. A threshold consideration always should be whether the reintroduction of the human rights abuser to his or her home country will result in further violence or further destabilize that country. For example, we recently opposed efforts to send a death squad leader back to Haiti because we felt that he would further destabilize the country and because they do not have a sufficient functioning judiciary in place to prosecute human rights abusers.

The next issue is command responsibility. Command responsibility is a well-established theory of liability which covers military officers or civilian superiors who knew or should have known about abuses that took place under their command and failed to take

steps to stop the abuses or punish the offenders. This is a standard that has been applied in criminal cases in the United States, and it has been applied internationally and in civil cases. Real deterrence cannot be achieved unless these officials perceive that they may be held individually accountable, not just for committing the abuses themselves but for their failure to take reasonable action to stop others under their command from doing so.

To that end, all criminal and human rights law should allow for the prosecution of those with command responsibility. Legislation which strengthens the rules regarding subordinates while allowing those with command responsibility for human rights abuses to live in this country sends the wrong message about our commitment to human rights.

Further, in situations where removal or deportation is an appropriate remedy, we also should have a commitment to subject people with command responsibility to removal proceedings. We believe that the 2004 changes to the Immigration and Nationalization Act cover those who had command responsibility. Nonetheless, the Department of Homeland Security has failed to initiate removal proceedings against known human rights abusers in the United States with command responsibility. You will hear powerful testimony today from Dr. Romagoza about his torture and the fact that the two generals who were found responsible at trial and had command responsibility over those that were responsible for Dr. Romagoza's torture are still living in Florida.

We urge the Department of Homeland Security to interpret provisions of the INA that make the command responsibility for the commission of torture and extrajudicial killings a ground for removal. And if they are not able to do that, then we invite Congress to amend the INA to include clearer language on command responsibility.

Finally, to supplement what Ambassador Scheffer just said about the need for strengthening the current statutory framework, the leadership that this Committee, has shown by filing the three bills Senator Durbin mentioned is an extremely important step toward addressing this concern. I would like to add a couple other points.

There should be a criminal law on the books for the crime of extrajudicial killing. There should also be one on the books for crimes against humanity. These are well-established, international crimes that have been around since Nuremberg. And, finally, the application of all these human rights laws need to be retroactive. There should not be an ex post facto concern for torture, extrajudicial killing, genocide, and crimes against humanity. These are all crimes that have been considered crimes since Nuremberg. If the application of these laws are not retroactive, the United States will remain a safe haven for those abusers who arrived here before, at least with the torture statute, before 1994.

Thank you very much, and I am happy to answer any questions.

[The prepared statement of Ms. Merchant appears as a submission for the record.]

Senator DURBIN. We will have some questions. Thank you, Ms. Merchant.

Dr. Romagoza, thank you so much for being with us today. I read very carefully your statement and have learned a lot about your

background. You have endured things which few, if any of us, could ever endure. It is inspiring to me that, despite all of the suffering that you have been through in your life, you have dedicated your life to reducing the suffering of the poor here in our Nation's capital, and I thank you so much for being with us today.

I understand you have a translator with you, and you are now welcome to give your testimony.

STATEMENT OF JUAN ROMAGOZA ARCE, EXECUTIVE DIRECTOR, LA CLINICA DEL PUEBLO, WASHINGTON, D.C. (TRANSLATED FROM SPANISH BY SALLY HANLON)

Dr. ROMAGOZA. First of all, thank you. I want to congratulate the Chairman of the Committee, Senator Durbin, and also Senator Coburn and Senator Cardin, as well as the other members of this Subcommittee. Thank you for this opportunity to speak and especially to speak on behalf of the thousands of torture survivors who now live in this country and who cannot be with us today.

I am a surgeon, a surgeon who cannot exercise his specialty of surgery. And the tools of a surgeon are his hands. But my hands have become useless as a result of the tortures.

Today I will share with you my own personal story as a survivor, and I will give you my own personal perspective, give you my own point of view on being held responsible or accountability for crimes and torture.

My story begins on December 12, 1980. On that day I was carrying out my profession and doing surgery for some of the rural communities of the poor in El Salvador when troops of the National Guard opened fire on the crowd there. And they also shot me in the foot. They grazed me with their bullets as well, and they detained me. They accused me of being a "subversive leader" because of the equipment and tools that I had, medical-surgical tools. And on that day and the next 22 days after it, I underwent unspeakable tortures at the hands of members of the National Guard of El Salvador. I was tortured with electric shocks three or four times a day in my ears, my tongue, my testicles, anus, and along the edges of my wounds. And those electrical shocks ended only when I fell into unconsciousness. And they forced me to come to by kicking me and applying cigarette burns to my body. They sodomized me with foreign objects, and they also gave me additional beatings and the experience of asphyxia with a hood over my head that contained calcium oxide. And throughout that whole time, I also suffered waterboarding. They called it the "bucket of water." And I can tell you from my own personal experience that there is no room for doubt here. Yes, waterboarding is torture. And I was tortured sufficiently so that I could never return to my chosen career as a surgeon. They broke my arm with a shot in the left arm. They cut my fingers, making me lose the normal functioning and the use of those. And throughout this whole time, they never gave me any medical care for the wounds I suffered.

And finally, thanks to God and to the efforts made by my family, they released me. But I was forced to flee from El Salvador. I came here to the United States where I did receive asylum, and I am now a U.S. citizen. And two of the men responsible for my tortures, General Garcia, the Minister of Defense at that time, as well as

General Carlos Eugenio Vides Casanova, he was the General Director of the National Guard, and both of them moved here to South Florida. They are permanent residents here. Now they live comfortably, legally, and openly in South Florida.

In July of the year 2002, I, together with some courageous co-plaintiffs, brought them to court, brought them to trial. That was in the U.S. Federal court through the help of the Center for Justice and Accountability. And, finally, I had the chance to come before the justice system and give my testimony against these generals and to speak to a U.S. jury about the tortures that I had endured. And the jury heard that truth, and they found the generals responsible, granting to me and my co-plaintiffs compensatory damages of $54.6 million. And I know that we will never see those $54.6 million. But that wasn't what mattered to me. What mattered to me was this opportunity, this chance to confront in a Federal tribunal these human rights violators, and the value of this case is immense to me. And this is why I want to share with you a special moment for me during this case before the generals. The fact is that I felt a great strength or power coming over me. I felt myself in the bow of a huge ship and that there were people behind me, immense numbers of people. And they were rowing behind me, bringing me closer and closer to this moment. And I did not want to look back because I felt that if I did, I would weep, because I would see again the wounded ones, the tortured, the raped, the naked, the torn, the bleeding ones, as I saw them in the prisons of the National Guard in El Salvador. But I did feel the strength that they gave me, their support, their energy.

And so to be part of this case and to have this opportunity to confront those generals for these terrible crimes provided me with the very best possible therapy that a survivor can have, that positive therapeutic value as a result of this civil remedy made available to me under the law on protection of torture victims. At the very least, they provided—they gave me my day in court, another day of life.

Having to confront my torturers in a legal tribunal was one of the most difficult and important things that I've done in my entire life, one of the moments when I was most proud. But, nevertheless, my story and my efforts for justice are not over. These generals continue to live up here in the United States. They have not had to confront the possibility of their being deported. They have not been tried in a penal court, either in the United States or in El Salvador. And until that day comes, I will not be silent.

Thank you for hearing me.

[The prepared statement of Dr. Romagoza appears as a submission for the record.]

Senator DURBIN. Dr. Romagoza, thank you so much. This Human Rights and the Law Subcommittee has had many touching stories told by witnesses, and yours has truly touched our heart. I could not help but think as you were telling your story how painful and difficult it must have been to get up this morning and dress and come to tell this story again, to remember the painful details of the torture, and to share this with so many people, not only in this room but across America. It must have been a difficult morning preparing for this journey.

I could not help but think as you testified of how this morning might have started for these two generals in Florida, in the soft breezes of South Florida, drinking coffee and reading the paper and going about their business under the protection of the United States of America. If this Judiciary Committee is about justice, that is wrong. It is wrong that you would have faced this horrible treatment by people who have been found responsible in the courts of our land and we still provide protection for the people responsible for it.

I hope we can change that. I hope this hearing is in some way the beginning of a process that will seize your courage in testifying at that trial and then testifying today and lead us to do what needs to be done to restore justice in our own country.

I would like to ask you, Doctor, if you could tell me—I read your statement about the courage it took for you and your plaintiffs to come forward. If these generals were to be deported back to El Salvador for trial, what do you think would happen? Have there been trials of those who have been responsible for similar crimes in El Salvador?

Dr. ROMAGOZA. Unfortunately, the conditions are not yet there for getting justice from these crimes that occurred over the 1980s and 1990s in El Salvador. In 1992, they declared a law of amnesty, and that was the Salvadoran Government that made that happen to avoid any trials having to do with the human rights violations of the 1980s and 1990s. And the United Nations, in its followup on the Peace Accords, recommended bringing to trial those—so that if they were to go back to El Salvador, there would be no problem, there is no case been brought yet, and it has been kind of ensured that it not be brought.

Senator DURBIN. Thank you.

Dr. ROMAGOZA. But there is an effort now and a concern for doing away with the amnesty law.

Senator DURBIN. Ms. Merchant, thank you to your center for helping Dr. Romagoza and giving him a chance to be here today. He describes in his statement one general whose office was just a few feet away from the prison cell where he was being tortured. And you raised this issue of command responsibility, which I asked about earlier and did not get a complete answer to. Is this the kind of case that you are thinking of, where the general may not have been directly involved in the torture, but may have responsibility similar to what we found at Nuremberg after the Holocaust?

Ms. MERCHANT. Yes, exactly.

Senator DURBIN. Currently, is there a provision in the law of the United States allowing the prosecution of these two generals who are responsible in a command capacity for Dr. Romagoza's torture?

Ms. MERCHANT. No. One of the questions is whether you could use the torture statute and interpret it in a broader way. The argument can be made that you could, the way that we did when I was a white-collar prosecutor, because obviously we always went up the chain of command in a company. But the Government's position so far has been that they cannot. And in a separate issue about whether or not these generals can be deported under the new section of the INA, which includes torture and extrajudicial killing as a means for a removal, our reading of that language is that it

would cover command responsibility. But our understanding is that the Government does not accept that interpretation.

Senator DURBIN. I will come back with additional questions after Senator Cardin.

Senator CARDIN. Thank you very much.

Dr. Romagoza, I also want to join with our Chairman in thanking you for being here. We hear numbers all the time about victims of torture and the numbers of people, and we sort of glaze over the numbers. But when you see the actual person, when you realize that each victim is a person who has family and is personally impacted by what has happened, it brings it home a lot clearer to us. Thank you very much for your courage to appear before our Committee.

Professor Scheffer, I want to ask you a question in regards to a role that you played in your former life in regards to the Rome Statute of the ICC, the International Criminal Court. Let me preface the question by saying that I have the honor to represent the United States in the OSCE Parliamentary Assembly as a Vice President, and I am not sure whether I am attacked more because of Guantanamo Bay or our position on the ICC. It is about equal. And I guess Guantanamo Bay has taken over the lead recently, but I think maybe in a way they are related.

I had questions, you had questions about the United States joining the ICC. But you raised those in a positive way rather than just withdrawing. We have now withdrawn, and I understand the risks involved in the ICC as it was moving forward. But it seems to me that when we are looking at what we are going to do with the detainees in Guantanamo Bay, it may have been helpful if we had an ICC we could turn to, to deal with some of those international crimes against humanity.

So I just really want to get your thinking as to the credibility of the United States today in dealing with crimes against humanity in an international forum, whether we have suffered as a result of the way that Guantanamo Bay has been handled, the ICC has been handled, and other issues of late.

Mr. SCHEFFER. Thank you, Senator. I think the credibility of the United States has been degraded considerably. I have seen this folloing my Government service over the last 7 years when I go overseas. It is very, very difficult to be in discussions with foreign colleagues and not be on the complete defensive with respect to what we had thought, at least when I had the privilege of serving in Government, we were in the leadership role of, which was to ensure the proper prosecution of these crimes by building the international criminal tribunals for the former Yugoslavia, for Rwanda, for Sierra Leone. That all happened in the 1990s, the negotiations and the follow-through on those tribunals.

And with the International Criminal Court, President Clinton's expressed objective stated in 1995 was that by the end of the 20th century, there would be standing a permanent International Criminal Court. My job was to make sure, A, that it was the right kind of court and, B, do everything possible to see if the United States could be part of that court.

We had certain questions. It was a negotiation. We had certain issues that clearly were of concern to us as that court was being

structured. But by the end of the Clinton administration on December 31, 2000, we had rectified most of those issues, and we were able to sign the Rome Statute. We became a signatory to the Rome Statute. For me, that was, quite frankly, my proudest day in Government service when I was able to, under plenary power from the President, sign that statute.

Since then, of course, we had the unsigning on May 6th of 2002, and we must ask: do we want to be standing on the moral high ground on this issue? Or do we want to slip down the slopes and have to be in a position where we are constantly clawing our way back up, if possible? I think what has happened in recent years is that by not being part of that process, other nations, in fact, have been able to assume the leadership on international justice, and in addition to that, they are in the driver's seat in terms of the development of the law, which used to be our specialty. From Nuremberg onwards, we were in the driver's seat. We are not in the driver's seat anymore. Other nations have taken that position. It is simply because we are not in the room. We are not there representing our views. We are not bringing all of the skills and expertise of our Justice Department and of our Department of Defense attorneys to bear on these issues.

So I think it is a serious problem, and I would close my comment with this: The problem with Guantanamo, Senator, is that you either have officials who are cognizant of how important these particular crimes are in international society—crimes against humanity, war crimes, genocide—and they operate knowing that there is an International Criminal Court and international criminal tribunals which are litigating these issues every single day. The law is evolving within these tribunals every single day. So if you set up a Guantanamo and you put some prisoners in there, you either act with knowledge of all that is occurring in these courts as to how these crimes are to be considered, how they are to be interpreted, how individuals are to be brought to justice with respect to the infraction of these particular crimes, or you act in ignorance of them.

And what I see so often with Guantanamo and in Iraq and Afghanistan is this: It is as if we do not have a full knowledge of all of these legal developments that are taking place that would inform our decisionmaking as we go step-by-step in how we detain prisoners, how we bring them to justice, how we basically handle the threats that they pose to us.

All of that is being dealt with in international courts and in the foreign courts of other countries now. But we seem to be falling behind.

Senator CARDIN. I just might point out that the recommendations of the 9/11 Commission patterned some of your concerns by saying that we should be seeking international support for the manner in which we handle detainees and seeking international standards for that.

I think we have a real dilemma now at Guantanamo Bay. We have individuals who clearly we are holding without giving them the rights of criminal defendants. And if we had an ICC we could turn to, we might very well be able to make significant progress against terrorism as being crimes against humanity. But instead we are handling it in isolation.

Mr. SCHEFFER. If I may, Senator, it is an excellent point. In 2009, there will be a review conference of the Rome Statute of the International Criminal Court where the statute can be open for amendment. One of the crimes that we know will be on deck will be the crime of aggression, a crime that we should have incredible interest in and focus on.

When I was the Ambassador, I actually enjoyed going to all of the discussions about how to bring the crime of aggression into the statute because we had a lot of friends at the table with us about how do you properly structure the definition and the trigger for that crime. We were never isolated on that issue. But we have been absent for 7 years from those working group discussions. I fear for where they may lead without our being back at the table. We cannot be at the table unless we are a state party to the Rome Statute in 2009.

One of the other crimes that is available for consideration in 2009 and which was mandated in Rome in 1998 for consideration at the first review conference is the crime of international terrorism. Now, whether it will actually be on deck in 2009, whether all the prep work will have been done, is still very, very questionable. But the fact is the United States could actually take the lead and say we want international terrorism on deck, we want to have it properly defined, we want to be able to have a forum in which the leaders of these terrorist organizations can actually be brought to justice.

I want to share Ms. Merchant's views entirely on command responsibility, which, by the way, I did not stress in my testimony simply because it is so self-evident now in international criminal law. These tribunals actually focus on the commanders. They do not go after the foot soldiers or the machete wielders. They go after the commanders because they only have a certain range of resources, and, of course, they want to go to where the decisions are being made to actually unleash these crimes. So the defendants before the tribunals are, in fact, at the command level, and the statutes of the tribunals provide for jurisdiction over the commanders.

Senator CARDIN. It seems obvious, I think, to all of us, except for those who are charged today with prosecuting our torture statutes or enforcing our immigration laws.

Thank you, Mr. Chairman.

Senator DURBIN. Thank you very much.

Before I ask Professor Scheffer a question, I want to say to Ms. Merchant and Dr. Romagoza, I am going to send a letter to the U.S. Attorney in the Southern District of Florida and ask officially what action is going to be taken against these two generals. I would like to hear this response. If he tells me he does not have the authority, I think it is a compelling argument for us to change the law. If he has the authority and is not going to use it, it is a compelling argument to change the U.S. Attorney.

Let me ask you this, Professor Scheffer: This testimony and statement that you have given us suggests this kind of progression from Nuremberg forward, where the United States through the Geneva Conventions and other means expanded the notion of war crimes and the authority of the United States to deal with them.

Then there is a clear break on page 19 where you talk about the Military Commissions Act of 2006, and the following page, where you make reference to the President's Executive order of July 20, 2007. You characterize these as "regression."

Tell me what you mean by that. In other words, if this was a break in what had been America's historic tradition relative to human rights and war crimes, what was changed by those two things?

Mr. SCHEFFER. Let me start with the Executive order, if I may, and sort of walk back.

The Executive order, which we have only had a few months of experience with now, addressed what had happened in the Military Commissions Act with Common Article 3 of the Geneva Convention. This was a very standard formulation that had been around ever since the 1948 Geneva Conventions whereby certain fundamental violations of human rights were to be subject to the responsibility of states to ensure that these violations did not take place, whether it be an internal conflict in civil war or through various jurisprudence that has emerged. National government statements since then have confirmed that, those general principles of Common Article 3, also which were articulated and expanded in Protocol II of 1977, have become applicable to international conflicts as well. We do not have a debate anymore about whether or not Common Article 3 is really relevant to internal or international conflicts. It is generally relevant to both.

The War Crimes Act of 1996, as amended in 1997, brought Common Article 3 into enforceability in this country. We were several decades late in doing so under the Geneva Conventions, but we did do it in 1997 with the amendment to the War Crimes Act.

What happened with the Military Commissions Act, which was all in the context of Guantanamo and the individuals who are detained in Guantanamo, was to essentially say: we are going to take Common Article 3 seriously; we are going to provide very specific definitions for the infractions under Common Article 3; but in doing so, the law was amended to extract from Federal law certain violations that we had established as criminal in 1997. And the ones that were extracted are the ones that you might logically think could be charged with respect to our performance in Guantanamo. That is to me the disturbing character to what happened in the MCA.

What happened further in the President's Executive order is that he alone is empowered under the MCA to interpret Common Article 3 and the Geneva Conventions. That itself was disturbing because one would have thought, with all due respect, that the U.S. Congress under the Constitution has the power to define offenses against the Law of Nations. I would say that is a pretty powerful interpretive tool on the part of the legislative branch.

Senator DURBIN. Dr. Romagoza talked about actions taken in El Salvador to create an amnesty for those who were responsible for his torture. Was there a provision in the Military Commissions Act relative to amnesty for those who were perpetrators, potentially perpetrators of torture?

Mr. SCHEFFER. Well, there was no provision addressing the issue of amnesty, in other words, saying that if you had an amnesty you

would be free from any possible prosecution under the MCA. But let me just say on the amnesty issue, Senator, it is a very good point. It is sometimes more of a policy issue than a legal issue, this issue of amnesty. I remember from my years in the Clinton administration my colleagues at the White House sometimes would turn and say, "Look, David, we have got a dicey situation overseas. Let's not forget that amnesty may be a tool that is needed to resolve an armed conflict."

Granted, that is true. It is sometimes very necessary. But the way the law has evolved is, yes, amnesty for low-level perpetrators from international or domestic prosecution is often times a possible tool that you need on the table in order to reach a peace agreement. We have lots of debates about that in academia, but sometimes it is a tool.

The issue, though, that we have reached by the year 2007, Senator, is it is simply intolerable and unacceptable in the 21st century for there to be an amnesty at the command level for the commission of atrocity crimes.

Senator DURBIN. Is it not true that the Military Commissions Act had a retroactive definition of some forms of interrogation and detention?

Mr. SCHEFFER. Oh, yes. I am sorry. Yes.

Senator DURBIN. And would that not in practical terms affect the liability—

Mr. SCHEFFER. That is a de facto amnesty. I am sorry. I misunderstood your question. I was focusing on foreign amnesties. It is a perfect point. The MCA is de facto an amnesty bill or law for infractions of the War Crimes Act of 1996 between 1996 and 2006. It is an amnesty bill.

Senator DURBIN. It is hard to imagine that we have reached this point. The debate in this room over the appointment of the last Attorney General brought this issue front and center again, and it will continue.

I hope that this is the beginning of some conversation within the U.S. Senate about laws that we need to change so that we no longer serve as a safe haven for the abusers of Dr. Romagoza and so many others. And I hope that we will also dedicate resources far beyond what was described today to this issue. This is going to be a long, tortuous journey for the United States to reclaim its international image after what we have been through. But I trust in our values and I trust in our people, and I trust that ultimately we will, that America will come to understand that even great nations can make great mistakes. And in this case, we have made some.

By and large, I believe that the traditions of Nuremberg and Geneva are still good, solid American traditions that we value, and I hope that we can prove that with our laws and with our actions in the months and years to come.

Your testimony today was so important. Thank you, Doctor, again, and your translator. Very good. Even though I do not speak Spanish, I thought you did a great job.

Ms. HANLON. OK.

Senator DURBIN. Ms. Merchant, thank you for all that you do at the Center for Justice and Accountability. Professor Scheffer, thank you for being here today.

This Subcommittee will stand adjourned. We will leave the record open for 10 days for the submission of questions and answers by members of the panel.

[Whereupon, at 11:55 a.m., the Subcommittee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Responses of Dr. Juan Romagoza,
Executive Director, La Clínica del Pueblo to
Written Question of Senator Richard Durbin, Chairman
Senate Judiciary Subcommittee on Human Rights and the Law
Hearing on "*No Safe Haven: Accountability for Human Rights Violators in the United States*"
November 14, 2007

1. You testified that leading up to the trial in the case you brought against Generals Garcia and Vides Casanova you received threatening phone calls and letters. Based on this experience, what do you think the U.S. government should do to ensure that victims of serious human rights abuses such as yourself can testify in criminal prosecutions without fearing for their safety?

My primary recommendation is that victims have access to a designated person in law enforcement who is responsible for dealing with threats received by complainants, plaintiffs and witnesses in human rights cases.

Threats should be reported and documented immediately.

Threats should be evaluated and investigated in a timely fashion.

A decision should also be made in a timely fashion about the type of protection that should be provided to the witness and/or their family members. In addition, each witness who has received a threat should be offered emotional support.

Finally, the victim or witness should be involved in all decisions regarding their safety and the safety of their family members.

Submitted February 4, 2008.

43914.001

Question#:	1
Topic:	GAO report
Hearing:	No Safe Haven: Accountability for Human Rights Violators in the United States
Primary:	The Honorable Jon Kyl
Committee:	JUDICIARY (SENATE)

Question: In its recent report (07-915), the GAO recommended greater collaboration and information sharing between departments and agencies with responsibilities concerning human trafficking. What specific actions has the Department of Homeland Security taken to implement the GAO's recommendations to:

- Establish joint strategies with other departments or agencies to share data and information as well as to collaborate on human trafficking issues;
- Agree on roles and responsibilities regarding human trafficking data collection, investigations, and prosecutions; and
- Establish compatible policies, procedures, and other means to operate across agency or department boundaries?

If no action has been taken, what actions have been planned and what is the timetable for implementing such plans?

Answer:

U.S. Immigration and Customs Enforcement (ICE) supports common goal setting and works within an interagency strategic framework through the Senior Policy Operating Group (SPOG) that carries out the responsibilities of the President's Interagency Task Force to Monitor and Combat Trafficking. The Task Force, which is comprised of cabinet level members including DHS, was established by the Trafficking Victims Protection Act of 2000 and is primarily responsible for facilitating coordination among U.S. agencies, other countries, and domestic and foreign nongovernmental organizations (NGOs), and for measuring and evaluating the progress of U.S. and international counter-trafficking in persons efforts. Implemented in 2006, the ICE Trafficking in Persons Strategy (ICE TIPS) targets criminal organizations and individuals engaged in human trafficking worldwide. ICE TIPS focuses on partnerships and collaboration with other DHS agencies, foreign governments, NGOs, the Department of Justice Civil Rights Division and federal, state and local law enforcement.

Currently, the ICE Deputy Assistant Secretary for Operations is the DHS representative chair to the SPOG. The SPOG has been responsible for a number of interagency policy developments, such as the coordination of U.S. agency strategic plans to address trafficking in persons and the development of an interagency grant policy statement to help implement the President's National Security Presidential Directive on Trafficking in Persons.

43914.002

Question#:	1
Topic:	GAO report
Hearing:	No Safe Haven: Accountability for Human Rights Violators in the United States
Primary:	The Honorable Jon Kyl
Committee:	JUDICIARY (SENATE)

The anti-trafficking efforts overseen by the SPOG directly relate to the investigation and prosecution of individuals and criminal organizations engaged in human trafficking in the United States and abroad. Under the purview of the SPOG, ICE is a major stakeholder in the Global Trafficking in Persons (G-TIP) Initiative. ICE will continue to support interagency coordination toward common goals and strategies, such as through the SPOG and G-TIP, as long as the goals contain several objectives that specifically address the unique agency capabilities in combating human trafficking.

Additionally, ICE holds the permanent directorship of the Human Smuggling and Trafficking Center (HSTC). The HSTC provides a mechanism to bring together federal agency representatives from the policy, law enforcement, intelligence and diplomatic areas to work together on a full time basis to achieve increased effectiveness in combating human smuggling and trafficking.

43914.003

Question#:	2
Topic:	command responsibility
Hearing:	No Safe Haven: Accountability for Human Rights Violators in the United States
Primary:	The Honorable Jon Kyl
Committee:	JUDICIARY (SENATE)

Question: Does DHS interpret section 212(a)(3)(E)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(3)(E)(iii), to include aliens who had "command responsibility" for the torture or extrajudicial killing of others? If not, why not?

Answer:

There is no express mention of command responsibility in the Immigration and Nationality Act (INA). However, section 212(a)(3)(E)(iii) of the INA, 8 U.S.C. § 1182(a)(3)(E)(iii), provides that an alien is inadmissible if, outside of the United States, that alien committed, ordered, incited, assisted or otherwise participated in the commission of torture or, under color of law, an act of extrajudicial killing. Commanders could thus fall under this rubric if the facts support such a finding. *See also* INA § 237(a)(4)(D), 8 U.S.C. § 1227(a)(4)(D) (providing for deportability for aliens described in 8 U.S.C. § 1182(a)(3)(E)(i)-(iii)).

43914.004

Question#:	3
Topic:	follow up
Hearing:	No Safe Haven: Accountability for Human Rights Violators in the United States
Primary:	The Honorable Richard J. Durbin
Committee:	JUDICIARY (SENATE)

Question: When I asked you whether DHS has ever sought to remove someone from the United States on the basis of his or her command responsibility for serious human rights abuses such as torture or extrajudicial killing, you responded that you were not aware whether there had ever been such a case. Please provide a response to this question.

Answer:

There is no express mention of command responsibility in the Immigration and Nationality Act (INA). However, section 237(a)(4)(D) of the INA, 8 U.S.C. § 1227(a)(4)(D), provides that an alien is deportable if, outside of the United States, that alien committed, ordered, incited, assisted or otherwise participated in the commission of torture or, under color of law, an act of extrajudicial killing. Commanders could thus fall under this rubric if the facts support such a finding. DHS has been reviewing its cases since Congress amended the INA to add these removability grounds, but to date, has not removed anyone on this basis.

43914.005

Question#:	4
Topic:	interagency coordination
Hearing:	No Safe Haven: Accountability for Human Rights Violators in the United States
Primary:	The Honorable Richard J. Durbin
Committee:	JUDICIARY (SENATE)

Question: What is the interagency coordination process for deciding whether to prosecute a suspected human rights abuser for human rights abuses, prosecute a suspected human rights abuser for immigration offenses or to remove or extradite such an individual?

Answer:

Similar to other criminal or administrative cases, ICE investigates information related to alleged human rights violators in order to determine if there is sufficient evidence to support criminal prosecution and/or removal. ICE works with U.S. Attorney's Offices and the ICE Office of Chief Counsel to decide upon a proper course. For criminal laws involving serious human rights violations such as genocide or torture, the Department of Justice's Domestic Security Section (DSS) must approve the decision to prosecute. For removal hearings involving the administrative charges of extrajudicial killings, torture or genocide, the ICE Human Rights Law Division (HRLD) must approve the charges to proceed administratively. Extradition matters are coordinated through the Department of Justice Criminal Division's Office of International Affairs.

43914.006

Question#:	5
Topic:	regions
Hearing:	No Safe Haven: Accountability for Human Rights Violators in the United States
Primary:	The Honorable Richard J. Durbin
Committee:	JUDICIARY (SENATE)

Question: You testified that ICE's human rights cases are predominantly focused on Central and South America, Haiti, the Balkans and Africa. Why are ICE's cases focused on these regions?

Answer:

Past (or continuing) armed conflicts in Central and South America, Haiti, the Balkans and Africa have resulted in large numbers of refugees and asylum seekers and others who have entered the United States. Concealed among these various populations are individuals who have engaged in acts of persecution or other human rights abuses. Under the Immigration and Nationality Act, anyone who has ordered, incited, assisted or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group or political opinion is statutorily barred from receiving asylum or refugee status in the United States. The Immigration and Nationality Act further provides that certain individuals who have participated in Nazi persecution, genocide or the commission of any act of torture or extrajudicial killing are inadmissible to the United States, as are foreign government officials who have engaged in severe violations of religious freedom. Many of these persons are also subject to criminal charges. While ICE investigates human rights related cases from over 85 different countries, a large part of our caseload corresponds to the larger non-immigrant, immigrant, refugee and asylum populations who presently reside in the United States and are from the aforementioned regions.

43914.007

Question#:	6
Topic:	human rights
Hearing:	No Safe Haven: Accountability for Human Rights Violators in the United States
Primary:	The Honorable Richard J. Durbin
Committee:	JUDICIARY (SENATE)

Question: What does DHS currently do to prevent human rights violators from entering the U.S.?

Answer:

ICE has the ability to enter individual suspected human rights violator information into the Treasury Enforcement Communication System lookout system which interfaces with the Department of State (DOS) CLASS database. This information can be visible to overseas DOS Consular Affairs officials who are responsible for visa issuance. Additionally, this information can be visible to U.S. Citizenship and Immigration Services adjudicators, and U.S. Customs and Border Protection inspectors to aid in determining the viability of immigration benefits and the admission of suspects as they are confronted in the United States.

Question:

Upon what data sources does DHS rely to identify suspected human rights violators?

Answer:

ICE's information on known or suspected foreign human rights abusers comes from our coordination and cooperation with other nations' law enforcement agencies who investigate these issues within their own jurisdictions. ICE also receives information from our relationships with international or regional tribunals and judicial bodies that investigate these crimes.

ICE also develops information on suspected human rights violators based on our own case-related research activities and receipt of information or tips from a number of non-governmental sources, open source media reporting, and even the public-at-large.

43914.008

Question#:	6
Topic:	human rights
Hearing:	No Safe Haven: Accountability for Human Rights Violators in the United States
Primary:	The Honorable Richard J. Durbin
Committee:	JUDICIARY (SENATE)

Question:

What steps does DHS take to ensure such data is reliable and to avoid unfairly denying entry to innocent individuals?

Answer:

In many cases, information available from outside the United States comes in the form of data obtained through links to Europol, Interpol or other regional organizations that deal with international law enforcement cooperation. In these instances, the U.S. Government has little control over the veracity or completeness of this information beyond the requirements of those organizations.

ICE recognizes the potential for inadvertent or even deliberately false records to be generated which could prevent innocent individuals from entering the U.S. in a number of circumstances. The fact that a record is created on a potential human rights abuser does not result in an automatic refusal of admission. However, it does initiate an interagency process that ensures that information is properly vetted to determine if valid grounds to deny entry actually exist. In the case of visa applicants, these interagency vetting procedures are codified in the Department of State's Foreign Affairs Manual. In the case of individuals who do not require a visa, U.S. Customs and Border Protection coordinates with the originator of the record, or with the ICE Headquarters component, Human Rights Violators/Public Safety Unit to determine if credible grounds exist to deny admission.

43914.009

Question#:	7
Topic:	tracking center
Hearing:	No Safe Haven: Accountability for Human Rights Violators in the United States
Primary:	The Honorable Richard J. Durbin
Committee:	JUDICIARY (SENATE)

Question: When will the Human Rights Tracking Center be operational?

Answer:

ICE is attempting to establish a pilot Human Rights Violators Center (HRVC) with existing funding and positions. If successful, the primary focus of the HRVC would be to proactively identify and bar from entry individuals or organizations that have assisted in, ordered, or committed offenses such as genocide, war crimes, torture, extrajudicial killings, suppression of religious freedom, and persecution. The HRVC would work with other U.S. agencies, foreign governments, and nongovernmental organizations to collect information about past and current conflicts where human rights abuses have occurred in order to identify perpetrators before they enter the United States or obtain an immigration benefit.

Question:

How will the Tracking Center improve DHS's capacity to prevent human rights violators from entering the U.S.?

Answer:

In an effort to keep with ICE's core objectives to protect the United States and uphold public safety, the mission of the HRVC will be to deter or prevent the entry of human rights violators into the U.S., and to take enforcement actions against those who have engaged in criminal activity by violating the human rights of others.

1) The first mission is deterrence oriented by preventing suspected war criminals and human rights violators from entering or reentering the United States.

2) The second mission is enforcement oriented by identifying, locating, prosecuting and removing foreign national human rights abusers who have gained entry to or who are already residing in the United States.

43914.010

Question#:	7
Topic:	tracking center
Hearing:	No Safe Haven: Accountability for Human Rights Violators in the United States
Primary:	The Honorable Richard J. Durbin
Committee:	JUDICIARY (SENATE)

Another goal of the HRVC is to create a focal point for the collection and processing of information on suspected offenders from law enforcement, intelligence and open source derived information.

By creating a centralized hub to create and maintain such records, the required analytical and processing abilities will be in place to ensure records are created and updated beyond the duration of any one particular investigation. This is crucial given the fact that many of these identified offenders may not attempt to enter the U.S. for years (or even decades) after the commission of the foreign offenses.

Question:

Upon what data sources will the Tracking Center rely?

Answer:

The HRVC will have a system to ensure data quality similar to how the National Counter Terrorism Center vets and nominates suspects to be placed on a watchlist. The scope and utilization of the information will be re-oriented in order to more precisely serve the objective of preventing the entry of such suspects in the first place. The Center will rely on data sources such as open source reporting, newspaper accounts, DOS reports, and intelligence cable traffic. In the first phase, information that is available via our unclassified data holdings will be processed for the creation of records. In our second phase, protocols for the sanitization and use of classified information will be undertaken.

Representatives from appropriate USG agencies (CIA, DOS, DOJ) and DHS components (USCBP, USCIS) would be invited to participate in the HRVC.

Question:

What measures will DHS take to ensure the reliability of this data and to protect innocent people from being denied entry?

Answer:

Through the creation of a central focal point for collecting, processing and analyzing human rights related offender information, a "knowledge center" on these issues will be created and fostered. This expertise will enhance ICE's ability to vet information and

43914.011

Question#:	7
Topic:	tracking center
Hearing:	No Safe Haven: Accountability for Human Rights Violators in the United States
Primary:	The Honorable Richard J. Durbin
Committee:	JUDICIARY (SENATE)

records to reduce the potential that inaccurate or malicious information will impact innocent individuals who wish to enter the U.S.

Question#:	8
Topic:	process
Hearing:	No Safe Haven: Accountability for Human Rights Violators in the United States
Primary:	The Honorable Richard J. Durbin
Committee:	JUDICIARY (SENATE)

Question: Is the human rights situation in the home country of the suspected human rights abuser taken into account in the process of deciding whether to prosecute or remove a suspected human rights abuser?

Answer:

ICE seeks to prosecute all foreign suspected human rights abusers residing in the United States to the extent permissible under the law. During removal proceedings, country conditions in the designated country of removal are often raised. In accordance with its obligations under Article 3 of the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the United States will not remove an individual to a country where it is more likely than not that they will be subjected to torture. All individuals in removal proceedings have the opportunity to seek protection under regulations implementing our CAT Article 3 obligations.

Question#:	9
Topic:	steps
Hearing:	No Safe Haven: Accountability for Human Rights Violators in the United States
Primary:	The Honorable Richard J. Durbin
Committee:	JUDICIARY (SENATE)

Question: What steps does the U.S. government take to ensure that, if a suspected human rights abuser is removed to her home country, she will be prosecuted for her crimes and the prosecution will comply with internationally-recognized standards?

Answer:

DHS notifies local law enforcement authorities when it is removing a suspected human rights abuser to his/her home country and shares relevant evidence as permitted under U.S. laws and regulations, as requested by local authorities. Any monitoring and reporting of subsequent prosecutions by the home country would be under the purview of the Department of State.

43914.014

Question#:	10
Topic:	Negewo
Hearing:	No Safe Haven: Accountability for Human Rights Violators in the United States
Primary:	The Honorable Richard J. Durbin
Committee:	JUDICIARY (SENATE)

Question: Ms. Mandelker testified about the removal to Ethiopia of Kelbessa Negewo. While still in the U.S., Negewo was convicted in absentia by an Ethiopian court and sentenced to life in prison. What assurances, if any, do you have that Negewo's conviction complied with human rights standards?

Answer:

While ICE does receive such information from the Department of State or nongovernmental organizations in other human rights violator cases, it did not receive any information regarding the *in absentia* conviction in this particular case. After Negewo was returned to Ethiopia, he was entitled to a new trial. ICE worked with the Ethiopian prosecutor to provide him with relevant documents for that trial.

43914.015

Question#:	11
Topic:	Boskic
Hearing:	No Safe Haven: Accountability for Human Rights Violators in the United States
Primary:	The Honorable Richard J. Durbin
Committee:	JUDICIARY (SENATE)

Question: You testified that you anticipated Marko Boskic will face charges for the atrocities he committed when he returns to Bosnia. What is the basis for this statement? What type of commitment has the U.S. government obtained that Boskic will in fact be held accountable for his alleged role in the Srebrenica massacre?

Answer:

Ongoing contacts with the Office of the Prosecutor for the War Crimes Chamber of the Bosnian State Court indicate their continued interest in the eventual prosecution of Marko Boskic for war crimes related acts in Bosnia. ICE will continue to closely monitor this situation.

43914.016

Question#:	12
Topic:	human rights cases
Hearing:	No Safe Haven: Accountability for Human Rights Violators in the United States
Primary:	The Honorable Richard J. Durbin
Committee:	JUDICIARY (SENATE)

Question: What steps does the government take to protect witnesses in human rights cases?

Answer:

ICE protects all of the victims and the witnesses in all of our investigations. ICE utilizes all available means to accomplish this including exigent relocation, providing armed agent protection, and utilization of the U.S. Marshals Witness Security Program. ICE takes the preservation of human life and victim/witness well-being very seriously.

ICE has a victim assistance program with victim coordinators specially trained to deal with the unique circumstances surrounding these cases. Domestic efforts to protect witnesses are generally handled by each respective local ICE office and witness threats have been infrequent.

Generally, the greatest concern is to overseas witnesses or family members of U.S.-based witnesses; in those instances, ICE can work with its overseas attaché offices, other U.S. Government (USG) partners, and foreign governments to protect witnesses and family members from intimidation and harm. ICE has the ability to grant Significant Public Benefit Parole to bring the affected person(s) into the U.S. Obviously, ICE can afford the witnesses and victims the highest level of protect if the witnesses and victims are in the United States. ICE also utilizes third-country relocation or internal relocation options with overseas USG and non-USG partners.

43914.017

Question#:	13
Topic:	witness process
Hearing:	No Safe Haven: Accountability for Human Rights Violators in the United States
Primary:	The Honorable Richard J. Durbin
Committee:	JUDICIARY (SENATE)

Question: Under current immigration law, does the government have the ability to bring witnesses to the United States to testify?

Answer:

Yes. ICE has the ability to grant Significant Public Benefit Parole (SPBP). Additionally, as a long-term solution, ICE may pursue S-visas for witnesses and their derivative family members who assist during the course of investigations. Both S-visas and SPBP are critical tools that enhance the ability of ICE to enforce the law and protect victims and witnesses from harm. SPBP is a temporary measure used to support law enforcement efforts by providing a legal mechanism for aliens such as informants, witnesses, criminals, and defendants who are otherwise inadmissible to be present in the United States so they may assist with investigations, prosecutions, or other activities necessary to secure the borders of the United States. S-visas provide witnesses with a more permanent solution that may result in the witness obtaining lawful permanent residency in the U.S.

43914.018

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 8, 2008

The Honorable Richard J. Durbin
Chairman
Subcommittee on Human Rights and the Law
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find enclosed responses to questions arising from the November 14, 2007, appearance before the Subcommittee of Deputy Assistant Attorney General Sigal Mandelker at a hearing entitled "No Safe Haven: Accountability for Human Rights Violators in the United States." We hope that this information is helpful to the Subcommittee. Please do not hesitate to call upon us if we may be of further assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Keith B. Nelson
Principal Deputy Assistant Attorney General

cc: The Honorable Tom Coburn
Ranking Minority Member

Subcommittee on Human Rights and the Law
Committee on the Judiciary
United States Senate

Hearing Concerning
"No Safe Haven: Accountability for
Human Rights Violators in the United States"

November 14, 2007

Questions of Senator Richard Durbin

Sigal Mandelker, Deputy Assistant Attorney General, Criminal Division, Department of Justice

1. You testified that one of the main challenges in prosecuting human rights violators is that DOJ can only prosecute individuals for crimes committed in a particular time period, either because of the statute of limitations or the ability to prosecute only for crimes committed after the enactment of a law. When I asked your position on whether we should eliminate all statutes of limitations for atrocity crimes under U.S. law, you responded that you would get back to me on this question. Please respond.

It is difficult to comment in the abstract on a general category of "atrocity crimes." The offense of genocide, found at 18 U.S.C. § 1091 and recently amended by the Congress, for example, is not subject to a uniform statute of limitations. The Government may charge an offense under subsection (a)(1) (offenses involving death) at any time. For an offense under subsections (a)(2) through (a)(6), however, the Government must ordinarily prosecute the offense within five years of its commission. Given the gravity of the offenses under subsections (a)(2) through (a)(6), the Department of Justice previously recommended to the Congress that this limitation be removed.

2. You testified that DOJ is currently investigating a number of naturalized U.S. citizens for having committed genocide, torture or extrajudicial killings.

a. Please state how many such individuals DOJ is investigating and from what countries/regions they came.

The Justice Department does not generally release the number of potential cases that are presently under investigation. We can tell you that a number of individuals are being investigated who are suspected of participating in genocide, torture, or extrajudicial killings for, inter alia, denaturalization purposes. The subjects of these investigations include individuals suspected of participation in crimes perpetrated in Africa, Europe, Asia, and Latin America.

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00056 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.020

b. How many naturalized U.S. citizens have ever been investigated for committing serious human rights abuses?

Since 1979, over a thousand naturalized U.S. citizens have been investigated by Department of Justice components on suspicion of possible participation in serious human rights abuses committed abroad, a majority of those in the context of our Office of Special Investigations' (OSI) long-standing World War II program. Where we have found sufficient admissible evidence to bring denaturalization proceedings, we have done so.

c. How many naturalized U.S. citizens have ever been investigated for committing serious human rights abuses pursuant to the jurisdiction provided to OSI in the Intelligence Reform and Terrorism Prevention Act of 2004 to investigate persons who participated in genocide or, when committed under color of law of a foreign nation, torture or extrajudicial killings?

The Department, in partnership with U.S. Immigration and Customs Enforcement (ICE), has a number of ongoing investigations for both criminal and civil denaturalization for committing serious human rights abuses pursuant to the jurisdiction provided to OSI in the Intelligence Reform and Terrorism Prevention Act of 2004 to investigate naturalized U.S. citizens suspected of participating in genocide, torture, or extrajudicial killings. As noted above, the Justice Department does not generally release the number of cases that are under investigation.

d. How many individuals have ever been denaturalized for committing serious human rights abuses?

The Department is aware of approximately 85 cases in which individuals who participated in the perpetration of serious human rights abuses have been denaturalized.

e. How many naturalized U.S. citizens have ever been denaturalized pursuant to the jurisdiction provided to OSI in the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA) to denaturalize persons who participated in genocide or, when committed under color of law of a foreign nation, torture or extrajudicial killings?

The first non-WWII case litigated by OSI since IRTPA's enactment to denaturalize a naturalized United States citizen is currently at the pre-trial stage. The indictment alleges, inter alia, that the defendant concealed from U.S. immigration authorities his service in the Vojska Republike Srpske (Army of the Serb Republic), which perpetrated atrocities in Bosnia and Herzegovina.

3. Is the human rights situation in the home country of the suspected human rights abuser taken into account in the process of deciding whether to prosecute or remove a suspected human rights abuser?

The Government may consider many factors when deciding whether to prosecute or remove a person suspected of committing human rights abuses. These factors may include, inter

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00057 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.021

alia, (1) the stability of the country to which the person would be removed; (2) the extent to which the foreign government in question can effectively prosecute the underlying human rights abuses; and (3) whether there are any concerns related to our treaty obligations.

4. What steps does the U.S. government take to ensure that, if a suspected human rights abuser is removed to her home country, she will be prosecuted for her crimes and the prosecution will comply with internationally-recognized standards?

Removals of aliens are effected by ICE in the Department of Homeland Security, and contested removal cases are litigated before immigration judges and the Board of Immigration Appeals by ICE attorneys. In the World War II cases, in which OSI has borne principal responsibility for both denaturalization and removal, the Department of Justice has customarily taken the initiative to share its evidence with competent foreign authorities and has worked with the Department of State to encourage foreign governments to mount vigorous investigations and, whenever possible, to prosecute these individuals.

5. You testified about the removal to Ethiopia of Kelbessa Negewo. While still in the U.S., Negewo was convicted in absentia by an Ethiopian court and sentenced to life in prison. Negewo was accused of horrible crimes, but what assurances do you have that his conviction complied with human rights standards?

As noted above, removals of aliens are effected by ICE and contested removal cases are litigated before immigration judges and the Board of Immigration Appeals by ICE attorneys. The Negewo removal case was litigated by ICE, and that agency carried out his removal. The same question about the Negewo case has been posed by Chairman Durbin to ICE, and we understand that ICE is providing a response.

6. You testified about the challenges resulting from prosecuting human rights abusers for crimes committed in another country. One significant challenge is securing and protecting witnesses.

a. What steps does the government take to protect witnesses?

It is true that a significant challenge in the prosecution of human rights abusers for crimes committed in another country is the safety of witnesses. The challenges arise for many reasons: the very nature of the crimes, the support of a human rights abuser from third parties, and the fact that the witnesses very often remain outside the jurisdiction of the United States. In some cases, difficulties in securing live testimony of witnesses from outside the United States may effectively foreclose the Government's ability to bring a prosecution in Federal court.

Nonetheless, the Government takes steps to protect witnesses including, where possible, the same steps we would take in any criminal case where a witness's safety was of concern. In all criminal cases, those steps can include witness relocation, provision of law enforcement

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00058 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.022

protection, and requests for protective orders from courts to ensure that the identities of witnesses are not revealed to third parties.

b. Under current immigration law, does the government have the ability to bring witnesses to the United States to testify?

Yes. The Department of Homeland Security has authority to parole witnesses into the United States under the Immigration and Nationality Act.

7. What is the interagency coordination process for deciding whether to prosecute a suspected human rights abuser for human rights abuses, prosecute a suspected human rights abuser for immigration offenses or to remove or extradite such an individual?

The Department of Justice works directly with the Department of Homeland Security with regard to investigative and prosecution matters and with the Departments of Homeland Security and State on removal and extradition matters.

8. You testified that OSI and U.S. Customs and Border Protection (CBP) have succeeded in stopping over 180 suspected World War II criminals at U.S. ports of entry and preventing them from entering the country. When I asked you at the hearing how many modern-day war criminals OSI had prevented from entering the United States, you said you would have to defer to CBP on that question. What role, if any, does OSI play in collaborating with CBP to prevent modern-day suspected human rights abusers from entering the United States? Is this role different from the role OSI played in preventing suspected World War II criminals from entering the United States?

The Attorney General's 1979 Order creating OSI assigned to that office responsibility for enforcing the U.S. immigration and nationality laws against participants in World War II-era Axis-sponsored acts of persecution. Those laws included the pertinent exclusion provisions of the Immigration and Nationality Act. With the creation of the Department of Homeland Security in 2003, the Attorney General's authority to effect exclusions was transferred to the Secretary of Homeland Security. OSI nevertheless continues to provide to the Department of Homeland Security information about both World War II-era and modern-day human rights abusers that can be used to prevent their entry into the United States.

An example of OSI's collaboration with the Department of Homeland Security to prevent the entry of human rights violators is the case of Bozo Jozepovic, a naturalized Canadian citizen who was interdicted while trying to drive a truck into Washington State from British Columbia in May 2006. Jozepovic's name had come to OSI's attention a year earlier, in May 2005, in the course of an OSI investigation. Documents examined by OSI at that time included one reflecting that Jozepovic had been charged with having participated, while serving in the Bosnian Croat Military Police, in the murder of seven Muslim male civilians near the town of Kakanj on or about June 9, 1993. Six of the seven victims had been beaten to death with axes, hammers, and

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00059 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.023

other instruments. OSI provided the known details of the matter in 2005 to U.S. Immigration and Customs Enforcement (ICE), so that Jozepovic's name could be added to the border security "watchlist," in order to ensure that, as a suspected human rights violator, he would be prevented from entering the country. On May 23, 2006, OSI was contacted by a CBP official in Blaine, Washington, who advised that CBP had just detained Jozepovic, who was attempting to enter the U.S. as the operator of a commercial vehicle. OSI devised questions for CBP to pose to Jozepovic. When those questions were put to Jozepovic, he denied membership in the Bosnian Croat armed forces and also the specific allegations of participation in human rights violations. He was refused entry, and he subsequently applied for a hearing in an attempt to have the exclusion decision overturned. Jozepovic later tried to enter the U.S. at a different Washington State border crossing and was again refused. He was taken into custody on this occasion, and his case proceeded as a removal action. In the meantime, OSI investigated Jozepovic's case, as did ICE. An OSI investigative historian was subsequently asked by ICE to testify in the removal hearing (which was prosecuted by ICE attorneys), and he did so, testifying on the origins and import of the wartime documents and witness statements he had found. On December 13, 2007, Immigration Judge Edward Kandler sustained all charges for removing Bozo Jozepovic from the United States. The immigration judge found that Jozepovic committed or assisted in the murder of seven Muslim men in Poljani, Bosnia, and Herzegovina, on June 9, 1993. This is only the second case in which an immigration judge has sustained an extrajudicial killing charge under IRTPA. Jozepovic waived appeal and was removed to Canada.

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00060 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.024

Subcommittee on Human Rights and the Law
Committee on the Judiciary
United States Senate

Hearing Concerning
"No Safe Haven: Accountability for
Human Rights Violators in the United States"

November 14, 2007

Questions from Senator Jon Kyl to Sigal P. Mandelker

1. In its recent report (07-91 5), the GAO recommended greater collaboration and information sharing between departments and agencies with responsibilities concerning human trafficking. What specific actions has the Attorney General taken to implement the GAO's recommendations to: Establish joint strategies with other departments or agencies to share data and information as well as to collaborate on human trafficking issues; Agree on roles and responsibilities regarding human trafficking data collection, investigations, and prosecutions; and Establish compatible policies, procedures, and other means to operate across agency or department boundaries? If no action has been taken, what actions have been planned and what is the timetable for implementing such plans?

The Department of Justice concurs with the GAO's evaluation that human trafficking crimes present special challenges that are multi-faceted, complex, and resource intensive. The GAO correctly finds that the Justice Department and its partners work together to rescue the victims of this terrible crime and investigate and prosecute human traffickers. As GAO reports, since 2001 the Justice Department has significantly increased the number of human trafficking prosecutions and investigations. The Department has significantly increased the number of human trafficking cases it has prosecuted. Likewise the FBI and, since 2003, Department of Homeland Security (DHS) have investigated record numbers of human trafficking matters. This success has been the result of regular collaboration between the Justice Department, DHS, the Department of Labor (DOL), the 42 Human Trafficking Task Forces funded by the Justice Department's Bureau of Justice Assistance, and our other partners. GAO is also correct in finding that the Justice Department and DHS have engaged in extensive outreach, training, and technical assistance to other Federal and State law enforcement, non-governmental organizations, and foreign governments. As discussed more fully below, the Justice Department agrees with GAO that routine collaboration among the various partners is a key factor in the continued success of this program.

The GAO report states that interagency coordination on trafficking occurs primarily on a reactive, case-by-case basis and that "individual agency goals on trafficking are linked to individual agency missions, rather than to a common government-wide outcome for combating trafficking crimes." However, the Justice Department, DHS, the State Department (DOS), and the other agencies identified by GAO engage in regular strategic and proactive collaboration, in

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00061 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.025

addition to what GAO calls "case-by-case" or "reactive" collaboration. Senior Government officials regularly meet at the Senior Policy Operating Group (SPOG) to identify broad Government-wide common outcomes or "end goals." Senior Justice Department, DHS, DOS and the other law enforcement agency officials have met and developed subordinate goals. For example, the Justice Department and DHS senior officials have met and created memoranda of understanding that identify "joint strategies" and "agreed on roles." The Justice Department, working with our other partners, designed and implemented a proactive task force model that includes regular collaboration among each task force's representatives, including DOJ, FBI, ICE, DOS, DOL, IRS, State law enforcement, and non-governmental organizations, among others. Likewise, DOJ, DHS, DOS, the CIA and other agencies proactively collaborated to form the Human Smuggling and Trafficking Center, with the functions described in the GAO report.

Moreover, DOJ's specific law enforcement activities are aimed to achieve the end goals and operational results determined through our collaboration with our law enforcement partners at DHS, DOL, DOS, and elsewhere. For example, DOJ and its partners proactively established the victim-centered task force model for investigating and prosecuting human trafficking crimes. In each specific investigation and prosecution, FBI agents and DOJ attorneys implement and utilize this model, as GAO describes in its report. As GAO recognized, this system has been successful and resulted in record numbers of investigations and prosecutions.

GAO recommends that the Attorney General and the Secretary of Homeland Security, in conjunction with the Secretaries of Labor, State, and other agency heads develop and implement a "strategic framework" to coordinate U.S. efforts to investigate and prosecute human trafficking cases. We agree that continued proactive collaboration would be beneficial to further success in our efforts to investigate and prosecute human trafficking crimes. We have already taken steps to increase our collaborative efforts. That said, the unique challenges in these matters, identified by GAO in its report, counsel for flexibility in determining the methods of collaboration among our law enforcement partners.

2. What is the Attorney General's position on the removal of statutes of limitation from criminal provisions regarding atrocities and human rights violations as recommended by David Scheffer in his statement before this subcommittee?

It is difficult to comment in the abstract on a general category of "atrocity crimes." The offense of genocide, found at 18 U.S.C. § 1091 and recently amended by the Congress, for example, is not subject to a uniform statute of limitations. The Government may charge an offense under subsection (a)(1) (offenses involving death) at any time. For an offense under subsections (a)(2) through (a)(6), however, the Government must ordinarily prosecute the offense within five years of its commission. Given the gravity of the offenses under subsections (a)(2) through (a)(6), the Department previously recommended to the Congress that this limitation be removed.

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00062 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.026

3. How many aliens who are suspected of having engaged in atrocities or human rights violations have been criminally charged in the United States and what charges were brought against them? What was the outcome of these cases?

As noted above, it is difficult to comment in the abstract on a general category of "atrocity" or "human rights" offenses. To date, there have been no criminal prosecutions in Federal court for genocide. We note that, until Congress's recent passage of legislation amending the genocide statute, there were limited jurisdictional bases upon which a substantive genocide charge could have been brought. However, the Department, through the Criminal Division's Office of Special Investigations, has brought numerous civil denaturalization charges against World War II perpetrators. In addition the first prosecution for torture under 18 U.S.C. § 2340A, against Roy M. Belfast, Jr., a/k/a Chuckie Taylor, is currently pending in the Southern District of Florida. As alleged in the indictment, however, Taylor was born in the United States. Other individuals suspected of having engaged in human rights violations have been charged for other crimes, including immigration-related crimes.

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00063 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.027

Responses of Pamela Merchant, Executive Director
Center for Justice and Accountability to
Written Questions of Senator Richard Durbin, Chairman
Senate Judiciary Subcommittee on Human Rights and the Law
Hearing on "*No Safe Haven: Accountability for Human Rights Violators in the United States*"
November 14, 2007

1. What messages do you believe the United States sends perpetrators and victims of serious human rights abuses when it prosecutes or deports suspected human rights violators for immigration offenses instead of prosecuting them for the human rights abusers they committed?

When the United States "under-prosecutes" human rights abusers living in this country it sends a message of indifference to the abuses and indifference to the impunity enjoyed by human rights abusers. It also sends a mixed message about our overall commitment to human rights, the sanctity of life, and each individual's right to be free from torture and other human rights abuses.

Imagine an individual who plans and executes a complicated scheme to murder a business competitor and then goes into hiding. While in hiding, the murderer passes a bad check. Eventually, the killer is prosecuted, not for the murder, but for the misdemeanor charge of passing a bad check. When the U.S. government prosecutes human rights abusers who have committed unspeakable crimes against their own citizens for lying on their immigration forms -- it is the same as prosecuting a murderer for passing a bad check.

Under-prosecution results in impunity for perpetrators of gross human rights violations. By allowing human rights abusers to live with impunity, survivors and their communities are denied their right to truth, justice and redress. Impunity creates a culture that allows abuse to flourish; what is done without any punishment can be repeated without fear of consequences.

2. You testified that some individuals in the Liberian community in the United States who have supported the prosecution of Chuckie Taylor have received threats. What steps can the U.S. government take to ensure that victims and witnesses can assist human rights prosecutions without fearing their safety?

Federal and local law enforcement has considerable experience protecting the safety of witnesses and victims in the context of organized crime prosecutions. One suggestion is to use that expertise in the human rights context and offer access to a witness protection program and other protections that have been developed in the organized crime arena.

870 Market Street, Suite 688 San Francisco, CA 94102 tel 415 544 0444 fax 415 544 0456 info@cja.org cja.org

43914.028

If a threat has occurred, at a minimum, the victim or witness should have ready access to a designated law enforcement officer who can help them on an immediate basis.

Reported threats should be documented and investigated immediately.

Asylum and derivative petitions of family members of witnesses in the Chuckie Taylor trial should be expedited so the family members are out of harm's way prior to the public testimony.

The individual witness or survivor needs to be involved in all decisions regarding their safety and the safety of their family members.

3. In your testimony, you suggested establishing a visa option to allow victims and witnesses abroad to be able to come to the United States to testify in human rights cases. Could you please elaborate on why you think it would be important to create a visa similar to the T-Visa, which allows victims of human trafficking to stay in the United States and assist the U.S. government in the investigation and prosecution of human trafficking cases, for victims and witnesses in human rights cases?

It is important to create a human rights visa option to ensure the safety of victims, witnesses and their family members and to expedite civil and criminal human rights litigation.

With regard to safety, our clients participate in our civil cases at great personal risk to themselves, their families and their colleagues in the United States and overseas. That risk is greatly heightened in the context of criminal prosecutions where the stakes are higher. Returning these individuals to the country where the abuse has occurred can lead to further abuses and even death. Failing to provide protection to their family members may also lead to further abuse or death.

For example, we have one client who is afraid to testify without assurance that his family members who remain in Africa are safe. In another case from Central America, one of our key witnesses did not testify at trial due to death threats. In the vast majority of our cases we have clients who have remained anonymous due to very real safety concerns for themselves and their family members who remain in the country where the abuse occurred (Haiti, Honduras, El Salvador, Somalia, East Timor, China).

With regard to successful prosecutions, it is extremely difficult to prosecute or litigate a human rights case if victims or witnesses are unable to get into the country to testify. Creating a new human rights visa option will help expedite human rights litigation. In our experience, each case CJA has brought against a well known human rights abuser has been hampered by the vagaries of the current system. In one case, we have been unable to depose key witnesses from Somalia because the State Department will not grant visas to allow the witnesses to travel to the United States. In other cases, the courts have been reluctant to proceed given the logistical challenges of not being able to reliably bring

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00065 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.029

witnesses into the country for testimony. In yet another case, we had to resort to intervention by Representative Pelosi's office with the U.S. Consulate in Haiti in order to get a visa for our client so she could testify in *her own trial.* Our client honored her one-entry visa and checked in with the Consulate upon her return to Haiti.

When the Victims of Trafficking and Violence Protection Act of 2000 and the Trafficking Victims Protection Reauthorization Act of 2003 were enacted they put in place a comprehensive approach to address the problem of human trafficking through protection, prosecution and prevention. The T-Visa was created as a humanitarian tool to facilitate the protection and rehabilitation of trafficking survivors. Unfortunately, very few T-Visas are granted per year and even fewer derivative visas are granted for family members. In addition T-Visas are limited to criminal prosecutions.

Another option would be an expansion of the U-Visa to cover all human rights litigation. The U-Visa was created by the Victims of Trafficking and Violence Protection Act, of 2000. It is available to non-citizens who 1) have suffered substantial physical or mental abuse resulting from a wide range of criminal activity, including torture and trafficking, and, 2) have been helpful, or are being helpful with the criminal investigation or prosecution of the crime.[1] The U-Visa provides eligible immigrants with authorized stay in the United States and employment authorization. *See,* Immigrant Legal Resource Center, U-Visas: Immigration Relief for Victims of Certain Crimes, Frequently Asked Questions. http://www.ilrc.org/uvisa.php. Unfortunately, while the U-Visa was enacted in 2000, the Department of Homeland Security did not issue the necessary regulation to make them available until late last year (seven years after the law was passed).[2]

The U-Visa in its current form is limited for a variety of reasons including, but not limited to, the fact that it only applies to crimes that violated the laws of the United States. As Ambassador Scheffer explained in his testimony on November 14, 2007, there are significant gaps in the U.S. federal law that prevent the prosecution of a wide variety of human rights crimes. In addition, the U-Visa does not apply to those who are cooperating in civil human rights cases. As the testimony on November 14, 2007 demonstrated, civil human rights cases are often the only route available to a victim of human rights abuse.

While it is our understanding that the first U-Visa has not been issued yet, it may prove a useful tool to aid in human rights prosecutions. In order to be truly effective, U-visas for derivative family members should be made a priority and issued on a timely basis.

---

[1] There are four basic elements for a U-Visa: 1) The immigrant has suffered substantial physical or mental abuse as a result of having been a victim of certain criminal activity; 2) The immigrant possesses information concerning that criminal activity; 3) The immigrant has been helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of the criminal activity; and, 4) The criminal activity described *violated the laws of the United States or occurred in the United States or the territories and possessions of the United States.* 8 U.S.C. §1101(a)(15)(U) (emphasis added).

[2] DHS did make an interim form of relief available known as "U nonimmigrant status interim relief."

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00066 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.030

4. What factors should the U.S. government consider in determining whether to extradite or remove a human rights abuser or prosecute such human rights abusers in the United States?

As I stated in my testimony, the U.S. government should make the criminal prosecution of human rights abusers, either in the home country of the human rights violator or in the United States, a top priority. The focus of the prosecutions should be on high-level officials who were responsible for setting policy and/or overseeing large numbers of troops in their own country and have sought refuge here. As a human rights policy matter, any such prosecution should not seek the death penalty.[3]

The first priority should be to ensure that the human rights abuser is prosecuted for human rights abuses whether in the United States or their home country.

Extradition or removal should be a priority when the national courts in the country of origin and/or the country where the crimes were committed have 1) a functioning and fair judiciary; 2) has given sufficient assurance that the individual will be prosecuted; 3) the penalty will be commensurate with the crime; and 4) the safety of witnesses is assured.

If the national courts in the country of origin and/or the country where the crimes were committed are not able to make such assurances, then the U.S. should prosecute the perpetrator using available criminal laws such as the Torture Statute or the Genocide and Accountability Act.

If the available human rights laws in the U.S. and the home country are inadequate, the next step should be to evaluate whether a criminal prosecution could be brought under other U.S. laws, for instance, for false statements made on immigration applications.

In a situation involving extradition or removal, our government should take diplomatic and legal steps to ensure that the human rights abuser will (a) be fairly prosecuted or otherwise held accountable by the national courts in his/her home country, and (b) not be subjected to abusive treatment. It is also crucial to assess whether the national courts of the home country have the ability to carry out a fair trial before any removal or extradition is permitted to proceed.

Decisions regarding extradition or removal should be made in the context of the broader human rights agenda. Again, using a human rights framework, a threshold consideration should be whether the reintroduction of the human rights abuser to his or her home country will result in violence or will further destabilize the receiving country. Therefore, for example, we opposed plans to send Haitian death squad leader Emmanuel "Toto" Constant to Haiti because the judiciary there is, at this time, neither able nor

[3] Any prosecution seeking the death penalty would not be supported by the human rights community. As a policy matter, CJA may not cooperate with a criminal prosecution if prosecutors are seeking the death penalty.

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00067 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.031

willing to prosecute him and there are grave concerns that he could further destabilize the country.[4]

5. You recommended making extrajudicial killings committed anywhere in the world by U.S. nationals or aliens found in the United States a crime under U.S. law, as we have for torture. Can you provide examples of cases where this loophole in our laws may have prevented us from holding accountable suspected human rights violators?

Yes. A striking example from the testimony on November 14, 2007 is Marko Boskic, a former member of an elite unit of the Bosnian Serb Army who participated in the infamous 1995 Srebrenica Massacre where over 1000 male civilians were killed. *See*, Statement of Marcy M. Forman, Director, Office of Investigations, Department of Homeland Security, Before the U.S. Senate Committee on the Judiciary Subcommittee on Human Rights and the Law. Despite the fact that Boskic confessed to his participation in these atrocities, the only charges the U.S. government brought against Boskic was for immigration fraud for false statements he made in his immigration application.

In addition to Boskic, CJA has brought civil cases against several perpetrators of extrajudicial killing, crimes against humanity, war crimes and other abuses who do not face criminal liability under existing United States federal criminal statutes.

Alvaro Saravia is a former Captain the Salvadoran Army who was found liable for his role in the assassination of Archbishop Romero of El Salvador in 1980. *Doe v. Saravia*, 348 F. Supp. 2d 1112 (E.D. CA 2004). Saravia came to the United States in 1985 and lived and worked in Modesto, California. He fled Modesto around the time when CJA filed the case against him. He does not have any criminal charges pending against him in the U.S. and the changes against him in El Salvador were dismissed based on the country's blanket amnesty law.

Colonel Nicolas Carranza is a former Salvadoran Vice Minister of Defense who was found liable by a federal jury in Memphis, Tennessee for the extrajudicial killing of Juan Francisco Calderon and Manuel Franco. Carranza still resides in Memphis and does not have any criminal charges pending against him in the U.S. or El Salvador. *Chavez v. Carranza*, 2:03-cv-02932-JPM (W. D. TN 2005).

Armando Fernández-Larios was an officer in the Chilean Army and an operative in Pinochet's secret service. Fernández-Larios was implicated in the assassinations of Orlando Letelier and Ronnie Moffitt in Washington, D.C. in 1976 and Chilean General Carlos Prats in Buenos Aires in 1974. He is also responsible for numerous other human rights abuses in Chile. In 2003 was found liable for the extrajudicial killing of Chilean

[4] Constant is currently in prison in New York on state mortgage fraud charges. CJA and human rights activists from Haiti recently intervened to protest a DHS supported plea agreement that would have resulted in his immediate deportation to Haiti. Based, in part, on our intervention the judge threw out the plea agreement and noted that Constant's record of human rights abuses does not make him a candidate for leniency under the law.

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00068 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.032

economist Winston Cabello by a federal jury in Miami. *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005). Fernández-Larios pled guilty to his role in the killing of Letelier and Moffitt and, under the terms of the plea agreement, served a five-month prison term. He currently resides in the Miami area and has not been criminally charged for the killing of Winston Cabello or extradited to Chile and/or Argentina despite existing requests from both countries.

There are also examples of perpetrators implicated in well known massacres that have come to the U.S. and successfully evaded prosecution because no criminal statute applies to their crimes. From Haiti, several perpetrators of the Raboteau Massacre of 1994 subsequently came to the United States including Carl Dorélien (who was found liable in a civil suit for torture and extrajudicial killing and won $3.2 million in the Florida lottery while living in Miami, Florida), Jean-Claude Duperval (who worked openly for Walt Disney World Resort for three years), and Herbert Valmond (who worked as a pastor in Tampa, Florida). All three of these individuals were deported to Haiti where they continue to evade prosecution.

Two perpetrators of the Accomarca Massacre in Peru also came to live in the United States, avoiding criminal liability. Telmo Hurtado Hurtado and Juan Rivera Rondón are former Peruvian military who commanded the patrol units responsible the massacre of 69 innocent civilians in 1985. These individuals have been arrested by U.S. immigration officials and are defendants in civil lawsuits brought by CJA, but they have not been charged criminally for the murders in Accomarca.

Submitted January 21, 2008.

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00069 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.033

Responses of Pamela Merchant, Executive Director
Center for Justice and Accountability to
Written Questions of Senator Jon Kyl
Senate Judiciary Subcommittee on Human Rights and the Law
Hearing on "No Safe Haven: Accountability for
Human Rights Violators in the United States"
November 14, 2007

1. In your statement, you said that special precautions or procedures are needed in asylum proceedings to avoid triggering memories of traumatic interrogations and that better training is needed for government employees. What precautions or procedures do you feel are needed? What training do you believe is needed for investigators, asylum officers or Immigration Judges for effective, non-threatening interview techniques?

Thank you for asking this question. It is extremely important that those involved in immigration and asylum proceedings receive adequate trainings in their work with survivors of torture and other severe human rights abuses.

As an initial matter, it should be noted that while re-traumatization cannot be avoided, it can be minimized. Even in victim-oriented, supportive surroundings, the questioning of victims about their torture history frequently triggers traumatic memories and reactions. The memories can provoke or increase flashbacks, memory loss, difficulty in concentrating, and any of the other seventeen Post-Traumatic Stress Syndrome (PTSD) symptoms—and many of these can occur in the interrogation procedure. *See,* Diagnostic and Statistical Manual of Mental Disorders IV, 309.81. In addition, panic attacks can occur, and depression of sufficient strength as to cause effective withdrawal from the questioner.

The reawakened reactions of these victims are not only terrifying to them, but also interfere with asylum proceedings. At the very least, these symptoms stop or limit proceedings. At worst, the victim's refusal to recall more, perhaps accompanied by emotional withdrawal and memory loss, may be interpreted as evidence that the victim is dissembling. Survivors, therefore, may be judged "not credible" due to a normal PTSD response. For these reasons, it is also important to understand the behavioral responses of survivors within the context of torture and/or trauma.

The asylum process is an inherent threat to a survivor's sense of safety because of the chance that they will be deported. As a result, survivors often are nervous in these proceedings and may appear to act suspiciously. Finally, interviews may simulate power dynamics from abusive interrogations causing the torture dynamic to be replayed for the survivor.

870 Market Street, Suite 688 San Francisco, CA 94102 tel 415 544 0444 fax 415 544 0456 info@cja.org cja.org

43914.034

The following are some specific recommendations for the trainings of investigators, asylum officers or immigration judges:

a. Although most investigators, asylum officers, and immigration judges receive initial orientation and training, there should be ongoing training and enhancement of skills once they are placed in a work situation. Asylum proceedings are inherently stressful for all participants and the potential for burn out is high. Regular trainings will help the interviewers deal with the stress of the trauma they confront daily and will help to counteract the irritability and cynicism which often develops in stressful situations and may result in impairment of interviewing skills and judgment.

b. Trainings should be done by experienced mental health professionals with expertise in working with trauma survivors. There are now over 28 U.S.-based torture treatment centers with extensive experience treating survivors of trauma. *See*, National Consortium or Torture Treatment Programs, http://ncttp.westside.com/default.view. Most of these centers receive federal funding and are a ready source of experts in the field.

c. Investigators, asylum officers and immigration judges should be trained in interviewing styles that minimize re-traumatization. Conventional questioning techniques and strategies may directly cause affective constriction, confusion, and/or fear in the survivor being interviewed and not provide the needed clarification of facts. (e.g. the tone and demeanor of the interviewer reflecting irritation, disbelief, exasperation).

d. Investigators, asylum officers and immigration judges should be trained on how to avoid making assumptions and generalizations about different countries and nationalities. Assumptions interfere with accurate information gathering. It is important to learn how to ask a sufficient number of questions to facilitate explanations. Through this type of questioning, a survivor will be able to provide enough details about an event that may initially seem implausible to the interviewer.

e. Survivors whose torture included rape may not be able to disclose a complete and coherent narrative at the interview stage. A protocol for interviewing rape survivors should specify what needs to be known about a rape – for example, pressing for details may overwhelm the survivor and result in an overwhelming emotional response such as, but not limited to: crying; emotional numbing or shutting down; or an inability to continue.

f. Investigators, asylum officers and immigration judges exposed to victims' trauma histories may experience "secondary trauma" symptoms, similar to PTSD, from the exposure. When the interviewer has these unrecognized symptoms, they can interact with the questioned victims in such a way as to produce very inadequate asylum hearings. The training should teach interviewers how to identify and cope with secondary trauma.

Some relevant clinical articles:

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00071 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.035

Levin and Greisberg, *Vicarious Trauma in Attorneys,* 24 Pace Law Review (2003).

Fischman, *Interacting with Trauma: Clinicians' Responses to Treating Aftereffects of Political Repression,* 61 American J. Orthopsychiatry (1991).

Stark, *Posttraumatic Stress Disorder in Refugee Women: How to Address PTSD in Women Who Apply for Political Asylum Under Grounds of Gender Specific Persecution,* 11 Georgetown Immigration Law Journal, 193, 257 (1996-1997).

Parker, *Increasing Law Students' Effectiveness when representing Traumatized Clients: A Case Study,* 21 Georgetown Immigration Law Journal 163, (Winter 2007).

See also, *TORTURE Journal*, The International Rehabilitation Council for Torture Victims, http://www.irct.org/Default.aspx?ID=61.

2. You also indicate in your statement that special protocols need to be developed to handle the unique immigration problems of torture survivors, witnesses, and their family members. What specific protocols do you believe are needed?

a. Trainings. As described above, immigration officers and other government employees who work with torture survivors, witnesses and their family members should receive training to avoid re-traumatization and to help them identify the special behavioral problems of survivors.

b. Immigration applications for torture survivors, witnesses and their family members should be handled on an expedited basis. Delays on affirmative decisions are extensive and very problematic. At present, there are too many ways to delay final decisions and thus delay the torture survivor from reclaiming their dignity and moving on with their lives through education, employment, and reunification with their family.

c. Document authentication requirements should be relaxed. The existing protocols cause considerable delay in adjudication. Often, there is more time allotted to document authentication than to the substance of the asylum claim. This is both demoralizing for the survivors and ultimately impractical since it is often impossible to authenticate documents in war or repression situations. For example, in Ethiopia, deportation orders were mass-produced and not officially stamped, resulting in significant delays for those in the U.S. who cannot establish that they have an authentic deportation order. In another example, translated documents of those who have fled from one country to another often contain errors not intended or even known to the survivor. In another example, a Sudanese refugee in Chad was challenged by U.S. immigration authorities because he had some documents in Arabic and some in French with conflicting data as to gender, name, and dates.

False documentation that was obtained in order to escape violence should not be held against an asylum applicant. There is inadequate understanding of the need to take desperate measure to escape conflict situations. Survivors and their support networks

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00072 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.036

routinely have to pay bribes, purchase false documents, and hire traffickers to transport them across borders to safety.

d. Derivative applications for family members of human rights victims should be handled on an expedited basis. Family members who remain behind are often left in danger and continued risk of persecution. They should not have to wait for their spouse's asylum grant and the extended family reunification process. At present, family unification following an asylum win is a long, difficult, and expensive. For example, asylees with children are now expected to cover costs of DNA testing if they cannot produce birth certificates or family photographs. The lack of understanding about birth documentation differences from country to country, or even urban to rural is problematic. Additionally, at times of flight, few people have the wherewithal to make sure they have these documents with them.

3. Explain how you interpret section 212(a)(3)(E)(iii) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(3)(E)(iii), to include aliens who had "command responsibility" for the torture or extrajudicial killing of others.

Command responsibility is a well-established part of U.S. and international law which covers military officers or civilian superiors who knew or should have known about abuses taking place under their command and failed to take steps to stop the abuses or punish the offenders It has been applied in criminal trials in the United States as well as in civil litigation.[1]

Section 212(a)(3)(E)(iii) covers aliens who had command responsibility for the torture and extrajudicial killing of others covers commanders as a matter of statutory construction and legislative intent.

First, with regard to statutory construction, Section 212(a)(3)(E)(iii) states,

> Commission of Acts of Torture or Extrajudicial Killings: Any alien who, outside the United States, has committed, *ordered, incited,* ***assisted, or otherwise participated*** in the commission of
> (I) any act of torture as defined in section 2340 of title 18, U.S. Code; or
> (II) under color of law of any foreign nation, any extrajudicial killing as defined in section 3(a) of the Torture Victim Protection Act of 1991 (28 U.S.C. §1350 note) is inadmissible. (emphasis added).

[1] *See, e.g., Yamashita v. Styer,* 327 U.S. 13-15 (1946) (Application of command responsibility doctrine in a criminal case); *Ford v. Garcia.* 289 F.3d 1283, 1288 (11th Cir. 2002) (Civil case: The elements that must be established to find a defendant liable for command responsibility are: 1) the existence of a superior-subordinate relationship between the commander and the perpetrator of the crimes; 2) that the commander knew or should have known, owing to the circumstances at the time, that his subordinates had committed, were committing, or planned to commit acts volatile of the law of war; and, 3) that the commander failed to prevent the commission of the crimes, or failed to punish the subordinates after the commission of the crimes).

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00073 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.037

The plain language of the statute, "assisted, or otherwise participated in" covers command responsibility. If Congress intended the statute to be limited to direct conduct, it would have limited the language to the use of the word, "committed." Instead, Congress added "assisted, or otherwise participated in," which covers those with command responsibility in addition to those who "committed" the crime.

Second, the fact that the statute intended to cover commanders is also clear from the Section by Section Analysis included in the Senate Report. Section 212(a)(3)(E)(iii) was added to the Immigration and Nationality Act (INA) in 2004 when the 108th Congress enacted the Intelligence Reform and Terrorism Prevention Act (IRTPA). Section 212(a)(3)(E)(iii) expanded the U.S. Immigration and Customs Enforcement's authority to take action against human rights abusers to include those who participated in torture or extrajudicial killings. Prior to 2004, the only human rights abusers who could be denied admission to the U.S. were Nazi persecutors, perpetrators of genocide, and severe violators of religious freedom.

The relevant language codified in §212(a)(3)(E)(iii) of the INA was originally introduced in the 108th Congress as the Anti-Atrocity Alien Deportation Act of 2003 (AADA) which was ultimately incorporated into the IRTPA. *See,* Statement on Introduced Bills and Joint Resolutions, Senate, March 26, 2003, pages S4436-4439. The Section by Section Analysis of the AADA included in the Senate Report, clearly states that it was intended to reach those with command responsibility for torture and/or extrajudicial killing:

> Second, subsection (a) would add a new clause to 8 U.S.C. Sec. 1182(a)(3)(E) that would trigger operation of the inadmissibility ground if an alien has `committed, ordered, incited, assisted, or otherwise participated in' acts of torture, as defined in section 2430 of title 18, United States Code, or extrajudicial killings, as defined in section 3(a) the Torture Victim Protection Act. **The statutory language--`committed, ordered, incited, assisted, or otherwise participated in'--is intended to reach the behavior of persons directly or personally associated with the covered acts, including those with command responsibility**. Command responsibility holds a commander responsible for unlawful acts when (1) the forces who committed the abuses were subordinates of the commander (i.e., the forces were under his control either as a matter of law or as a matter of fact); (2) the commander knew, or, in light of the circumstances at the time, should have known, that subordinates had committed, were committing, or were about to commit unlawful acts; and (3) the commander failed to prove that he had taken the necessary and reasonable measures to (a) prevent or stop subordinates from committing such acts, or (b) investigate the acts committed by subordinates in a genuine effort to punish the perpetrators. Attempts and conspiracies to commit these crimes are encompassed in the 'otherwise participated in' language. This language addresses an appropriate range of levels of complicity for which aliens should be held accountable, and has been the subject of extensive judicial interpretation and construction. See *Fedorenko* v. *United States,* 449 U.S. 490, 514 (1981); *Kalejs* v. *INS,* 10 F.3d 441, 444 (7th Cir. 1993); *U.S.* v. *Schmidt,* 923 F.2d 1253, 1257-59 (7th Cir. 1991); *Kulle* v. *INS,* 825 F.2d 1188, 1192 (7th Cir. 1987).

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00074 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.038

See, Senate Report 108-209, Anti-Atrocity Alien Deportation Act of 2003, http://thomas.loc.gov/cgi-bin/cpquery/?&dbname=cp108&sid=cp108gTvjf&refer-&r_n=sr209.108&item=sel=TOC_26015& (emphasis added).

We urge the U.S. Department of Homeland Security and the U.S. Department of Justice to interpret provisions of the INA that make commission of torture and extrajudicial killings a ground for removal as including command responsibility. If they refuse to adopt this interpretation, we invite Congress to amend the INA to include clearer language on command responsibility.

Submitted January 21, 2008.

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00075 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.039

Answers to Written Questions of Senator Richard Durbin
Chairman, Subcommittee on Human Rights and the Law
Hearing on "No Safe Haven: Accountability for
Human Rights Violators in the United States"
November 14, 2007

David Scheffer, Mayer Brown/Robert A. Helman Professor of Law, Northwestern University School of Law

1. *Please explain why you believe most or all of the statutes of limitations for atrocity crimes under U.S. law should be eliminated.*

Answer: First, Article 29 of the Rome Statute of the International Criminal Court requires that, "The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations." Because the United States, even as a non-party State to the Rome Statute, realizes the full protection (and benefit) of the complementarity principle under that treaty, then U.S. law should not extinguish the power of the courts to adjudicate atrocity crimes because of a legal obligation to apply a statute of limitations to offenses which qualify as atrocity crimes. Imagine the difficulty U.S. authorities would face if a 5-year federal statute of limitations runs its term pertaining to a particular atrocity crime allegedly committed by a U.S. national who remains exposed to the jurisdiction of the International Criminal Court (because the atrocity crime was committed on the territory of a State Party to the Rome Statute) and, in responding to requests and diplomatic pressures from the ICC and other governments, the State Department must confirm that U.S. courts no longer have the power to investigate and, if merited, prosecute the alleged perpetrator. That admission would render the United States "unable" to prosecute (even if it were willing to do so but for the statute of limitations) and thus open up the possibility of controversial efforts by the ICC to gain custody of the alleged perpetrator, particularly if he or she travels abroad. I see no reason to invite that disarming of American options.

Second, as a matter of sound policy the U.S. Government should retain throughout the lifetime of any alleged perpetrator of atrocity crimes the power to investigate and, if merited, prosecute such individual for the heinous acts that constitute atrocity crimes. Anything less would likely lead to extreme embarrassment for the United States and a perception that we are mocking the rule of law. Such a situation (of statutes of limitations applying to, and ultimately blocking prosecution of, atrocity crimes) would sustain the United States as a safe haven for war criminals and atrocity lords—precisely what the Subcommittee has been seeking to shut down with the Genocide Accountability Act of 2007 and the pending legislation of the Child Soldiers Accountability Act and the Trafficking in Persons Accountability Act. How does one explain to the victims' families that if the alien perpetrator can reach American territory and avoid indictment for the duration of the relevant U.S. statute of limitations, he or she may succeed in achieving permanent sanctuary in the United States? Even if an international criminal tribunal still would pursue such an individual for commission of an atrocity crime in the past, the United States would

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00076 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.040

thwart any such prosecution by having closed the door to federal prosecution even though U.S. law might also recognize the criminality of the heinous act (but only within the time frame afforded by the relevant statute of limitations). Atrocity lords and war criminals often have support networks, the capacity and will to intimidate potential witnesses into silence, and political advantages (such as holding onto office for years following commission of atrocity crimes) that can stymie investigations and the indictments of national prosecutors and thus realize the maximum benefit of statutes of limitations.

Third, there remains considerable variance among national criminal codes on the applicability of statutes of limitations for common offenses that may rise to the gravity of atrocity crimes, so it may be premature to conclude that there is a customary international rule prohibiting statutes of limitations for atrocity crimes. [*See* Antonio Cassese, *International Criminal Law* 316-319 (2003).] It is noteworthy that Article 29 of the Rome Statute of the ICC confirms the view of at least the 105 States Parties as of November 2007 that there should be no such statute of limitations for international prosecution of atrocity crimes. Further, many States Parties have eliminated statutes of limitations for atrocity crimes in their implementing legislation for the Rome Statute. There are 45 States Parties (not including the United States) to the United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (26 November 1968), which entered into force on 11 November 1970, and which was favorably noted during the negotiations leading to Article 29 of the Rome Statute of the ICC. [*See* M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text,* v. 2, 221 (2005).] The European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes (25 January 1974), though negotiated and finalized by European Governments, has not entered into force.

Fourth, while the case can be made for statutes of limitation for lesser common crimes under federal criminal law, the magnitude and international significance of atrocity crimes, combined with the growing trend in international law towards rejection of statutes of limitation for atrocity crimes, points to the value of their denial in federal criminal law.

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00077 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.041

2. *You testified that certain countries have incorporated atrocity crimes into their national criminal codes as a way to preempt International Criminal Court (ICC) jurisdiction over their nationals. Please explain how reforming our human rights laws would allow the United States to preempt ICC jurisdiction over U.S. nationals.*

Answer: Either as a current non-party State or as a potential future State Party to the Rome Statute of the International Criminal Court (ICC), the United States is able to ensure that U.S. nationals who may be or become the targets of investigation by the ICC for atrocity crimes in a "situation" of atrocities in fact would be subject to U.S. rather than ICC jurisdiction. That is the "complementarity" regime set forth in Articles 17, 18, and 19 of the Rome Statute and its intent is to maximize domestic investigations and prosecutions of atrocity crimes, looking to the ICC as a last resort court if the State "is unwilling or unable genuinely to carry out the investigation or prosecution" or a national decision not to prosecute results "from the unwillingness or inability of the State genuinely to prosecute." [Rome Statute, Art. 17(1)(a)&(b)] The United States delegation to the United Nations talks on the Rome Statute was deeply influential in the drafting and negotiation of the complementarity regime because it was a methodology and reasonable restraint on the ICC that we strongly believed should be incorporated into the Rome Statute.

It is essential, however, that the United States be able to demonstrate that it is able genuinely to carry out investigations and, if merited, prosecutions of U.S. national suspects of atrocity crimes falling within the subject matter jurisdiction of the Rome Statute. [Rome Statute, Arts. 5, 6, 7, and 8] Only when the federal criminal code provides for federal jurisdiction over all atrocity crimes will the U.S. Government be able to demonstrate such ability in all relevant cases and thus inform the ICC, if it were to pursue a U.S. national, to stand down and let U.S. authorities address the matter on a comparable basis under U.S. law. Certain States Parties, as identified in my written testimony, have undertaken or are undertaking such a modernizing exercise of their criminal codes so as to strengthen their own domestic abilities to investigate and prosecute atrocity crimes and thus prevent ICC jurisdiction over their own nationals. We should not want even to contemplate the possibility of any ICC judge pondering whether the federal criminal code covers any particular atrocity crime set forth in the Rome Statute so that he or she may conclude that the United States is not "able" to investigate or prosecute a particular crime falling within the subject matter jurisdiction of the Rome Statute, even if it were to demonstrate a willingness to do so.

Thus, for both pragmatic and legalistic reasons, the United States would protect its interests by amending the federal criminal code so that U.S. courts rather than the ICC seize jurisdiction over U.S. nationals who may be responsible for the commission of atrocity crimes anywhere in the world. If it were to take such a modernizing step, then the United States would join some of its major allies which already have modernized their criminal codes with the result of minimizing their exposure to ICC jurisdiction.

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00078 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.042

3. *Based on your experience as U.S. Ambassador at Large for War Crimes Issues, can you think of situations where the U.S. government would have liked to assert jurisdiction over non-U.S. nationals who committed atrocity crimes but was not able to do so under current laws?*

Answer: There are two clear examples from my own experience. The first concerns senior Khmer Rouge leaders Pol Pot and Ta Mok. Until Pol Pot died in March 1998 and Ta Mok was captured by the Cambodian military in early 1999, I undertook intensive diplomatic and operational efforts to apprehend and bring both individuals to justice outside of Cambodia pursuant to strategies that ideally would avoid their presence on U.S. territory but, if either was detained on U.S. territory, would minimize that period of detention prior to transfer to a foreign jurisdiction that would prosecute either of them. The elaborate strategies were required because the Justice Department determined that it would be strongly preferable not to risk trying to prosecute non-U.S. nationals in U.S. courts, or afford them the opportunity for *habeus corpus* petitions before U.S. courts and potentially enable them to achieve safe haven in the United States, because U.S. statutory law did not permit the prosecution of non-U.S. nationals for genocide that was not committed on U.S. territory or for crimes against humanity. The Genocide Accountability Act of 2007 now corrects part of that old deficiency in U.S. law, but in the late 1990's the option of prosecution of a non-U.S. national for genocide committed outside the United States did not exist. Pol Pot and Ta Mok more likely would have been charged primarily with crimes against humanity, for which there was not then and there still is not jurisdiction in U.S. courts to prosecute the likes of those two individuals.

The second example concerns former Iraqi leader Saddam Hussein and other leaders in his regime. During the Clinton Administration I waged an often lonely campaign to obtain U.N. Security Council authorization for the establishment of a commission of experts on the atrocity crimes of the Saddam Hussein regime and, as a final step, the creation of an international criminal tribunal to investigate and, if merited, indict Saddam Hussein and his regime colleagues for atrocity crimes. Gaining custody for prosecution, we knew, might be a long time coming but the strategy was to create the legal net within which to snare them, and degrade their domestic legitimacy. I could not consider the option of indicting and, one hoped, ultimately prosecuting Saddam Hussein and his colleagues in U.S. courts for a wide range of atrocity crimes, including war crimes against U.S. soldiers and diplomats during the First Gulf War in 1990-91. (The war crimes charges had been key priorities of the Pentagon until they were eclipsed by other issues in the mid-1990's.) I was advised by the Justice Department that U.S. statutes of limitations prevented any such prosecution for the war crimes charges relating to U.S. personnel and that there was no law to apply towards genocide and crimes against humanity charges pertaining to the Iraqi leadership. To a large extent, these realities continue to cripple U.S. law.

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00079 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.043

Answer to Question from Senator Jon Kyl to David Scheffer:

1. *In your statement and testimony, you said that the United States, as a non-party to the Rome Statute of the International Criminal Court, is more exposed to the International Criminal Court's jurisdiction than are other countries who have modernized their criminal codes to deal with atrocities and human rights violations. Give specific examples of how the United States has greater exposure to the International Criminal Court's jurisdiction and the ramifications of such exposure.*

Answer: When one considers the relatively antiquated character of the federal criminal code as it concerns atrocity crimes and combine that with the non-party status of the United States under the Rome Statute of the International Criminal Court, the United States could find itself subject to greater exposure to the ICC's jurisdiction than would a number of countries which are States Parties to the ICC and have modernized their criminal codes to more effectively address atrocities and human rights violations.

First, it is important to recognize that regardless of how U.S. authorities or judicial officers or any American observers might interpret the Rome Statute or understand international law, the predominant foreign perspective is that a U.S. national can be subject to the jurisdiction of the ICC—even though the United States is a non-party to the Rome Statute—if he or she perpetrated an atrocity crime on the territory of a State Party to the Rome Statute. [*See* Rome Statute, Art. 12(2)(a).]

Second, for example, if a U.S. national allegedly commits the crime against humanity of persecution [*See* Rome Statute, Art. 7(1)(h)], which is a legal charge that often arises when ethnic cleansing has been committed, no U.S. court has statutory authority to prosecute such a crime *per se*. If the United States were to claim its "complementarity" right under Articles 17, 18, and 19 of the Rome Statute in order to prevent ICC jurisdiction, the ICC judges likely would conclude that given the inability of U.S. courts to prosecute the crime against humanity of persecution, the ICC would have jurisdiction to indict and seek custody of the U.S. national for trial in The Hague. Gaining custody might become a realistic option for the ICC if the U.S. national travels outside the United States. Further ramifications would be the diplomatic uproar that might result as Washington sought to restrain the ICC and any nation in which the individual travels from acting against him or her. In contrast, the ICC could not reach such a conclusion based solely on the inability to prosecute the crime against humanity of persecution if the State in question had modernized its criminal code to include such crime, which, for example, the United Kingdom, Australia, Canada, and Germany have accomplished.

Third, the War Crimes Act of 1996, as amended, creates only a partial set of war crimes for which U.S. nationals can be prosecuted. There is a wide gap between U.S. statutory law and the full listing of war crimes set forth in Article 8 of the Rome Statute. Again, key countries have now incorporated the Article 8 war crimes into their domestic criminal codes and thus empowered their national courts to prosecute the full range of such crimes and thus avoid ICC jurisdiction. If, for example, U.S. nationals employed by American contractors providing security services to U.S. diplomats in Iraq or

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00080 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.044

Afghanistan allegedly commit war crimes that are not covered by the War Crimes Act of 1996, as amended, and yet are war crimes covered by the much broader listing in Article 8 of the Rome Statute, then the ICC might find a basis for exercising jurisdiction over such U.S. nationals provided other jurisdictional pre-conditions under the Rome Statute are satisfied (which is a real possibility). It would be far safer for U.S. interests if one were to amend U.S. law so that U.S. courts have the unquestioned authority, by statute, to prosecute the full range of war crimes which, as expressed in Article 8 of the Rome Statute, are well understood to constitute customary international law. With such authority, the United States would be able to use the complementarity principle in the Rome Statute to deflect ICC jurisdiction, in a manner identical to that of other countries which have modernized their criminal codes accordingly.

Those who might argue that in some cases the so-called "Article 98 bilateral non-surrender agreements" that have been negotiated during the Bush Administration would protect all U.S. nationals from surrender to the ICC, are, in my view, mistaken. See my article entitled, *Article 98(2) of the Rome Statute: America's Original Intent*, 3 J. INT'L CRIM. JUSTICE No. 2, 333 (2005).

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00081 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.045

SUBMISSIONS FOR THE RECORD

Senate Committee on the Judiciary
Subcommittee on Human Rights and the Law
"No Safe Haven: Accountability for Human Rights Violators in the United States"

Statement of Amnesty International USA
November 14, 2007

Introduction

Millions of acts of genocide, crimes against humanity, war crimes, torture, extrajudicial executions and "disappearances" have been committed since the end of the Second World War. Yet only a handful of those responsible for these crimes have ever been brought to justice by courts in the territories or jurisdictions where they were committed. Instead, many of those responsible for these crimes have been able to travel outside their countries - either voluntarily on state business or pleasure trips, or involuntarily after going into exile - with complete impunity.

Amnesty International believes that suspects should be brought to justice wherever they are found, or failing that, either extradited to a state able and willing to do so in a fair trial or surrendered to an international criminal court. Accordingly, Amnesty International strongly supports the principle that U.S. courts should be able to investigate and prosecute persons for crimes committed outside the U.S., even if such crimes are not linked to the U.S. by the nationality of the suspect or of the victim or by harm to the United States' own national interests. Logic and morality dictate that this principle should be implemented by all countries.

Amnesty International welcomes legislative efforts to combat impunity such as the accountability bills which have been introduced in the Senate with respect to genocide, trafficking, and the use of child soldiers. By enacting such laws, the United States will ensure that its territory cannot be used as a safe haven for individuals accused of the most serious crimes under international law.

43914.046

An Old Concept Gaining New Momentum

National courts have exercised universal or other forms of extraterritorial jurisdiction dating back to the Middle Ages. Centuries ago, such trials involved brigands and persons accused of war crimes. Today, their scope has expanded to include the so-called "modern day pirates", the torturer, the war criminal, and the genocidaire.

Since the Second World War, courts in more than a dozen countries have conducted investigations, commenced prosecutions, and completed trials based on universal jurisdiction over these crimes, or arrested people with a view to extraditing the persons to a state that will prosecute. These countries include: Australia, Austria, Belgium, Canada, Denmark, France, Germany, Israel, Mexico, Netherlands, Senegal, Spain, Switzerland, the United Kingdom, and the United States.

International Law and Practice

While universal jurisdiction can be applied to most ordinary crimes (such as murder, manslaughter, and theft), states have also enacted legislation extending to crimes of international concern (including hijacking and hostage-taking) and crimes under international law (including genocide, crimes against humanity, war crimes, torture, extrajudicial executions and "disappearances"). In a worldwide study of national laws, Amnesty International found that approximately 125 countries – roughly two-thirds of the number of UN member states - have laws providing for universal jurisdiction over conduct amounting to the latter category of crimes.

The Geneva Conventions and the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Convention against Torture) place a legally binding obligation on states that have ratified them to exercise universal jurisdiction over persons accused of grave breaches of the Geneva Conventions and torture or to extradite them to a country that will. The Inter-American Convention on Forced Disappearance of Persons, requires Organization of American States members that have ratified the Convention to exercise universal jurisdiction over persons suspected of the crime of "disappearances" or to extradite suspects.

In addition, the International Convention against the Taking of Hostages, the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, and the Convention for the Suppression of Unlawful Seizure of Aircraft provide that member states must establish jurisdiction where an alleged offender is present in their territory, regardless of nationality.

U.S. Law and Practice

U.S. courts have universal criminal jurisdiction over torture and certain forms of international terrorism, but not over genocide, war crimes or other crimes against

43914.047

humanity.[1] In addition, since 1980, U.S. courts have acknowledged the right of victims of human rights violations committed abroad to seek civil remedies for their injuries. Pursuant to the Alien Tort Claims Act, U.S. Federal courts have repeatedly exercised adjudicative civil universal jurisdiction over torts based on the law of nations committed abroad. The U.S. Congress strongly approved such exercises of adjudicative universal jurisdiction when it enacted the Torture Victim Protection Act, giving Federal courts jurisdiction over tort claims based on torture and extrajudicial executions committed abroad. While the U.S. Government has not been a party to these lawsuits, it has occasionally submitted amicus curiae (friend of the court) briefs in support of the litigation.

In 2002, Amnesty International USA (AIUSA) published *USA: A Safe Haven for Torturers*, which examines the United States' compliance with its obligations under the Convention Against Torture and outlines measures that the U.S. Government should take to ensure that it is not a safe haven for perpetrators of torture and other grave human rights abuses. At the time of publication, AIUSA decried the failure of the U.S. Government to conduct even one prosecution pursuant to 18 U.S.C. § 2340A, the federal statute which establishes criminal liability for individuals who commit or attempt to commit torture outside the United States. Since then, to our knowledge the Justice Department has sought only one such indictment, against Charles "Chuckie" Taylor, Jr. While Amnesty International welcomed this landmark step, we have continued to raise concerns about the overall failure to mount more such prosecutions, particularly in light of the alleged number of suspects reported to be living in the U.S., as well as what appears to be the almost exclusive reliance on using immigration law in lieu of criminal law to deal with individuals suspected of having committed human rights abuses outside of the United States.

It is therefore essential that the political will to mount prosecutions matches the enthusiasm to enact legislation permitting prosecution of a broader range of crimes committed outside the United States. As the single prosecution mounted to date under the Torture Convention implementing legislation makes clear, simply having the laws on the books is no guarantee of action.

Amnesty International recommends that Congress conduct a review of the existing torture legislation in order to determine why it has only been used once in the almost 14 years since it was enacted. Such a review should touch on how many complaints have been made, how many persons who might fall within the provisions are estimated present in the U.S., what reforms are needed in law or practice to ensure that there are investigations, why the Justice Department does not publish annual reports as other countries with similar units (Canada and Denmark, for example) have, and what steps are taken when deportation is the alternative to ensure that the receiving state will submit the case to its prosecuting authorities and that the U.S. will cooperate.

---

[1] Cassel, Douglass, *Empowering United States Courts to Hear Crimes Within the Jurisdiction of the International Criminal Court,* 35 New Eng. L. Rev. 421, 428-432 (2001): http://www.nesl.edu/lawrev/vol35/2/cassel.PDF.

43914.048

Why Should the U.S. Undertake Such Prosecutions?

The exercise of universal jurisdiction is a small, but very important, part of a much broader effort to end impunity at the national and international level for the most serious crimes under international law. The state in which the crimes occurred should of course continue to have the primary responsibility for bringing to justice those responsible for such crimes: this is where most of the evidence will be found, and where the accused, victims and witnesses are likely to be located and to be able to understand the legal system and language of the court. However, in many cases trials in the territorial state are not possible, either because the territorial state is unable or unwilling to do so or because the suspect has fled into exile in another state. In such cases, the other states in the international community must step in to exercise jurisdiction.

There are a number of reasons why prosecutors and investigating judges in the territorial state may fail to act. The entire legal system may have collapsed. The courts could be functioning, but incapable of bringing those responsible to justice for reasons such as lack of resources or inability to provide security for suspects, victims, witnesses or others in the proceedings. The courts could be functioning, with adequate resources, but lacking in the political will to bring those responsible to justice. The courts could have sufficient resources and political will, but be prevented from exercising jurisdiction by the executive authorities. The authorities may themselves be involved in committing such crimes. Transitional governments are sometimes reluctant to prosecute members of the former government and may even give those responsible amnesties or the benefit of other measures of impunity.

Therefore, when the territorial state fails to act, it makes sense to permit - or even require - the criminal justice systems of other states to exercise jurisdiction on behalf of the international community, either when the suspects come into their jurisdictions or by requesting extradition from the state where the suspect is located.

The reasons for addressing such crimes through prosecutions, rather than through other methods, are many. Firstly, such judicial determinations of individual guilt or innocence end the attributions of collective responsibility on ethnic, racial, religious, national and political grounds and make it possible for effective reconciliation. As the Security Council declared when establishing the Rwanda Tribunal:

> ". . . in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace[.]"

Secondly, criminal investigations abroad can act as a catalyst for efforts in territorial states to eliminate amnesties or to investigate and prosecute those responsible. Reed Brody, a prominent international human rights lawyer, has explained the impact of the arrest in London of the former President of Chile on the judicial system back home:

43914.049

> "Previously timid Chilean judges began looking for chinks in the dictator's legal armor. After decades of silence, Pinochet's former collaborators stepped forward to tell of his role in covering up atrocities, revelations that have had a snowball effect. The number of criminal cases against Pinochet jumped to dozens, then hundreds. By the time British Home Secretary Jack Straw sent Pinochet back to Chile, ostensibly on health grounds, the myth of his immunity had been totally shattered."

There are also a number of legal, philosophical and moral rationales which have been advanced in support of such prosecutions, including the threat these crimes pose to the international legal fabric, their attack on fundamental legal values shared by the international community, their international character and, in some cases, the threat they pose to international peace and security.

For example, the United States Court of Appeals for the Sixth Circuit explained in the *Demjanjuk* case, which involved a request for the extradition of a person charged with war crimes and crimes against humanity during the Second World War:

> "This universality principle is based on the assumption that some crimes are so universally condemned that the perpetrators are the enemies of all people. Therefore, any nation which has custody of the perpetrators may punish them according to its law applicable to such offences."

Particularly when such crimes are committed on a large scale or where they lead to cross-border refugee flows or conflicts which might draw in other states, they pose a threat to international peace and security. This rationale was invoked by the Security Council when it established the Yugoslavia and Rwanda Tribunals.

In the end, any effort to hold those who commit human rights abuses accountable reinforces human rights values everywhere. Publicity generated by these cases helps to educate the general public about the importance of human rights, while at the same time delegitimizing those who would seek to justify their crimes as an act of state or an act of war. These cases also provide support for human rights defenders who remain at risk in country for their efforts to promote accountability.

Most importantly, the willingness of states to exercise universal jurisdiction is often the last and only possibility of justice available to survivors, who have a right to have the truth established and acknowledged and the right to see justice done.

A Word of Caution

To accuse an individual of a serious crime under international law is a serious charge. It can have profound personal implications for the suspect. It can affect family and social relations. It can also lead to civil and criminal liability. Accordingly, such allegations should be treated with caution and circumspection.

43914.050

Throughout any criminal or administrative hearings, the rights of individuals under national and international law should be fully respected. All individuals, whether in criminal or administrative proceedings, are innocent until proven guilty. They should be given fair notice of any charges and a reasonable opportunity to respond. Suspects should be provided with defense counsel and adequate resources to properly defend themselves. When necessary, they should have access to a competent interpreter. They should be notified of their right to communicate with consular officials. Proceedings by a competent, independent, and impartial tribunal must be open and fully accessible. Individuals cannot be compelled to testify against themselves. No one should be punished on the basis of charges, testimony, or evidence that is not made available to them. Accordingly, the use of secret evidence cannot be allowed. In sum, proceedings should comply with international law and standards guaranteeing a right to a fair trial.

Over the past decade, an average of at least three countries per year have abolished the death penalty, and, at the time of writing, the United Nations General Assembly is set to vote on a resolution calling for a global moratorium on executions. The death penalty is in fact ruled out as a punishment in all international courts and tribunals for the worst crimes in the world, such as genocide, war crimes and crimes against humanity. Amnesty International therefore urges that any trials conducted pursuant to the accountability bills that have been introduced in the Senate exclude the possibility of the death penalty. Furthermore, the U.S. should not extradite, deport, or otherwise remove an individual to a country unless the country agrees to forego the imposition of the death penalty.

The rule of non-refoulement should be applied in cases where an individual faces the threat of torture or other cruel, inhuman or degrading treatment or punishment. Indeed, the rule of non-refoulement should be extended to preclude extradition, deportation, or removal to a country that fails to provide basic due process rights to detained or indicted individuals, including standards guaranteeing the right to a fair trial. The current U.S. policy on non-refoulement, while providing some protection, also raises some concerns. In immigration cases, for example, an individual may be returned to a country if the United States receives diplomatic assurances from that country that the individual will not be tortured or if the individual is relocated to a part of the country where he or she is not likely to be tortured. These exceptions should be carefully regulated to ensure they comply with the letter and spirit of the Convention against Torture and the rule of non-refoulement.

Appellate review is an integral check against unfettered executive power and should be provided in all proceedings. Accordingly, efforts to preclude judicial review of either criminal or administrative proceedings should not be allowed.

Mere membership in a suspect group or organization should not result in automatic responsibility for the acts of that group or organization. Similarly, family members of suspects should not bear the consequences of a relative's actions.

43914.051

Finally, with respect to the child soldiers bill[2], Amnesty International considers that due to the nature of the conflicts in which child soldiers are most often used, it should be very clear in many cases that individuals who were children at the time that the alleged offense was committed were not acting voluntarily - in some cases, they were drugged against their will - and therefore may not be criminally responsible. In other cases they were threatened and might be able to assert a defense of duress. Even in those cases where persons who while still under 18 can be said to have acted voluntarily, due weight should be given to their age and other mitigating factors, for example, if they were abducted and brutalized by their leaders. The assessment of an individual's awareness, who at the time the alleged crime was committed would have been a child, of the choices open to him or her, whether to join the armed groups or to commit atrocities, should be undertaken critically, with due consideration to a child's vulnerability and limited understanding. Such an assessment should contribute to mitigation of the individual's responsibility.

Conclusion

It is unacceptable for states to condemn human rights abuses committed abroad and yet allow the perpetrators of such abuses to reside in their territory with impunity. The struggle to protect and preserve human rights should always begin at home.

Human dignity suffers at the hands of the torturer, the war criminal, the trafficker, and the genocidaire; it suffers equally, however, in the face of impunity. The United States cannot allow such criminals to escape responsibility for their actions. This is both a legal and moral obligation.

The United States has a particularly important responsibility. U.S. law and practice contributes to the development of national and international standards with respect to human rights. Throughout the world, national legislatures often look to U.S. law for guidance in drafting their own legal systems. Foreign courts also engage in such comparative analysis. Accordingly, the implications of U.S. policy and practice in this area will extend far beyond its shores.

For more information, please see *USA: A Safe Haven for Torturers*, http://www.amnestyusa.org/stoptorture/safehaven.pdf, and *Universal Jurisdiction: The Duty of States to Enact and Enforce Legislation*, http://web.amnesty.org/pages/uj-memorandum-eng.

[2] An additional concern is the potentially broad definitional scope of the term "armed force or group"; for example, the term "other military organization," may include a non-combat group.

43914.052

Appendix 1

The role of Amnesty International with regard to universal jurisdiction

Amnesty International has been involved with universal jurisdiction in several ways. First, it has conducted a 722-page global study of the subject, examining state practice at the international and national level in 125 countries around the world, the first such study since 1935. The findings of that study have been largely confirmed by the recent International Committee of the Red Cross study of customary international humanitarian law. Second, the organization has intervened in litigation involving universal jurisdiction, either directly or indirectly, to explain its scope to international and national courts. For example, it provided a copy of a study of the subject to the Belgian government, which attached it to its submission to the International Court of Justice in the *Democratic Republic of the Congo v. Belgium* case, argued the scope of this rule of customary international law in the House of Lords in the *Pinochet* case and issued commentaries used by lawyers in the *Sabra and Chatila* case in Belgium. Third, it has published commentaries on national jurisprudence to be used in lobbying for law reform, including a recent paper on the flaws in Spanish jurisprudence, and staff members have written articles and contributed to books on the subject.

43914.053

Appendix 2

14 Principles on the Effective Exercise of Universal Jurisdiction (Summary)

The following is a brief summary of Amnesty International's ***14 Principles on the effective exercise of universal jurisdiction*** (AI Index: IOR 53/01/99). For further detail of the principles and legal arguments in favor of them, please refer to the document.

1. States should ensure that their national courts can exercise universal jurisdiction over genocide, crimes against humanity, war crimes, torture, extrajudicial executions and "disappearances."

2. National laws should ensure that the national courts can prosecute anyone suspected or accused of the crimes whatever their official capacity at the time of the alleged crime or anytime thereafter.

3. National laws should ensure that the national courts can exercise universal jurisdiction over the crimes no matter when the crimes occurred, including crimes committed before the universal jurisdiction law is enacted.

4. National laws should ensure that there is no time limit after which a person accused of the crimes cannot be prosecuted.

5. National laws should ensure that persons on trial in national courts can only raise defenses that are consistent with international law. In particular, claiming that the person was acting on superior orders, under duress or out of necessity should not be permissible defenses.

6. National laws should ensure that national courts can exercise jurisdiction over the crimes in cases where the suspect or accused is shielded from justice in any other national jurisdiction (for example, a person who has been granted amnesty by the authorities where the crime took place).

7. Decisions to start or stop an investigation or prosecution should be made only by the prosecutor, subject to judicial scrutiny, which does not impair the prosecutor's independence, based solely on legal considerations, without outside political interference.

8. National laws should require national authorities exercising universal jurisdiction to investigate the crimes and, where there is sufficient admissible evidence, to prosecute, without waiting for a complaint by a victim or any other person with a sufficient interest in the case.

9. National laws should ensure that the trial will be fair and prompt in strict accordance with international law and standards for fair trials. All branches of

43914.054

government, including the police, prosecutor and judges must ensure that these rights are fully respected.

10. Intergovernmental and non-governmental organizations should be permitted to attend and monitor trials.

11. National courts must protect victims, witnesses and their families. Investigation of crimes must take into account the special interests of vulnerable victims and witnesses, including children. Courts must award appropriate redress to victims and their families.

12. National law should ensure that the crimes are not punishable by the death penalty or other cruel, inhuman or degrading punishment.

13. States should cooperate fully with other states exercising universal jurisdiction.

14. Judges, prosecutors and investigators should receive effective training in human rights law, international humanitarian law and international criminal law.

43914.055

Testimony of
Dr. Juan Romogoza Arce
Executive Director, La Clinica del Pueblo*
Plaintiff, *Arce v. Garcia*

Before the
Subcommittee on Human Rights and the Law
Committee on the Judiciary
United States Senate

No Safe Haven: Accountability for Human Rights Violators in the United States

November 14, 2007

Chairman Durbin, Ranking Member Coburn, and Members of the Subcommittee, thank you for inviting me to testify about the importance of accountability for human rights abusers in the United States. I am honored to appear here today and I would like to thank you, Mr. Chairman, for the opportunity to speak on behalf of the hundreds of thousands of survivors of serious human rights abuses living in the United States who cannot be present today.

I am a surgeon who cannot perform surgery. A surgeon's tools are his or her hands, and mine have been rendered useless as a result of torture. My torturers stripped me of my most treasured gift.

Today I share with you my personal story of survival. Even after all of these years, it is very painful for me to recount these memories. Unlike my many brothers and sisters in El Salvador who were killed, I am still alive and one of the few who can tell this story. I do not think it fair to remain silent. Scars cannot be erased with treaties and amnesty.

The men responsible for my torture live in the United States – in fact, two of them currently live legally, openly, and comfortably in Southern Florida. In 2002, I, along with two courageous co-plaintiffs, forced these two men - General José Guillermo Garcia and General Carlos Eugenio Vides Casanova – to face trial in a civil suit that we brought in United States federal court with the help of the Center for Justice & Accountability (CJA). Confronting my torturers in a court of law was one of the most difficult and important things that I have ever done in my life – maybe one of my proudest moments.

The civil remedy available to me and my co-plaintiffs under the Torture Victim Protection Act provided me, at the very least, with my day in court. However, this civil

---

* Dr. Juan Romagoza is the Executive Director of a free health care clinic, La Clinica del Pueblo, in Northwest Washington D.C. Dr. Romagoza was named one of *Washingtonian* magazine's Washingtonians of the year, 2005, for his work at the clinic to serve low-income Latino families.

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00092 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.056

remedy does not prevent perpetrators of torture from continuing to live openly and comfortably in the United States. I urge the authorities of the United States to make criminal remedies a reality for survivors of serious human rights abuses like myself.

A Story of Survival

Growing up in rural El Salvador, I always knew that I wanted to be a doctor. I witnessed first-hand the effects of the lack of medical care on my family and community. My grandfather died of a heart attack at age 58 and I watched many childhood friends die of malnutrition and parasitic diseases. As a medical student, I dreamt of specializing in cardiac surgery. But because of El Salvador's increasing unrest, I spent most of my time helping to start a free clinic at the University of El Salvador where we treated survivors of torture and the poor. While working as a resident, I witnessed the military storm my hospital and kidnap a patient. In another instance, security forces gunned a recovering patient under my care to death. I was never politically involved or a guerrilla. I simply believed in basic principles of assisting the poor.

As a young doctor in El Salvador, I worked with the medical school at the University of El Salvador and the Catholic Church to help establish medical clinics for the poor in rural areas as well as in the capital, San Salvador, and began performing surgery in the field for those who could not make it to a hospital. I was working at one of these rural health clinics on December 12, 1980, when two vehicles carrying soldiers from the local army garrison and the National Guard pulled up and opened fire with their machine guns upon a crowd of people. I was shot in the right foot and another bullet grazed my head. The soldiers and Guardsmen then detained me as a "subversive leader" because I possessed medical and surgical instruments.

The soldiers arrested me and transferred me to a helicopter. During the ride, my captors threatened to throw me off. I was taken to a cell in *El Paraiso* (ironically, "heaven") where I was interrogated and tortured. I feared I would never see my newborn daughter Laura ever again.

The next day, I was taken to the headquarters of the National Guard in San Salvador. I was blindfolded. My captors kept saying they were taking me to the "best hotel in El Salvador." For the next 22 days, three to four times a day, National Guardsmen subjected me to unspeakable torture: electric shocks to my ears, tongue, testicles, anus and the edges of my wounds until I lost consciousness. The Guardsman forced me to regain consciousness by kicking me and burning me with cigarettes. They sodomized me with foreign objects and subjected me to additional electric shocks and asphyxiation with a hood containing calcium oxide. I was also subjected repeatedly to various forms of waterboarding where my head was immersed in water to simulate drowning, including being hung by my feet and having my head held in a bucket of water until I almost drowned.

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00093 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.057

I was tortured in such a way as to ensure that I could never practice my chosen specialty of surgery again. They broke my arm and fingers, causing me to lose normal function and movement in my hand. I was never treated for any of my injuries.

At the time of my torture, General José Guillermo Garcia was the Minister of Defense of El Salvador and General Carlos Eugenio Vides Casanova served as the Director General of the Salvadoran National Guard.

One day was different than all the others that I spent in detention. My captors told me that "the big boss" was coming to see me. They also referred to him as "my colonel." General Vides Casanova came to my cell. I was chained to the floor when he arrived. He interrogated me about my uncles in the military, pressing me to see if they were aligned with the armed opposition. Vides Casanova showed no concern for my well-being. Once he left, I had to endure many more days of extreme torture. Several of these days they kept me locked inside of a coffin.

I was never charged with any crime. I was never brought before a judge. I was not allowed to speak with anyone. When I was finally released, I could not walk and weighed only 70 pounds. One of my uncles, a member of the military, came to get me. As I left the facility, I had another look at Vides Casanova, who was standing just outside the Guard facility. I later learned that Vides Casanova's office was only 150 feet from the cell where I was kept.

I had to go into hiding as soon as I was released. I could not receive medical treatment at a hospital. A medical colleague treated me once, but was afraid to do so again. This friend was killed a year later. I had to self-treat for infections, loss of blood and malnutrition, as I had been given almost no food and water for the entire period of incarceration. I fled El Salvador and came to the United States. I applied for and received asylum and I have since become a United States citizen.

An Imperfect Justice

Both General Garcia and General Vides Casanova eventually left El Salvador and settled in South Florida. They have been permanent residents of the United States since 1989. Garcia was granted political asylum on the grounds that he and his children had been threatened during the war. Vides Casanova was allowed to enter the United States despite a 1983 report to the State Department that he likely participated in the cover up of the murders of the four American churchwomen in El Salvador in 1980.

The churchwomen had been dead for 18 years when I got a call from the Center for Justice & Accountability about the possibility of joining a civil lawsuit against the Generals. This was not an easy decision for me. I worried about the many members of my family who remained in El Salvador. But out of respect for the many who died in El Salvador – particularly the churchwomen – I found the courage.

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00094 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.058

Those who opposed the case did not make it easy for me: I can still recall today the chilling phone calls and numerous threatening letters. An anonymous caller reached me by phone in Washington to say: "If you weren't happy with your rape in El Salvador, we will rape you here. We will find you in the street. We know where you live."

But when I testified a strength came over me. I felt like I was in the prow of a boat and that there were many, many people rowing behind that were moving me into this moment. I felt that if I looked back at them, I'd weep because I'd see them again: wounded, tortured, raped, naked, torn and bleeding. So, I didn't look back, but I felt their support, their strength and their energy.

Being a part of the case and having the opportunity to confront these generals with these terrible facts provided me with the best possible therapy a torture survivor could have.

On July 23, 2002, a federal jury found that these two men were liable for my torture. The case marked the first time any of the former Salvadoran military who have settled in the United States had been held accountable for the mass atrocities committed against the civilian population of El Salvador. I am proud to say that this case inspired several more Salvadoran survivors to seek accountability against their perpetrators.[†]

On-going Injustice

Despite the overwhelming evidence amassed by my attorneys – evidence that led the jury to find the generals responsible for my torture and other human rights abuses – these two individuals remain in the United States today. They are not on the run. They are not facing criminal charges. They are not even facing deportation back to El Salvador. They continue to live here legally, openly and comfortably.

It is hard to express the anger and frustration I and so many members of my community experience when we think about the fact these men, these known-human rights abusers, live in the same country where we have found refuge from their persecution.

For these human rights abusers, the United States remains their safe haven.

[†] CJA has represented torture survivors and families of those extrajudicially killed in two subsequent cases brought against former Salvadoran officials found to be living in the United States. *See Doe v. Saravia*, 348 F. Supp. 2d 1112 (E.D. Cal. 2004); *Chavez v. Carranza*, 413 F. Supp. 2d 891, 895 (D. Tenn. 2005). *See, www.cja.org.*

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00095 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.059

Statement
United States Senate Committee on the Judiciary
No Safe Haven: Accountability for Human Rights Violators in the United States
November 14, 2007

The Honorable Tom Coburn
United States Senator , Oklahoma

Statement of Senator Tom Coburn, M.D.
Hearing: "No Safe Haven: Accountability for Human Rights Violators in the United States"
Subcommittee on Human Rights and the law
United States Senate Committee on the Judiciary
November 14, 2007

Today marks an important milestone for the United States Senate, as this is the first hearing Congress has ever held to examine the enforcement of human rights laws in the United States. I look forward to hearing testimony from government and advocate witnesses whose expertise will undoubtedly shed light on this issue and whose insight will help lay the groundwork for future legislation from the Subcommittee on Human Rights and the Law.

Although the subcommittee was created less than one year ago, under the leadership of Chairman Durbin, it has already produced powerful results. Four previous hearings have allowed this subcommittee to explore specific areas of human rights law, including genocide, human trafficking, child soldiers, and the unintended effects of a law meant to bar from the United States those who have given "material support" to terrorists. Those hearings have resulted in bipartisan legislation that will allow the United States to better hold accountable human rights perpetrators who may have entered this country. Moreover, one hearing resulted in immigration relief for a witness who was victimized by terrorists in her home country and then inadvertently denied safe haven in the United States.

Thus, in addition to being active, this subcommittee has been productive in a truly meaningful way. At least part of the reason for its success is the bipartisan cooperation that has characterized its activities. As ranking member, I have cosponsored every bill proposed by the Chairman. The Genocide Accountability Act passed the Senate by UC, and both the Trafficking in Persons Accountability Act and Child Soldiers Accountability Act were recently reported from the Judiciary Committee without opposition. By working together to reach reasonable goals, this small subcommittee has made notable progress in the realm of human rights enforcement in the United States.

It is my hope that today's hearing will lead to further progress by helping to identify other loopholes that can be closed with legislation. By hearing from the Department of Justice and the Department of Homeland Security — two agencies leading U.S. human rights efforts — we can better identify obstacles that prevent human rights violators from being brought to justice. By talking to those who have been on the front lines of these issues, Congress will be better equipped to provide the tools that law enforcement needs to identify, remove, or prosecute individuals who have violated the most fundamental human rights and who should not be living freely in the United States.

According to testimony that has been submitted by our DHS witness, there are approximately 1,000 suspected human rights abusers from 85 different countries currently in this country. Although the government has made significant progress against these violators — ICE reports more than 100 arrests and 238 removals — more should be done to eradicate these perpetrators. To the extent that Congress can alleviate jurisdictional or statutory barriers that stand in the way of this goal, it is the

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00096 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.060

responsibility of this subcommittee to identify those barriers and propose solutions to overcome them.

While today's oversight hearing is the first of its kind in Congress, I hope and expect to have more in the future. An open dialogue must be maintained in order to further our progress in the field of human rights. At a minimum, we must ensure that no perpetrator of these offenses ever finds safe haven in the United States. I look forward to hearing from our witnesses today about ways to meet that goal.

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00097 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.061

Statement
United States Senate Committee on the Judiciary
No Safe Haven: Accountability for Human Rights Violators in the United States
November 14, 2007

The Honorable Richard J. Durbin
United States Senator , Illinois

Opening Statement of Senator Dick Durbin
Chairman, Subcommittee on Human Rights and the Law
Hearing on "No Safe Haven: Accountability for
Human Rights Violators in the United States"
November 14, 2007

Welcome to "No Safe Haven: Accountability for Human Rights Violators in the United States," the fifth hearing of the Judiciary Committee's recently-created Subcommittee on Human Rights and the Law.

Unfortunately, our ranking member, Senator Coburn, is not able to be here today. But I know he feels as strongly as I do about the issue we will discuss today, and about the mission of this subcommittee. After a few opening remarks, we will turn to our witnesses.

First, an update on the activities of this subcommittee. This is the first time in Senate history that there has been a subcommittee focused on human rights. This year, we held the first Congressional hearings on the law of genocide and child soldiers. We also have held hearings on human trafficking and the impact of the so-called "material support" bar on the victims of serious human rights abuses.

I have been joined by Senator Coburn in proposing legislation to hold accountable perpetrators who have committed genocide, human trafficking and the use or recruitment of child soldiers. The Genocide Accountability Act passed the Senate unanimously and, after being reported last week by the House Judiciary Committee, is awaiting action on the House floor. The Trafficking in Persons Accountability Act and the Child Soldiers Accountability Act have both been reported unanimously by the Senate Judiciary Committee. I look forward to working with my colleagues to enact these proposals into law as soon as possible.

Today, another first. This is the first-ever Congressional hearing on the enforcement of human rights laws in the United States.

Accountability for Human Rights Abusers in the United States

The end of the last century was marked by horrific human rights abuses in places such as Bosnia and Rwanda. The early years of this century have seen ongoing atrocities being committed in, among other places, Darfur and Burma.

While a growing number of perpetrators of human rights abuses have been held accountable in international, hybrid and state tribunals, a much larger number of perpetrators have escaped accountability for their crimes. Some of these human rights violators have fled to the United States.

In the Subcommittee's last hearing, we discussed how our immigration laws prevent some victims of human rights abuses from finding refuge in the United States. It is a tragic irony that, at the same time

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00098 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.062

as we turn away these deserving refugees, war criminals have found sanctuary in our midst.

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. As the late Simon Wiesenthal, the world's leading Nazi hunter, often said, the appropriate response to human rights violations is "justice, not vengeance."

Now I would like to show a brief graphic video we created for this hearing to provide some context for our discussion.

[SHOW VIDEO]

Our country has a long and proud tradition of providing refuge to victims of persecution. These victims hope to leave behind the terrible abuses they have suffered in their countries of origin and begin a new life in the United States. They should not have to come across those who tortured them, as Edgegayehu Taye did at the hotel in Atlanta, Georgia where she worked as a waitress. One day, she walked out of an elevator and saw Kelbessa Negewo, the man who had supervised her torture in Ethiopia, who was working as a bellhop at the same hotel.

These victims should not have to fear retaliation or the threat of retaliation for speaking out against those who persecuted them, as one of our witnesses today, Dr. Juan Romagoza Arce, and many like him, have experienced.

I want to commend the Justice Department and the Department of Homeland Security for their efforts to hold accountable human rights violators who have found safe haven in our country. But more must be done. During today's hearing, we will explore what the U.S. government is doing and what more it could do to identify, investigate and prosecute suspected perpetrators of serious human rights abuses or deport them to be held accountable in an adequate forum. We will also explore what the U.S. government is doing to prevent such perpetrators from entering the United States in the first place.

To my knowledge, there has only been one indictment in the United States of a suspected perpetrator for committing a serious human rights abuse. This is unacceptable. We must ask ourselves why. Why do so many suspected human rights abusers find a safe haven in the United States? Is the government doing enough with its existing authority? Are new laws granting the government greater authority and jurisdiction necessary?

Torture is the only serious human rights violation that is a crime under U.S. law if committed outside the United States by a non-U.S. national. That's why Senator Coburn and I have introduced legislation that would give the government authority to prosecute individuals found in the United States who have participated in genocide, human trafficking and the use or recruitment of child soldiers anywhere in the world. I hope that this hearing will shed light on whether additional loopholes in the law hinder effective human rights enforcement.

The United States has a proud tradition of leadership in the promotion of human rights and the world watches our steps in this field closely. By holding perpetrators of serious human rights abusers found in the United States accountable, we will demonstrate our commitment to upholding the human rights principles we have long advocated and discourage human rights violators from fleeing to the United States.

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00099 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.063

Script for "No Safe Haven" Hearing Video

(Picture)

From 1993 – 1945, the Nazi regime killer approximately 6 million European Jews. Over 250,000 Roma were murdered. At least 200,000 mentally or physically disabled individuals were "euthanized."

(Picture)
(Picture)
(Picture)

Following the Second World War, the United States led the global movement to hold war criminals accountable for their actions.

Just eight months after the end of the war, the United States, along with France, Great Britain and the Soviet Union, tried and convicted 24 of the highest ranking Nazi war criminals in Nuremburg, Germany.

(Picture)
(Picture)
(Video Clip)

Some escaped and fled to the United States. We have spent decades tracking them down and holding them accountable.

"The United States should not be a safe haven for mass murderers and tortures from every corner of the world just because they've been clever enough to put on a change of clothes."

- Rabbi Marvin Heir, Founder, Simon Wiesenthal Center, Los Angeles

Genocide and other crimes against humanity did not stop with the Holocaust. In the decades since, horrific crimes have been perpetrated against people around the globe.

Central Africa: Rwanda

(Picture)

From April to July, 1994, an estimated 800,000 people were killed in the Rwandan genocide. According to Human Rights Watch, 250,000 to 500,000 woman were raped.

(Picture)
(Picture)
(Picture)

43914.064

Europe: Bosnia

(Picture)

It is estimated that 200,000 people were massacred in Bosnia between March, 1992, and November, 1995. At least 20,000 women were reportedly raped. According to Amnesty International, 13,000 individuals have been "disappeared."

(Picture)
(Picture)
(Picture)

Central America: El Salvador

(Picture)

From 1980 to 1992, El Salvador was embroiled in a violent civil war. It is estimated to have killed 75,000 people. There were over 22,000 reports of violence including: Over 13,000 extrajudicial executions; Over 5,500 enforced disappearances and nearly 5,000 incidences of torture.

(Pictures)
(Pictures)
(Pictures)

Some perpetrators have been held accountable for these horrific crimes. Many more have not been. No one knows how many of these criminals have found safe haven among us. The U.S. government is currently investigating over 1,000 suspected war criminals in the United States. They have come here from 85 countries. They are accused of unspeakable crimes. It is our obligation to do all that we can to bring the perpetrators to justice.

(Video Clip: The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated.)

43914.065

U.S. Immigration and Customs Enforcement

STATEMENT

OF

MARCY M. FORMAN

DIRECTOR, OFFICE OF INVESTIGATIONS

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT
DEPARTMENT OF HOMELAND SECURITY

REGARDING

**"NO SAFE HAVEN:
ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATORS IN THE UNITED STATES"**

BEFORE THE

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON HUMAN RIGHTS AND THE LAW

November 14, 2007 – 10:00 a.m.
226 Dirksen Senate Office Building
Washington, D.C.

43914.086

Good morning Chairman Durbin, Ranking Member Coburn, and distinguished members of the Subcommittee.

Before discussing our Human Rights Violators Program, I would like to take you back to July 16, 1995. On that date, eight men from an elite unit of the Bosnian Serb Army participated in an almost unimaginable atrocity in Srebrenica, a farm village in Bosnia and Herzegovina. According to one of the perpetrators who was present at the scene, between 1,000 and 1,200 male civilians were executed in a five-hour period. The civilians were lined in groups of ten to fifteen and were summarily executed. The perpetrator, who pleaded guilty to these events, named Marko Boskic as one of the participants in this atrocity.

In late 2002, an Immigration and Customs Enforcement (ICE) special agent learned that Marko Boskic was residing in the United States. This discovery resulted in a nearly two year international investigation conducted by ICE and the Federal Bureau of Investigation (FBI). The investigation uncovered evidence that substantiated Boskic's involvement in the murder of 1,000 to 1,200 civilians. Based on interviews with Boskic conducted by ICE, the FBI and the International Criminal Tribunal for the former Yugoslavia (ICTY), Boskic admitted that he actually pulled the trigger resulting in the deaths of many civilians. On July 12, 2006, Boskic was convicted of visa fraud and later sentenced to 63 months in a federal prison. Upon completion of his sentence in the United States, it is anticipated he will face charges for his atrocities upon his return to Bosnia.

It is my privilege to appear before you today to discuss ICE's comprehensive efforts against human rights violators who have victimized innocent civilians abroad, concealed their acts, and

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00103 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.067

violated U.S. laws. ICE is a U.S. law enforcement agency that is at the forefront of investigating human rights violators involved with genocide, torture, persecution, and extrajudicial killings. In keeping with our mission of national security and public safety, ICE utilizes both immigration and customs authorities to identify and locate these criminals and bring them to justice. ICE, along with our law enforcement partners and the private sector, are committed to ensuring that the United States is not a safe haven for those who have engaged in such atrocities.

ICE HUMAN RIGHTS VIOLATOR PROGRAM AND RESULTS

In 2003, ICE created the Human Rights Violators and Public Safety Unit and the Human Rights Law Division to investigate and litigate cases involving human rights violators who now reside in the United States. Contributing to the ICE human rights effort is our Victim/Witness Program, which includes over 300 victim/witness coordinators who are trained to address the needs of the victims of these horrific acts.

ICE has over 140 active investigations and is pursing over 800 leads and removal cases involving suspects from approximately 85 different countries. These cases are predominantly focused on Central and South America, Haiti, the Balkans, and Africa, and represent cases in various stages of investigation, prosecution, or removal proceedings. From Fiscal Year 2004 to date, ICE has made over 100 human rights related arrests and obtained 57 indictments and 28 convictions. From Fiscal Year 2004 to date, ICE has removed 238 human rights violators from the United States.

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00104 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.088

Due to the fact that human rights violations and atrocities have occurred abroad, law enforcement is often unable to assert U.S. jurisdiction for the substantive crime. In some cases, our ability to apply criminal charges that could have been levied in the U.S., such as visa fraud or false statements, may have expired due to the statute of limitations. In these situations, ICE applies our administrative authorities to ensure that human rights violators are investigated and removed from the United States. The following example demonstrates how ICE utilizes both its criminal and administrative authorities in pursuit of human rights violators.

In September 2005, the ICE office in Phoenix, Arizona, investigated and arrested 20 former Bosnian Serb military members who allegedly belonged to units that were active during the Srebrenica massacre. The 5-year statute of limitations relating to criminal Visa Fraud or False Statements had expired on seven 7 of the 20 violators arrested. ICE was able to use its administrative authorities to arrest and place the 7 offenders into administrative removal proceedings.

ICE PARTNERSHIPS

Successful human rights violations investigations and prosecutions could not be achieved without partnering with other law enforcement agencies, non-governmental organizations (NGO's), and foreign governments. These investigations require ICE to travel the world to find evidence and locate and interview victims and witnesses. ICE has established a global network through over 50 ICE offices in 39 countries, which has allowed us to foster strong international relationships. ICE partners with U.S. Citizenship and Immigration Services (USCIS), U.S. Customs and Border Protection (CBP), the Department of Justice (DOJ) and its

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00105 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.089

various components, including the Domestic Security Section, Office of Special Investigations, U.S. Attorney's Offices and Office of International Affairs, as well as with the Department of State, Intelligence Community, and Interpol.

ICE has established relationships with the United Nations sponsored International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone (SCSL). As I speak before the committee, one member of my staff, Richard Butler, is at the ICTY in The Hague, where he is preparing to testify as a Subject Matter Expert (SME) on the role of military forces and the responsibilities of their commanders for war crimes that occurred in Srebrenica. Mr. Butler spent six years as a military expert at the ICTY and ICE is fortunate to have hired him upon the completion of his U.S. military career.

ICE SUCCESSES

The following case examples are a testament to ICE's commitment to pursing human rights violators.

- In October 2006, ICE agents in Los Angeles, California arrested Gonzalo Guevara-Cerritos, a Salvadoran military officer involved in the cold-blooded assassination of six Jesuit priests, their housekeeper and her teenage daughter in November 1989. Guevara-Cerritos was present at a meeting at which it was announced that the six priests were to be killed, accompanied other soldiers on the killing mission, and guarded the perimeter of the priests' residence while other troops carried out the assassinations. Guevara-

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00106 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.070

Cerritos acknowledged his role in the killings, and was subsequently removed from the United States on April 30, 2007.

- On April 1, 2007, based on an investigative lead provided by USCIS and in cooperation with Argentinean authorities, ICE arrested Ernesto Barreiro for visa fraud charges. Barreiro, a former Argentine Army Officer, was wanted by Argentinean authorities for commanding a clandestine torture facility operated by the military in the late 1970's. As the Chief of the La Perla detention camp, Barreiro is alleged to have been involved in at least a dozen cases of torture, kidnapping, or extrajudicial killings. Barreiro was successfully prosecuted by the U.S. Attorney's Office for the Eastern District of Virginia and on October 30, 2007, after completion of his sentence, the ICE Office of Detention and Removal (DRO) removed Barreiro from the United States and turned him over to Argentinean authorities.

WHAT MAKES HUMAN RIGHTS VIOLATOR CASES DIFFERENT

The results that ICE has obtained in human rights violators cases often do not reflect the significant commitment of both time and resources to these types of investigations and removals. Human rights violator cases present some unique challenges. For instance:

- In most cases, the atrocities committed by the targets of our investigations happened years or even decades earlier.
- Many of the atrocities have often occurred in remote and hostile locations, and the nature of the crimes has caused displacement of the victim population, resulting in many victims and witnesses scattered around the world.

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00107 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.071

- Many cases rely heavily on documentary evidence that is used to show where military or security units were located when atrocities were committed and may be needed to corroborate witness accounts. Due to the horrific nature of these crimes and some foreign government's desires to suppress public disclosure of the crimes, foreign military or other government records are often not available or, worse yet, have been destroyed. In some lesser-developed parts of the world, government records may not exist at all and law enforcement must attempt to identify and locate victims or witnesses wherever they may be.

ICE vigorously investigates and submits for criminal prosecution any foreign national who misrepresents their role in human rights abuses. Such misrepresentation may initially allow these offenders into the United States. However, this misrepresentation may not come to light before the expiration of the 5-year statute of limitations for criminal violations like visa fraud or false statements. This is in contrast to misrepresentations that may carry a 10-year statute of limitations, such as the unlawful procurement of United States citizenship. As a result, when statutes of limitation bar ICE from pursuing criminal charges, ICE utilizes its administrative authorities that are vested under the INA to remove human rights violators from the United States.

CONCLUSION

Human rights violators represent the worst of humanity. ICE is committed to dedicating the resources necessary to investigate, present for prosecution, and remove from the U.S. those individuals who have participated in these atrocities in order to ensure that the United States does not become a safe haven for human rights violators. Thank you and I will be glad to answer any questions you may have.

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00108 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.072

HUMAN RIGHTS WATCH
350 Fifth Avenue, 34th Floor
New York, NY 10118-3299
Tel: 212-290-4700
Fax: 212-736-1300
Email: hrwnyc@hrw.org

HUMAN RIGHTS WATCH

www.hrw.org

"No Safe Haven: Accountability for Human Rights Violators in the United States"

Hearing before the Senate Judiciary Committee, Subcommittee on Human Rights and the Law, Wednesday, November 14, 2007

Statement for the record submitted by Elise Keppler, International Justice Program counsel at Human Rights Watch

Human Rights Watch appreciates the invitation to submit a statement for the record on this important subject. On December 6, 2006, the US Department of Justice took an unprecedented step to ensure accountability for human rights violators who are in or come to the United States. The department brought the first-ever criminal charges for torture committed abroad. The charges are against Charles "Chuckie" Taylor, Jr., the son of the former Liberian president Charles Taylor and also a US citizen, who entered the United States in March 2006. The charges relate to Taylor, Jr.'s role in committing torture as head of a security unit under his father's presidency in Liberia. The case is a crucial chance for victims to see justice done.

As reflected in US-supported international and internationalized criminal tribunals, the international trend in law and practice is to end impunity and to ensure that perpetrators of the worst human rights abuses are held accountable. However, these tribunals can only try a relatively small number of alleged perpetrators due to their finite resources and mandates, which are usually restricted to specific periods and conflicts. At the same time, increasing domestic prosecutions of international crimes, especially in Western Europe, is helping to limit safe havens for perpetrators in many states.

For more than ten years, federal law has made it a punishable crime in the United States for a US citizen or any individual in the United States to commit torture abroad (18 USC §2340A). Federal law also makes it a crime to commit war crimes abroad (18 USC §2441) and to commit genocide (18 USC §1091). But we understand that no one as yet had been prosecuted under these laws.

Federal prosecutions of serious crimes under international law committed abroad are long overdue. They are a critical way to ensure the United States does not serve as a safe haven to alleged perpetrators and to see that justice is delivered in the face of atrocities. The trial against Taylor, Jr., which is set to begin in January 2008, should thus be only the first of more cases of this kind.

in recent years, the Departments of Justice and Homeland Security have taken important steps to enhance US capacity to prosecute such cases including the creation of an ad hoc interagency working group to increase coordination on possible cases. As you are aware, critical legislation also has been put forward to increase the opportunities to prosecute serious human rights violations committed abroad. Such efforts are vital and should be intensified as experience suggests that while such cases are crucial, they involve significant challenges. Research by Human Rights Watch into the prosecution of serious human rights violations committed outside the forum state by eight Western European countries since 2001 offers valuable insights. From the initial complaint to the conclusion of the trial and any appeal, successful cases are being conducted. Yet, they have presented special demands on police, prosecutors, defense counsel, and courts. The right combination of appropriate laws, adequate resources, institutional commitments, and political will is therefore needed.

Kenneth Roth, Executive Director
Michele Alexander, Development & Outreach Director
Carroll Bogert, Associate Director
Emma Daly, Communications Director
Barbara Guglielmo, Finance & Administration Director
Peggy Hicks, Global Advocacy Director
Iain Levine, Program Director
Andrew Mawson, Deputy Program Director
Suzanne Nossel, Chief of Operations
Dinah PoKempner, General Counsel
James Ross, Legal & Policy Director
Joe Saunders, Deputy Program Director

Program Directors
Brad Adams, Asia
Holly Cartner, Europe & Central Asia
David Fathi, United States
Peter Takirambudde, Africa
José Miguel Vivanco, Americas
Sarah Leah Whitson, Middle East & North Africa
Joseph Amon, HIV/AIDS
Peter Bouckaert, Emergencies
Bruni Burres, International Film Festival
Richard Dicker, International Justice
Bill Frelick, Refugee Policy
Arvind Ganesan, Business & Human Rights
Steve Goose, Arms
Janet Walsh, Women's Rights
Scott Long, Lesbian, Gay, Bisexual & Transgender Rights
Joanne Mariner, Terrorism & Counterterrorism
Lois Whitman, Children's Rights

Advocacy Directors
Steve Crawshaw, United Nations
Juliette DiRivero, Geneva
Jean-Marie Fardeau, Paris
Marianne Heuwagen, Berlin
Lotte Leicht, European Union
Tom Malinowski, Washington DC
Tom Porteous, London

Board of Directors
Jane Olson, Chair
Bruce J. Klatsky, Vice-Chair
Sid Sheinberg, Vice-Chair
John J. Studzinski, Vice-Chair
Lloyd Axworthy
David M. Brown
Jorge Castañeda
Tony Elliott
Hassan Elmasry
Michael G. Fisch
Michael E. Gellert
Richard J. Goldstone
Vartan Gregorian
James F. Hoge, Jr.
Wendy Keys
Robert Kissane
Joanne Leedom-Ackerman
Josh Mailman
Susan Manilow
Kati Marton
Linda Mason
Barry Meyer
Pat Mitchell
Joel Motley
Samuel K. Murumba
Catherine Powell
Sigrid Rausing
Victoria Riskin
Shelley Rubin
Kevin P. Ryan
Darian W. Swig
John R. Taylor
Shibley Telhami

Robert L. Bernstein, Founding Chair, (1979-1997)
Jonathan F. Fanton, Chair (1998-2003)

I will now highlight some of our most significant findings, and recommendations, as to key elements to fair, effective prosecutions based in large part on our research on such cases in Western Europe. Notably, operationalizing these elements in the United States may require investment of resources and changes in practice. In this regard, we urge Congress and the Departments of Justice and Homeland Security to give them due attention and to consider seriously their implementation.

Appropriate legislation

First and foremost, effective prosecution of serious violations of human rights committed abroad requires appropriate legislation. Jurisdiction for prosecuting such crimes must extend beyond crimes committed on US territory or by US nationals. In this regard, several important bills proposed by members of this subcommittee should be enacted into law. These include the Genocide Accountability Act of 2007 which provides amendments to allow the US courts to exercise jurisdiction over genocide where committed abroad and the offender is brought into or found in the United States (as opposed to only where the crime is either committed by a US national or on US territory). These also include the Child Soldier Accountability Act, an important initiative introduced in October. The bill would make the recruitment or use of child soldiers under age 15 punishable for the first time in the United States and also allow jurisdiction to be exercised where the crime is committed abroad and when the alleged offender is either a US citizen or present in the United States.

Another important issue is more explicit recognition of criminal liability for these crimes on the basis of what is known as command

BERLIN · BRUSSELS · CHICAGO · GENEVA · LONDON · LOS ANGELES · MOSCOW · NEW YORK · PARIS · SAN FRANCISCO · TORONTO · WASHINGTON

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00110 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC
43914.074

responsibility. This basis of liability arises when leaders – those in positions of command – knew or should have known about the commission of serious crimes. This basis of liability has been integral to successful cases in international criminal tribunals against perpetrators who are leaders often far removed from the scenes of crimes. The basis of liability is already expressly recognized in the US military code, upheld by the US Supreme Court in cases brought after World War II, and has been recognized in several civil cases in federal courts involving human rights violations.

While Human Rights Watch believes that individuals can already be prosecuted in the United States on the basis of command responsibility, we believe that prosecutors may benefit from an explicit and direct recognition of this basis of criminal liability for human rights violations.

Developing investigative and prosecutorial expertise
Even where the appropriate laws exist, prosecuting crimes committed abroad can be daunting. This is for a variety of reasons, including language barriers, the unfamiliar country context, and proving crimes that may never have been previously adjudicated. A key way in which states that we examined in Western Europe responded to these challenges is by creating specialized units to investigate and prosecute transnational crimes. The specialized units allow the concentration of relevant experience and information which, in turn, enhances the efficiency and proficiency of investigations and prosecutions. Such specialized units include not only investigators and prosecutors, but also translators, military analysts, historians and anthropologists, on an as-needed basis. The efficacy of such units seems borne out in experience. In the countries that we examined, most cases since 2001 which led to convictions were put together by specialized units.

Another important way to enhance expertise is through the exchange of information and best practices with other practitioners around the world. We note that the European Union has established a network of contact points on these cases to which United States authorities should consider reaching out. In addition, Interpol has convened several expert meetings and has a working group on prosecuting international crimes which can also serve as a valuable resource.

The need for extraterritorial investigations
Another critical element to successful prosecutions is extraterritorial investigation. Facts must be collected from the place where the crimes were committed. For example, in the case of Faryadi Zardad, an Afghan militia leader ultimately convicted of acts of torture and hostage-taking in Afghanistan in the 1990s, British investigators traveled to Afghanistan to locate and interview witnesses. In order to identify potential witnesses in extraterritorial investigations, investigators have utilized a range of methods including in some instances making direct calls

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00111 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.075

for assistance in the state where the crimes occurred through radio and television.

The need to protect witnesses
Given the contexts in which grave human rights abuses are often committed, witnesses can be expected to face serious threats if they become involved in a prosecution. We have found that the high visibility of investigations conducted in the territorial state may increase risks for witnesses. Reducing visibility may be important and can be done easily in some instances by, for example, taking statements in neutral places. While the power to protect witnesses remains with the authorities in the state where the investigation is conducted, the welfare of at-risk witnesses also must be monitored by US authorities who should have the capacity to relocate threatened witnesses if necessary.

A related issue is a commonly cited concern that witnesses brought to testify in the forum state may seek asylum. Witness testimony has been taken abroad through various measures, including video link. However, if the witness's evidence is significant, and the witness has a well-founded fear of persecution, due consideration should be given to asylum claims of witnesses on US territory, or to witness relocation through refugee resettlement or other arrangements.

Human Rights Watch thanks this subcommittee for focusing on ensuring accountability for human rights violators in the United States. We hope that it helps to draw attention to this important issue and that appropriate resources will be dedicated and changes to law and practice implemented. They are critical to ensure the United States does not serve as a safe haven to perpetrators of serious crimes under international law and to enable redress to victims of such abuses.

Thank you.

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00112 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.076

Statement Of Chairman Patrick Leahy
Hearing On "No Safe Haven: Accountability For Human Rights Violators In The United States"
Senate Judiciary Committee, Subcommittee On Human Rights And The Law
November 14, 2007

I thank Senator Durbin for holding this important hearing to bring needed oversight to the crucial area of human rights enforcement. I was proud to work with Senator Durbin in creating the Human Rights and the Law Subcommittee, which is working to closely examine important and difficult legal issues that have increasingly been a focus of the Judiciary Committee. I congratulate Chairman Durbin and Ranking Member Coburn for the significant work they have already done and will continue to do in this Subcommittee, and I hope the Subcommittee's work with be a first step toward reversing and correcting the damaging policies established by this Administration over the last six years.

It is vital that the United States reclaim its historic role as a beacon to the world on issues of human rights. One key way to do so is to ensure that this country will never be a safe haven for those who commit atrocities. Congress took an important step toward doing this in 2004, when it passed the Anti-Atrocity Alien Deportation Act, a piece of legislation I introduced and worked for years to pass. That statute has made it easier for this country to keep out those who commit human rights abuses and to deport those perpetrators of abuses who are already here. This law has prompted, among other accomplishments, the deportation of Kelbessa Negewo to Ethiopia, where he is now serving a life sentence for torture and multiple killings.

The Anti-Atrocity Alien Deportation Act also authorized the Office of Special Investigations at the Justice Department, which previously focused only on prosecutions of Nazi war criminals, to expand its focus to include prosecutions of all perpetrators of human rights abuses. I look forward to hearing more today about that section's work to bring these criminals to justice.

Senators Durbin and Coburn have worked through this Subcommittee to expand on that important legislative accomplishment. I was glad to cosponsor their Genocide Accountability Act, which would close a loophole that has long existed in our criminal law allowing those who commit or incite genocide to seek refuge in our country without fear of prosecution for their actions. That bill has passed through the Judiciary Committee, as have similar bills providing for prosecution of those who seek refuge in the United States after committing human trafficking offenses or recruiting child soldiers. I hope the Senate will follow the Judiciary Committee's lead in passing this important legislation and working to ensure that the United States is never a refuge for those who commit crimes against humanity. I hope today's hearing provides added support for this legislation and ideas for any additional legislation necessary for rigorous human rights enforcement.

The Judiciary Committee has restored oversight to a Department of Justice that had run amok on principles as fundamental as keeping prosecutions free from political influence,

43914.077

limiting executive power, and clearly prohibiting torture. I am glad that the Human Rights Subcommittee is extending the Judiciary Committee's strong progress on oversight into this key area. It will be important to ensure that the Justice Department and the government as a whole is doing everything it can to combat human rights abuses and provide accountability to those who perpetrate them.

Perhaps more than anything, though, we must lead by example. It is an outrage that some in this Administration, from our State Department to our newly confirmed Attorney General, have been unwilling to say that waterboarding is illegal. The United States does not torture, and we should not have to discuss whether or not we can use the ancient and cruel practice of waterboarding. The answer should be self-evident.

It is an outrage that the last Congress and this Administration passed a law allowing non-citizens, including the millions of lawful, permanent residents living in this country, to be held indefinitely on mere suspicion of involvement in terrorism, without the ability to challenge their detention in court. I will continue working with Senator Specter to restore the Great Writ of habeas corpus. And it is an outrage that our government has engaged in extraordinary rendition, including sending a Canadian citizen to Syria to be tortured, and has not apologized or changed its policy.

We must promote accountability for human rights violations committed abroad, and we must never let those who commit these horrible crimes escape prosecution by coming to the United States. But no amount of enforcement against foreign nationals will compensate if we abandon our commitment to upholding the highest standards of human rights in the conduct of our own government and our own country.

I commend Senators Durbin and Coburn for holding this timely and pertinent oversight hearing and for their diligent work to fill loopholes in the law and conduct oversight to ensure that human rights abuses are punished. I hope the rest of Congress and the Administration will similarly recommit to the principles of human rights.

# # # # #

43914.078

Department of Justice

Statement of
Sigal P. Mandelker
Deputy Assistant Attorney General
Criminal Division
Department of Justice

Before the
Subcommittee on Human Rights and the Law
Committee on the Judiciary
United States Senate

Concerning
"No Safe Haven: Accountability for Human Rights Violators in the United States"

November 14, 2007

43914.079

Chairman Durbin, Ranking Member Coburn, and distinguished Members of the Subcommittee, thank you for inviting the Department of Justice to testify at this hearing. Pursuing justice against the perpetrators of genocide and other atrocities is a mission of the highest importance. As the Deputy Assistant Attorney General in the Criminal Division who supervises two key participants in that mission – the Domestic Security Section and the Office of Special Investigations – I am pleased to address the Department of Justice's ongoing efforts against the perpetrators of genocide, war crimes and crimes against humanity.

The Department has a long and distinguished history in this mission. Indeed, Former Attorney General Robert H. Jackson and his colleagues prosecuted the leading Nazi war criminals after World War II. The court before which those Nazi leaders were tried, the International Military Tribunal, convened in Nuremberg, Germany, precisely 62 years ago today, on November 14, 1945. Exactly 10 years earlier, the Third Reich had taken a fateful step along the road to genocide by issuing the first regulations implementing the notorious Nuremberg laws. Those November 14, 1935 regulations deprived all of the country's Jews of their German citizenship and established an elaborate scheme to classify people as Jews based on their ancestry and affiliations.

Who could have imagined on November 14, 1945, that genocide and other crimes against humanity would be committed *again*, much less that it would be perpetrated within the lifetimes of many who had somehow survived the Nazi Holocaust. Today reflects another important anniversary. On November 14, *1995*, the International Criminal Tribunal for the Former Yugoslavia, sitting in The Hague, issued its first indictments for genocide arising out of the Srebrenica massacre – an infamous atrocity in which up to 8,000 Bosnian Muslims had been brutally murdered earlier that year in the largest mass murder committed in Europe since the Holocaust. The fact that Radovan Karadzic and Ratko Mladic, the two men indicted twelve years ago today for that massacre, remain fugitives from justice is emblematic of the work that remains in the quest to deter the repetition of such monstrous crimes.

Federal efforts directed against participants in genocide are part of an important and time-honored national commitment. The United States government has long been a key participant in worldwide law enforcement efforts to help end impunity for genocide, war crimes and crimes against humanity. Thus, for example, our nation has taken a leading role in establishing and supporting such notable institutions as the Nuremberg and Tokyo Tribunals after World War II and, more recently, the International Criminal Tribunals for Rwanda and the former Yugoslavia, the Special Court for Sierra Leone, and the Iraqi High Tribunal. Most recently, the United States has been the worldwide leader in diplomatic efforts to stop the unspeakable atrocities in Darfur. In 2004, the U.S. State Department commissioned an Atrocities Documentation Team which, on only a few weeks notice, assembled a team of experienced law enforcement investigators and legal experts, including Department of Justice personnel. The team interviewed over 1,100 Darfurian refugees who had taken shelter in refugee camps in neighboring Chad. Based on the information elicited in those interviews, then-Secretary of State Powell was able to

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00116 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.080

conclude and state publicly that genocide has been committed in Darfur. In the Criminal Division today, a former prosecutor at the International Criminal Tribunal for the Former Yugoslavia, who more recently headed the Criminal Division's Domestic Security Section, serves as Senior Counsel to Assistant Attorney General Alice Fisher, focusing on international humanitarian and human rights law matters, including those related to genocide, war crimes and torture.

The federal government pursues this mission on multiple fronts. The first of these is to prevent perpetrators from gaining entrance to this country. This is accomplished principally by attempting to identify such individuals before they try to enter the United States and by adding their names to the interagency border control system. In addition, the government takes proactive measures targeted at identifying any such persons who have already gained entry, so that criminal prosecution or other appropriate law enforcement action can be taken in this country. In cases in which domestic criminal prosecution is not possible or is not the most desirable course of action, we seek to arrest and extradite or transfer suspects to stand trial abroad or to denaturalize them and accomplish their departure through administrative removal proceedings. Lastly, the Department of Justice, acting principally in conjunction with the Department of State, continues to take important initiatives aimed at enhancing the capacity of foreign governments and international tribunals to investigate and prosecute criminal cases against participants in genocide, war crimes and crimes against humanity – including, of course, investigations and prosecutions of suspects whom the U.S. government removes.

Among the numerous federal agencies involved in pursuing these law enforcement strategies are the Department of Justice's Criminal Division (primarily through the Domestic Security Section, the Office of International Affairs, the Office of Special Investigations, the Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT) and the International Criminal Investigative Training Assistance Program (ICITAP)), the National Security Division, the United States Attorneys Offices, the U.S. Immigration and Customs Enforcement (ICE) of the Department of Homeland Security, and the Federal Bureau of Investigation. Their efforts receive important support from the State Department and other components of the federal government. In 2005, seeking to strengthen their collaborative work on these often very challenging cases, an interagency group formed the Ad Hoc Interagency Working Group on Human Rights Violator Cases. The member agencies meet frequently to share information and to coordinate enforcement strategies.

I would like to elaborate on each of the key areas I have mentioned – identification, exclusion, criminal prosecution, international extradition, denaturalization, removal, and foreign capacity-building – and to provide examples of important successes that have been achieved.

First, extensive efforts have been made to identify and exclude participants in genocide and other heinous mass crimes. For example, laborious investigations conducted in archives here and abroad over the course of more than twenty-five years have enabled the Office of Special Investigations to identify and contribute to the system

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00117 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.081

managed by the Departments of State and Homeland Security the names of numerous individuals suspected of complicity in World War II-era Nazi and Japanese crimes. Working together, OSI and agents of U.S. Customs and Border Protection (CBP) of the Department of Homeland Security have thereby succeeded in stopping more than 180 suspected Axis criminals at U.S. ports of entry and have prevented them from entering the country. The most recent such incident occurred in August of this year, when CBP inspectors at John F. Kennedy International Airport in New York prevented a former SS officer from entering the United States under the visa waiver program. Among the Nazi perpetrators who have been excluded is Franz Doppelreiter, a convicted Nazi criminal who was stopped in November 2004 at Atlanta's Hartsfield-Jackson International Airport and admitted under questioning at the airport that he had physically abused prisoners at the notorious Mauthausen concentration camp while serving in the SS.

The federal government also seeks to bar entry to the United States to those who participated in genocide, war crimes, or crimes against humanity that have been committed since World War II. In June, for example, Isaac Kamali, an accused architect of the 1994 Rwandan genocide, was taken into custody by Department of Homeland Security (DHS) officials when he arrived at Philadelphia International Airport on an international flight and tried to enter the United States on a French passport. After notifying French officials, DHS returned Kamali to France, where he was immediately placed under arrest pending adjudication of an extradition request from the Government of Rwanda.

Second, the Department is committed to bringing criminal prosecutions against individuals for substantive human rights-related violations, where we have jurisdiction to do so. Although the Title 18 genocide statute, which was enacted in 1988, is limited to cases in which genocide has either been committed in the United States or committed abroad by a U.S. national,[1] the Justice Department makes use of other criminal and civil charges to ensure that the perpetrators of genocide, war crimes and crimes against humanity do not find safe haven in the United States.

When evidence is surfaced implicating U.S. residents or citizens in such acts, the federal government moves swiftly to investigate and take legal action. Even when offenders are not subject to prosecution in the United States (for example, when the crimes were committed before the applicable Federal statutes were enacted, as was the case with World War II-era Nazi criminals, among others), the U.S. government can often employ other effective law enforcement tools, such as instituting criminal prosecutions for visa fraud, unlawful procurement of naturalization, and making false statements, as well as bringing civil denaturalization actions as a prelude to the commencement of removal actions by ICE. For example, ICE and the U.S. Attorney's Office for the Southern District of Florida successfully prosecuted Telmo Ricardo Hurtado-Hurtado this year for false statements and visa fraud for failing to reveal on his immigration forms that he had been convicted in Peru for abuse of authority in connection with the murder of 69 civilians in the 1985 Accomarca massacre in Peru. ICE

[1] *See* 18 USC 1091.

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00118 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.082

has commenced removal proceedings against Hurtado, based on visa fraud and visa overstay charges and on his participation in extrajudicial killings. He faces removal to Peru, where the government has announced that he will be tried on charges of murder and forced disappearance. In another major case, Jean-Marie Vianney Mudahinyuka was convicted in Chicago in 2004 of lying on his U.S. immigration forms to gain entry to the U.S. as a refugee. He was sentenced to 51 months in prison for that offense and for assaulting Federal officers who arrested him. Upon his release from prison, Mudahinyuka will also be subject to removal. He is wanted in Rwanda on charges of genocide and crimes against humanity.

The World War II Nazi cases demonstrate the utility of civil denaturalization and removal strategies. The Criminal Division's Office of Special Investigations has compiled a 28-year record of identifying, investigating, and bringing civil denaturalization and removal actions against World War II-era participants in genocide and other Nazi crimes. OSI has successfully pursued more than one hundred of these criminals and it is widely considered to be the most successful law enforcement operation of its kind in the world. One of the program's recent victories was recorded on January 3, when a U.S. immigration judge ordered the removal of Josias Kumpf of Racine, Wisconsin. By his own admission, during a mass killing operation in occupied Poland in 1943, Kumpf stood guard at a pit containing dead Jewish civilians and others he described as "halfway alive" and "still convuls[ing]," with orders to shoot to kill anyone who attempted to escape. Also this year, OSI accomplished the denaturalization of Ivan (John) Kalymon after proving in federal district court in Detroit that he had shot Jews while serving in a Nazi-sponsored police unit during the 1942 liquidation of a Jewish ghetto in L'viv, Poland. In September, OSI accomplished the denaturalization and return to Germany of Martin Hartmann of Mesa, Arizona, based on his admitted participation in Nazi-sponsored acts of persecution while serving as an armed SS Death's Head guard at the infamous Sachsenhausen Concentration Camp and several of its subcamps in Germany during World War II.

To date, some 60 Nazi criminals have been returned to countries of Europe that possess the criminal jurisdiction that the United States lacks in the World War II cases. OSI continues to work with prosecutors overseas to facilitate the criminal prosecution of Nazi criminals, including, of course, those perpetrators whom we succeed in removing from the United States. Those efforts have borne fruit in a number of important instances. For example, in Vilnius, Lithuania, in 2001, former OSI defendant Kazys Gimzauskas became the first person ever convicted on genocide charges in any of the successor states to the former Soviet Union. Year after year, in recognition of its commitment to, and success in, pursuing justice in the World War II Nazi genocide cases, the United States government has been the only government in the world to receive the "A" rating of the Simon Wiesenthal Center, the Los Angeles-based organization named after the renowned Nazi-hunter.

In 2004, the Intelligence Reform and Terrorism Prevention Act expanded OSI's mission to include investigating and bringing civil denaturalization cases and criminal prosecutions for unlawful procurement of U.S. citizenship against post-World War II

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00119 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.083

participants in genocide, extrajudicial killings and torture perpetrated under color of foreign law. With this law, OSI became only the newest component of a comprehensive Federal interagency effort to ensure that perpetrators of these terrible crimes find no sanctuary in this country. A leading role in this effort is played by the Department of Homeland Security, particularly ICE and its Human Rights Violators and Public Safety Unit and Human Rights Law Division, as well as Citizenship and Immigration Services. Other components of the Department of Justice that participate in this effort are the Criminal Division's Domestic Security Section and Office of International Affairs, the National Security Division's Counterterrorism Section, the FBI and the U.S. Attorneys Offices.

In September 2005, a number of Bosnian Serbs who allegedly lied on immigration forms about their prior service in the Bosnian Serb army were arrested by ICE in Phoenix and indicted by the U.S. Attorney's Office there on immigration-related charges. Two of those who have since been removed by ICE to Bosnia were indicted last December 13 by Bosnian authorities on charges of murder and other serious offenses.[2] Also in December of last year, individuals in six states were charged with criminal violations in connection with their alleged efforts to obtain refugee status in the United States by concealing their prior service in the Bosnian Serb military. One of the defendants is alleged in a Federal affidavit as having been a commander of a police unit that cooperated with other Bosnian Serb entities in the Srebrenica massacre. All but one of the defendants face criminal charges that include immigration fraud and/or making false statements. The maximum sentence for making false statements is five years in prison, while the maximum sentence for immigration fraud is 10 years imprisonment. One defendant is a naturalized U.S. citizen, and he has been charged with unlawful procurement of citizenship and making false statements, offenses that carry maximum potential sentences of 10 and 5 years, respectively. The cases were investigated by ICE special agents with assistance from the Justice Department's Office of Special Investigations, and both agencies are actively reviewing other cases for further action.. The U.S. Attorney's Offices that have prosecuted these cases include those in the Middle District of Florida; Eastern District of Wisconsin; Middle District of North Carolina; District of Colorado; Eastern District of Michigan; Northern District of Ohio, District of Oregon, District of Utah and District of Arizona. (The Office of Special Investigations is also participating in the prosecution of the U.S. citizen defendant, in Tampa, Florida, and a Bosnian Serb defendant in Utah.)

The Kelbessa Negewo case is another excellent example of Federal agencies working together to pursue justice in these cases even when domestic criminal prosecution for the underlying offenses is not possible. Negewo served as a local official under the repressive military regime that ruled Ethiopia from 1974 to 1991. He subsequently immigrated to the United States, settled in Georgia, and obtained U.S. citizenship. Three Ethiopian women later filed suit against him under the Alien Tort Claims Act in U.S. District Court in Atlanta, alleging that they had been tortured in a jail

[2] The two men are Zdravko Bozic and Mladen Blagojevic, who were arrested in Phoenix in 2005 and subsequently convicted there on visa fraud and related charges.

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00120 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.084

that he had controlled. The district court found that Negewo had both supervised and directly participated in the torture of the women, and the court awarded damages. A civil denaturalization action was filed against Negewo in May 2001 by the U.S. Attorney's Office in Atlanta. His U.S. citizenship was revoked in October 2004 pursuant to a settlement agreement negotiated by that office. After a lengthy overseas investigation by ICE agents, removal proceedings were initiated by ICE in 2005 following Negewo's denaturalization. These proceedings were the first to charge participation in torture and extrajudicial killings, charges that were made possible by amendments made to the Immigration and Nationality Act by the 2004 Intelligence Reform and Terrorism Prevention Act. In October of last year, ICE removed Negewo to Ethiopia and he is now serving a life sentence there.

Our successes notwithstanding, experience has consistently shown that investigations targeted at building prosecutable cases against suspected perpetrators of genocide, war crimes or crimes against humanity can be extremely complex, whether the investigations concern those offenses directly or instead involve immigration-related violations prosecuted criminally or civilly. This is hardly surprising, as the activities at the heart of these cases occurred in foreign countries, often many years in the past, and they frequently took place in the context of complex political, military or social conflicts. Moreover, access to the crime scenes may be limited and our ability to gather evidence relies largely on the cooperation of other governments. Witnesses – if any survived – may face reprisals for testifying or may themselves be perpetrators who are statutorily barred from entering the United States, or they may speak only a rare dialect of a little-known language. In the unlikely event that pertinent written records were prepared by the perpetrators, they may have been destroyed, be inaccessible, or present insoluble chain-of-custody problems. Obtaining sufficient evidence that is admissible in a U.S. court of law therefore is apt to be a time-consuming undertaking, and it typically requires highly specialized expertise.

Third, at the Justice Department, we have helped facilitate the criminal prosecution abroad of the perpetrators of genocide, war crimes and crimes against humanity found in this country. For example, in March 2000, following the conclusion of hard-fought litigation,[3] the United States turned over Elizaphan Ntakirutimana to the International Criminal Tribunal for Rwanda (ICTR). He had been a pastor in Rwanda at the time of the 1994 genocide. Ntakirutimana was accused of devising and executing a lethal scheme in which Tutsi civilians were encouraged to seek refuge in a local religious complex, to which he then directed a mob of armed attackers. With his participation, the attackers thereupon slaughtered and injured those inside. The United States surrendered Ntakirutimana to the ICTR in response to a request made by the Tribunal pursuant to an Executive Agreement by which the U.S. agreed to transfer Rwandan suspects in its territory to the ICTR for trial.[4] In 2003, Ntakirutimana, a onetime Texas resident, was

---

[3]*See* Ntakirutimana v. Reno, 184 F.3d 419 (5th Cir. 1999), *cert. denied*, 528 U.S. 1135 (2000).

[4]Agreement on Surrender of Persons Between the Government of the United States and the ICTR, Jan. 24, 1995, U.S.-Int'l Trib. Rwanda, KAV No. 4529, 1996 WL

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00121 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.085

convicted by the Tribunal of aiding and abetting genocide and he was sentenced to ten years' imprisonment. A prosecutor from the Justice Department played a significant role in charging Ntakirutimana.

The United States has extradited other perpetrators to other countries to stand trial in their domestic courts. A recent extradition in the bilateral context was the January 2006 extradition of Mitar Arambašič to Croatia. Arambašič had been convicted in absentia in Croatia and sentenced to twenty years' imprisonment for crimes against humanity and war crimes perpetrated against civilians during the break-up of the former Yugoslavia. The charges included the murder of two Croatian police officers in 1991 and the beheading of civilians with an axe. The Department of Justice successfully pursued this extradition, which was contested by Arambašič in litigation spanning three years, and he was returned to Croatia, where he faced a trial in person. The Justice Department also accomplished the extradition of several accused participants in World War II-era Nazi crimes between 1973 and 1993 (when the last such extradition request was received).

Extradition matters are coordinated within the Justice Department by the Criminal Division's Office of International Affairs, which also responds each year to thousands of requests and inquiries from foreign law enforcement authorities for assistance in their investigations and prosecutions. The Federal government works diligently to locate international fugitives and return them to the countries in which their alleged crimes were committed. Extradition, however, is contingent upon receipt of a request from a foreign government with which the United States has an extradition treaty, and the United States has received relatively few such requests in these cases.

Finally, in cooperation with the State Department, the Justice Department also has long devoted very considerable resources to enhancing the capacity of foreign governments to investigate and prosecute cases of genocide, war crimes or crimes against humanity. Three components of the Justice Department's Criminal Division provide much of the assistance given to foreign law enforcement authorities. As noted, the Office of International Affairs takes the lead in executing foreign requests for evidence or other legal assistance and has responded to dozens of requests for assistance in matters relating to genocide, war crimes and crimes against humanity. Similarly, the OPDAT and ICITAP take the lead for the Department in providing training and assistance in criminal justice sector reform and development.

OPDAT was established to harness the Department of Justice's resources to develop foreign justice sector institutions and to enhance the administration of justice abroad. OPDAT also assists foreign prosecutors and judicial personnel by providing technical assistance and skills development support. OPDAT helps fulfill the Justice Department's commitment to assist foreign governments as they attempt to build and maintain, or improve viable criminal justice institutions. OPDAT commonly implements

---

165484 *as implemented by* National Defense Authorization Act, Pub. L. 104-106, § 1342, 110 Stat. 486 (1996).

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00122 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.086

its programs by assigning experienced federal prosecutors to serve on long-term bases as Resident Legal Advisors overseas. Resident Legal Advisors develop and implement programs of criminal justice assistance that emphasize the need to balance effective and aggressive law enforcement techniques with laws, procedures and policies that are based on rule of law principles and respect for human rights.

OPDAT supports the Department's and the U.S. Government's interests by promoting the rule of law and regard for human rights, by preparing foreign counterparts to cooperate more fully with the United States in combating transnational crime and terrorism, and by improving foreign judicial assistance to the investigative and prosecutorial elements of the Department of Justice. As a general rule, internationally accepted standards are a primary focus of OPDAT programs. In areas such as human rights, trafficking in persons, public corruption, gender-based violence, and transnational organized crime, international and regional conventions and agreements are routinely explained and the need for compliance with international obligations is emphasized.

Working with funding from the State Department and the Agency for International Development (AID), OPDAT uses a best practices methodology to develop effective criminal codes and procedures, improve institutional structures and relationships, and enhance the professional capabilities of prosecutors, judges, defense attorneys, and select law enforcement officers to help create more responsive and responsible criminal justice systems abroad. Currently, OPDAT provides justice sector development assistance in Africa and the Middle East, Asia and the Pacific, Central and Eastern Europe, Latin America and the Caribbean, and Eurasia.

OPDAT has provided capacity-building assistance in the investigation and prosecution of war crimes to the various countries and jurisdictions of the former Yugoslavia, principally Serbia and Bosnia-Herzegovina, to some extent Croatia, and to a lesser extent (and more recently) Kosovo, Macedonia and Montenegro. This has included provision of training; advice on legislation; assistance in the development of witness protection programs and witness exchange agreements; capacity-building in the area of victim-witness assistance; videoconferencing equipment (to allow witnesses in criminal cases, including war crimes cases, to testify safely from one country to another); and assistance to promote the exchange of information and cooperation between and among the countries and jurisdictions in the region. Prosecutors and other personnel of the National Security Division's Counterterrorism Section, the U.S. Attorney's Office for the District of Columbia, and the Criminal Division's Office of Special Investigations have also participated in the training programs in Croatia.

The Justice Department's efforts in the former Yugoslavia have been coordinated with the ICTY. For example, OPDAT has sponsored study tours by Bosnian prosecutors to the Tribunal (at The Hague), and ICTY representatives have participated in conferences that OPDAT has sponsored, such as regional conferences held in October 2006 in Montenegro and in October 2007 in Croatia. Members of the recently formed ICTY transition team attended the second conference. Both conferences were attended by officials from Serbia, Croatia, Bosnia and Herzegovina, Montenegro and Macedonia;

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00123 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.087

the October 2006 conference was also attended by officials from Kosovo. The October follow-on war crimes conference in Croatia was conducted in cooperation with the U.S. Ambassador-at-Large for War Crimes Issues. The conferences focused on issues such as cooperation and exchange of evidence between the countries and jurisdictions of the former Yugoslavia in war crimes investigations and prosecutions – which is particularly important since there are constitutional and/or legal impediments to extraditing suspects between those countries and jurisdictions.

ICITAP, also via State Department funding, has similarly provided assistance directly to foreign law enforcement authorities in the former Yugoslavia. In Bosnia and Herzegovina, Croatia and Serbia, ICITAP conducted extensive assessments of the needs of law enforcement authorities responsible for investigating and prosecuting war crimes cases. Equipment, software, and training that ICITAP subsequently supplied has significantly enhanced the capacity of the local authorities to identify and investigate complex and politically charged crimes. In Croatia, ICITAP, in coordination with OPDAT, provided specialized training to members of the criminal justice system who are directly responsible for the investigation and prosecution of war crimes cases. That training focuses on evidence collection, courtroom presentation, and witness protection. The work undertaken in this field by OPDAT and ICITAP draws extensively on the resources of Federal investigating agencies and the U.S. Attorney's Offices. It is an integral part of the Justice Department's commitment to assisting cognizant foreign governments and tribunals.

The assistance that we have provided in the former Yugoslavia, as elsewhere, is given with a view toward increasing the ability of these countries and jurisdictions to prosecute cases involving genocide, war crimes and crimes against humanity. This capability is especially important now that the ICTY is progressing towards its U.N. Security Council-endorsed closure and has transferred a number of cases to the individual countries in the region for investigation and prosecution.

OPDAT has provided assistance in the area of war crimes and other crimes against humanity in other regions of the world as well. For example, in 2001 and 2002 OPDAT assigned a Resident Legal Advisor to Rwanda to provide assistance to the Rwandan criminal justice sector. The program focused on investigations and prosecutions involving the most serious category of genocide-related offenses. The Resident Legal Advisor provided advice and support to the prosecution service in its efforts to evaluate and prosecute those detainees who were alleged to have planned and orchestrated the 1994 genocide. The OPDAT program in Rwanda provided advice, support and technical assistance that was intended to improve the capacity of Rwandan justice officials to gather evidence and prosecute cases based on rule of law principles.

In Colombia, the Justice Department provides assistance to the Colombian Prosecutor General's Human Rights Unit, which consists of a National Unit in Bogota and 15 regional units in the Colombian cities of Medellin, Cali, Bucaramanga, Villavicencio, Neiva, Cucuta and Barranquilla. This Unit is responsible for the investigation and prosecution violations committed either by illegally armed groups or

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00124 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.088

government officials. In addition, the Unit has been tasked with four sub-unit areas: cases involving union members, cases involving Union Patriotica (political organization), forced disappearances, and extrajudicial killings by the Colombian military. Justice Department assistance involves training and technical assistance, as well as provision of equipment and operational support. In addition, the Department provides forensic assistance specifically designed to focus on the scientific analyses that will directly support human rights investigations. Those areas are DNA analysis (CODIS), Integrated Ballistics Identification Systems (IBIS), Automated Fingerprint Identification Systems (AFIS), and Questioned Document (QD) examination. The Department has also provided a wireless network to transmit investigative and laboratory examination reports securely between and among prosecutors, investigators, and forensic examiners in remote locations.

The Department of Justice is also providing assistance to the Colombian Prosecutor General's Office Justice and Peace Unit tasked with investigating demobilized paramilitary organization members, identifying responsibility in serious criminal activity, identifying and locating assets, receiving complaints and interviewing victims, performing exhumation and identification at massacre sites, preparing for and interviewing the demobilized members in their proffers or "version libres," developing the subsequent criminal charging documents to form the basis of guilty pleas or passing the cases on for prosecution under ordinary criminal justice. Justice Department-provided assistance involves training, providing technical assistance, supplying equipment, enhancing and securing hearing rooms, advising on interview techniques, case and questioning strategies, and providing logistical and administrative support, data base development, and forensic support including training and aiding exhumation teams.

In conclusion, Mr. Chairman, I would like to express to you and the Subcommittee the Justice Department's appreciation for your leadership and this opportunity to discuss the government's ongoing efforts to ensure that justice is credibly and aggressively pursued both here and abroad on behalf of the victims of mass atrocities. We are very grateful for the tools that Congress has provided for law enforcement in these cases. Most important, we are committed to continuing and expanding our already vigorous efforts to promote fulfillment at last of the essential – but tragically unkept – promise of Nuremberg and its juridical progeny: that no man, woman or child anywhere will ever again be subjected to the cruel ravages of genocide, war crimes and crimes against humanity.

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00125 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.089

TESTIMONY OF

PAMELA MERCHANT
EXECUTIVE DIRECTOR
THE CENTER FOR JUSTICE & ACCOUNTABILITY

BEFORE THE

SUBCOMMITTEE ON HUMAN RIGHTS AND THE LAW
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NO SAFE HAVEN: ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATORS IN THE UNITED STATES

NOVEMBER 14, 2007

870 Market Street, Suite 688 San Francisco, CA 94102 tel 415 544 0444 fax 415 544 0456 info@cja.org cja.org

43914.090

Testimony of
Pamela Merchant
Executive Director
The Center for Justice & Accountability

Before the
Subcommittee on Human Rights and the Law
Committee on the Judiciary
United States Senate

No Safe Haven: Accountability for Human Rights Violators in the United States

November 14, 2007

Chairman Durbin, Ranking Member Coburn, and Members of the Subcommittee, thank you for inviting the Center for Justice & Accountability (CJA) and our client, Juan Romagoza Arce, to testify about the government's efforts to investigate, prosecute and remove human rights abusers.

On behalf of CJA, I would like to thank you, Mr. Chairman, for your leadership in the creation of this historic Subcommittee on Human Rights and the Law. It is very important that this committee exist to provide coordinated oversight of human rights law, policies and enforcement efforts.

My name is Pamela Merchant. I am the Executive Director of CJA. I am also a former federal prosecutor. I spent eight years as a prosecutor with the Criminal Division of the United States Department of Justice (DOJ) first under Attorney General William Barr and then Attorney General Janet Reno. I have also served as a prosecutor for the Commonwealth of Massachusetts and the State of California.

The Center for Justice and Accountability (cja.org) is a nonprofit legal organization dedicated to ending torture and seeking justice. We represent survivors of torture and other severe human rights abuses against individual human rights abusers in civil litigation using the Alien Tort Statute and the Torture Victim Protection Act. In the past ten years, we have brought cases in the United States against human rights abusers from Bosnia, Chile, China, El Salvador, Haiti, Honduras, Indonesia, Peru and Somalia. We are, therefore, in a unique position to offer insights to our allies in the government about the effective prosecution of these cases.

CJA was founded by a San Francisco-based therapist, Gerald Gray, who has spent most of his professional life treating torture survivors. Gray was inspired to start CJA because a patient of his, a Bosnian torture and concentration camp survivor, was experiencing additional trauma in the United States after he discovered that his torturer was living in the same community. Gray felt that there should be some way to hold the torturer accountable for the acts that he committed in Bosnia against his client. The idea

43914.091

behind CJA was to use the tools of civil litigation to help torture survivors hold their persecutors accountable and as a therapeutic aid to the healing and recovery process.

The core problem CJA addresses is *impunity* for perpetrators of gross human rights violations. By allowing human rights abusers to live with impunity, survivors and their communities are denied their right to truth, justice and redress. Impunity creates a culture that allows abuse to flourish; what is done without any punishment can be repeated without fear of consequences.

The United States is a country of immigrants. We are also a country that has been particularly welcoming to survivors of torture and to those who have come here to escape tyranny in their own country. Unfortunately, we have also become a haven for human rights abusers.

It is estimated that over 400,000 survivors of politically-motivated torture currently reside in the United States.[1] Every day these survivors strive to become self sufficient and healthy members of their new communities while also struggling to reclaim the strength and vitality that were stolen from them by brutal regimes. It is also estimated that thousands of human rights abusers have found safe haven in the United States, including more than one thousand with substantial responsibility for heinous atrocities.[2] These abusers often live in the same immigrant communities as their victims, causing extreme anxiety and undermining justice and accountability movements in the countries where the abuses occurred.

CJA applauds the work of DOJ and the Department of Homeland Security (DHS) to prosecute and in some instances to remove or extradite human rights abusers. In particular, CJA applauds DOJ for filing the first criminal case under the Torture Statute[3] last year against Emmanuel "Chuckie" Taylor, Charles Taylor's son and the former leader of Liberia's notorious Anti-Terrorism Unit. We hope that there will be many more such prosecutions. We also support efforts to extradite human rights abusers to other countries to stand trial in domestic courts, so long as the prosecutions and conditions of detention are likely to meet international standards.

Over the years, we have worked with attorneys, agents and historians within the Department of Justice, including the Office of Special Investigations and the United States Immigration and Customs Enforcement, and support appropriate efforts to direct more resources to human rights prosecutions and to expand the tools available to the government so they may effectively prosecute human rights abusers in the United States.

I would now like to offer recommendations concerning both policy and legislative reforms.

---

[1] U.S. Department of Health and Human Services Office of Refugee Resettlement, http://www.acf.hhs.gov/programs/orr/programs/services_survivors_torture.htm.
[2] Amnesty International, USA: A Safe Haven for Torturers, 2001.
[3] 18 U.S.C. §2340A.

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00128 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.092

Policy Recommendations: Human Rights Framework

Efforts to hold human rights abusers accountable in the United States must be undertaken in the context of a broader human rights framework and must conform with international human rights standards.

Criminal prosecutions are the most important form of accountability for victims of human rights abuses. The strongest message that the United States can send to human rights abusers around the world is that we will criminally prosecute them here when their home country will not.

Real deterrence cannot be achieved unless military and government officials perceive that they may be held individually accountable, not just for committing abuses, but for their failure to take reasonable action to stop others under their command from committing abuses. The focus of enforcement efforts, therefore, should be expanded to include command responsibility of those in power who enabled, or at the very least allowed, systematic and widespread human rights abuses.

When considering how to handle a human rights abuser in the United States, it is important to understand the role that individual played in the conflict, the needs and desires of the survivors and their community, and what efforts, if any, exist in the home country for to address the legacies of widespread or systematic human rights abuse through judicial and other approaches. A threshold analysis should be made into whether the return of a perpetrator to the home country is potentially destabilizing, or may result either in abuse of the perpetrator or in the perpetrator's participation in further criminal activity. We must not simply move the problem back to someone else's backyard when we have the resources and political will to take enforcement measures in the United States.

I would now like to offer three policy recommendations concerning prioritizing criminal prosecutions, more effective work with torture survivors, and increased coordination among agencies working to ensure that the US does not remain a safe haven for human rights abusers.

1. Prioritize Criminal Prosecutions

The U.S. government should make the criminal prosecution of human rights abusers, either in the home country of the human rights violator or in the United States, a top priority. Today, the vast majority of human rights enforcement efforts in this country are removals, although in most cases the human rights abuser will not be prosecuted in the home country, and related prosecutions for lying on immigration applications. We strongly urge the government to switch those priorities and make prosecution of human rights abusers for human rights crimes a priority. The focus of the prosecutions should be on high-level officials who were responsible for setting policy in their own country and have sought refuge here.

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00129 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.093

Unfortunately, only one case has been brought under the criminal Torture Statute in the thirteen years since it was enacted in 1994.[4] This needs to change. Given the number of human rights abusers in this country, awareness needs to be raised throughout DOJ about the importance of actively pursuing human rights prosecutions. Federal prosecutors nationwide should receive training on how to prosecute effectively a human rights case.

New protocols should be developed for human rights enforcement. The first priority should be to ensure that the human rights abuser is prosecuted for human rights abuses whether in the United States or their home country. Extradition or removal should also be considered in conjunction with the possibilities for criminal prosecution in the United States. If the national courts in the country of origin and/or the country where the crimes were committed are able to fairly prosecute or otherwise hold accountable the suspected human rights abusers, extradition or removal of the human rights abuser may be preferable to prosecution in the United States.

If the available human rights laws are inadequate, the next step should be to evaluate whether a criminal prosecution could be brought under other laws, for instance, for false statements made on immigration applications.[5]

In a situation involving extradition or removal, our government should take diplomatic and legal steps to ensure that the human rights abuser will (a) be fairly prosecuted or otherwise held accountable by the national courts in his/her home country, and (b) not be subjected to abusive treatment. It is also crucial to assess whether the national courts of the home country have the ability to carry out a fair trial before any removal or extradition is permitted to proceed.

Decisions regarding extradition or removal should be made in the context of the broader human rights agenda. Again, using a human rights framework, a threshold consideration should be whether the reintroduction of the human rights abuser to his or her home country will result in violence or will further destabilize the receiving country. A primary consideration at CJA is to "do no harm." Therefore, for example, we opposed plans to send Haitian death squad leader Emmanuel "Toto" Constant to Haiti because the judiciary there is, at this time, neither able nor willing to prosecute him and there are grave concerns that he could further destabilize the country.[6]

---

[4] In 1994 Congress passed the criminal torture statute to implement some of the obligations the U.S. accepted when it ratified the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. 18 U.S.C. §2340A. The law enables DOJ to criminally prosecute individuals in the U.S. who committed torture anywhere in the world.

[5] 18 U.S.C. §§1001, 1426 and 1546. In 2001, DOJ brought criminal false statement charges against Eriberto Mederos, a Cuban nurse, who had entered the U.S. in 1984 and became a U.S. citizen in 1993 despite well-documented reports of his violent past. In 2002, a jury found that he had administered electric shocks and other forms of torture to political opponents of the Castro regime, and found him guilty of false statements on his visa and citizenship applications. CJA has urged such prosecutions against other defendants who, our evidence shows, made material misrepresentations in their immigration applications.

[6] Constant is currently in prison in New York on state mortgage fraud charges. CJA and human rights activists from Haiti recently intervened to protest a DHS supported plea agreement that would have resulted

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00130 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.094

2. Techniques for Working with Torture Survivors

One of the things that we hear most often from attorneys and agents in the government who are working on these cases is the difficulty they have finding witnesses and maintaining relationships with witnesses. We are very familiar with these challenges. We have found that a client-centered approach is needed to develop the trust necessary for survivors to be effective witnesses.

Torture survivors suffer from post-traumatic stress disorder, depression, anxiety, nightmares, chronic pain and other long term conditions. It is important to avoid, or at the very least minimize, situations that will retraumatize them. Interviews need to be conducted with a particular sensitivity and, when possible, survivors should not be forced to tell the story of their torture over and over. Special precautions need to be taken in courtroom and asylum proceedings so as to avoid triggering memories of traumatic interrogations. Investigators need to be trained on effective, non-threatening interview techniques. In general, torture survivors require more frequent contact during the legal process than witnesses with no traumatic history.

Safety protocols need to be established for victims, witnesses and their families. As with organized crime prosecutions, clients and witnesses who testify in human rights cases often do so at great personal risk to themselves and their family members. Safety considerations also need to be taken into account for witnesses and family members overseas.

By way of example, this summer, individuals in the Liberian community who support the current criminal prosecution against Chuckie Taylor have received death threats. We know one individual who was shot at in broad daylight to discourage this individual from cooperating with the prosecution. In our case against the former Haitian death squad leader Constant, our client must remain anonymous until her five children who range in age from five to twenty-two are safely relocated to the United States from Haiti. Her children's lives will likely be in danger if her identity becomes known.[7] In another example, a witness in our trial against former Salvadoran Vice Minister of Defense Nicholas Carranza, at the very last minute, decided not to testify at trial because of death threats the witness received in El Salvador.

On a related issue, protocols need to be developed to handle the unique immigration problems of torture survivors, witnesses and their family members. Many victims, witnesses and family members in human rights cases are vulnerable because of their uncertain immigration status. Our Haitian client mentioned above applied for asylum in July 2003. Her application was granted almost three years later in May 2006. At that point, her children became eligible to file asylee relative petitions. Their

---

in his immediate deportation to Haiti. Based in part on our intervention, the judge threw out the plea agreement.

[7] CJA filed the case on behalf of three Jane Does in the Southern District of New York. At the hearing on damages, Jane Does testified anonymously and behind a screen. *Doe v.Constant.* 04 Civ10108 (SHS) (SD NY 2004).

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00131 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.095

application is still pending. This family has been separated for almost four years due, in part, to delays in our system. In another example, we have a client who was severely tortured over a period of seven months in West Africa. He was held in immigration detention in this country for four months before he was finally granted asylum. An extension of the visa regime should be considered to permit victims and witnesses abroad to be able to come to the United States to testify in human rights cases.

3. Coordination.

Today, at CJA we interact with at least four separate units or departments in DHS and DOJ that have a human rights component to their mission. It is clear that there needs to be more coordination and that an overall human rights policy needs to be established for bringing human rights abusers to justice.

Legislation

As this Subcommittee is well aware, a further limitation on the effective prosecution of human rights abusers is the limited existing statutory framework. The three bills filed by Chairman Durbin and Ranking Member Coburn this year to expand criminal jurisdiction for international human rights crimes are extremely important steps toward addressing this concern. The Genocide Accountability Act of 2007,[8] the Child Soldiers Accountability Act of 2007 and the Trafficking in Persons Accountability Act of 2007 will add critical tools to human rights enforcement efforts.

First, it is important that all criminal human rights laws allow for the prosecution of those with command responsibility for human rights abuses. Command responsibility is a well-established theory of liability which covers military officers or civilian superiors who knew or should have known about abuses taking place under their command and failed to take steps to stop the abuses or punish the offenders. It has been applied in criminal trials in the United States and internationally, as well as in civil litigation.[9] Legislation which strengthens the rules regarding subordinates while allowing those with command responsibility for human rights abuses to live in this country with impunity would send the wrong message about our commitment to human rights.

---

[8] The Genocide Accountability Act, S. 888, would amend the existing statute, 18 U.S.C. §1091, to include acts of genocide committed overseas by aliens and stateless individuals.

[9] *See, e.g., Yamashita v. Styer,* 327 U.S. 13-15 (1946) (application of command responsibility doctrine in a criminal case); *Kordic and Cerkez,* No. IT-95-14/2-T, Feb. 26, 2001, para. 401 (International tribunal: "[T]hree elements must be proved before a person may incur superior responsibility for the crimes committed by subordinates: (1) the existence of a relationship of superiority and subordination between the accused and the perpetrator of the underlying offence; (2) the mental element, or knowledge of the superior that his subordinate had committed or was about to commit the crime; (3) the failure of the superior to prevent the commission of the crime or to punish the perpetrators.)"; *Ford v. Garcia.* 289 F.3d 1283, 1288 (11th Cir. 2002) (Civil case: The elements that must be established to find a defendant liable for command responsibility are: 1) the existence of a superior-subordinate relationship between the commander and the perpetrator of the crimes; 2) that the commander knew or should have known, owing to the circumstances at the time, that his subordinates had committed, were committing, or planned to commit acts volatile of the law of war; and, 3) that the commander failed to prevent the commission of the crimes, or failed to punish the subordinates after the commission of the crimes).

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00132 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.096

Second, well-established international human rights crimes, such as extrajudicial killing and crimes against humanity, committed anywhere in the world by United States nationals or aliens found in the United States, should be made a crime under United States law, as was done with torture.

Third, the application of the Torture Statute and other human rights laws should be retroactive. There should be no *ex post facto* concerns for torture, extrajudicial killing, genocide and crimes against humanity which have been considered crimes since Nuremberg. The current effective date of November 1994 renders the statute ineffective for the particularly brutal human rights abuses committed throughout the eighties and early nineties in Latin America and Africa.

Fourth, as with common law murder, there should be no statute of limitations on torture or other international human rights crimes.[10]

Fifth, to enable criminal prosecution for fraud or deportation of human rights abusers with command responsibility, U.S. Citizenship and Immigration Services needs to amend immigration forms to include direct questions about participation in human rights atrocities.[11] The questions should be drafted to cover those former government officials who had command responsibility over those who committed human rights abuses.

Sixth, in situations where removal is the appropriate remedy, it is very important that individuals who had command responsibility for human rights abuses be subject to removal. We believe that the 2004 changes to the Immigration and Nationalization Act (INA), which added the commission of torture and extrajudicial killings as grounds for removal, cover those who had command responsibility over troops that committed severe human rights abuses.[12] Some of the legislative history supports this.[13] Nonetheless, DHS has failed to initiate removal proceedings against known human rights abusers in the United States with command responsibility. As a result, some of the most serious human rights offenders remain in the United States with impunity. You will hear powerful testimony today from Juan Romagoza Arce about his torture. The two Generals who were

---

[10] Today, there is no statute of limitations if the torture results in death or creates a foreseeable risk of death or serious bodily injury. 18 U.S.C. §2340A(a), 18 U.S.C. §3281, 18 U.S.C. §3286(b) and 18 U.S.C. §2332b(g)(5)(B). In a torture case where death or serious bodily injury does not occur, the statute of limitations is eight years. 18 U.S.C. §3286(a). The eight year statute of limitations may be suspended an additional three years if the evidence is located in a foreign country. 18 U.S.C. §3292. The proposed Trafficking in Persons Accountability Act and Child Solders Act both have ten year statutes of limitation. The Genocide Accountability Act has no statute of limitations.

[11] Two forms at least should be amended: (1) N-400 Application for Naturalization, OMB No. 1615-0052; and, (2) I-589, Application for Asylum and for Withholding of Removal, OMB No. 1615-0067.

[12] INA §212(3)(E)(iii), Commission of Acts of Torture or Extrajudicial Killings.

[13] *See* Senate Report, No. 107-144. The command responsibility language is in Part V, Section by Section Analysis, §2, para. 5: "The statutory language--'committed, ordered, incited, assisted, or otherwise participated in'--is intended to reach the behavior of persons directly or personally associated with the covered acts, including those with command responsibility."

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00133 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.097

found to have command responsibility for his torture are still living in Florida.[14] We urge DHS to interpret provisions of the INA that make commission of torture and extrajudicial killings a ground for removal as including command responsibility. If DHS refuses to adopt this interpretation, we invite Congress to amend the INA again to include clearer language on command responsibility.

Finally, human rights enforcement efforts should be done in a politically neutral fashion. In order to monitor enforcement efforts, the appropriate units of DOJ and DHS should submit an annual report to Congress on human rights enforcement efforts which would include the number of people investigated and prosecuted by nationality to facilitate oversight and make sure that individuals from disfavored countries are not unfairly targeted.

In conclusion, CJA encourages the United States to prosecute human rights abusers aggressively, to develop protocols for working with torture survivors and their families, and to use a more coordinated approach to human rights enforcement. CJA also encourages members of this Subcommittee to submit legislation to strengthen human rights enforcement laws.

I would like to thank you very much for this opportunity to testify. I would be pleased to answer any questions that the Subcommittee may have and to submit any additional information for the record.

[14] In a civil ATS/TVPA case, Generals Garcia and Vides-Casanova were found liable for human rights abuses committed against Juan Romagoza Arce under a command responsibility theory. *Arce v. Garcia,* 434 F.3d 1254 (11th Cir. 2006) (jury verdict upheld).

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00134 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.098

GAPS IN U.S. LAW PERTAINING TO ATROCITY CRIMES

Testimony of

David Scheffer
Mayer Brown/Robert A. Helman Professor of Law
Northwestern University School of Law
Chicago, Illinois

Before the

SUBCOMITTEE ON HUMAN RIGHTS AND THE LAW
COMMITTEE ON THE JUDICARY
UNITED STATES SENATE

No Safe Haven: Accountability for Human Rights Violators in the United States

November 14, 2007

I wish to thank Chairman Richard Durbin, Ranking Member Tom Coburn, and all Members of the Subcommittee on Human Rights and the Law of the Committee on the Judiciary of the U.S. Senate for this opportunity to present testimony in connection with the Subcommittee's hearing on November 14, 2007, entitled, *No Safe Haven: Accountability for Human Rights Violators in the United States*. I teach international criminal law and international human rights law at Northwestern University School of Law, where I also direct the Center for International Human Rights. I am a former U.S. Ambassador at Large for War Crimes Issues (1997-2001).

My testimony focuses on the gaps in U.S. federal law that currently prevent the prosecution of various types of cases pertaining to three categories of crimes: genocide, crimes against humanity (which includes torture and, as a crime of persecution, ethnic cleansing), and war crimes (which also includes torture). I have long described these three major categories as "atrocity crimes" for ease of reference and to more accurately

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00135 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.099

convey and emphasize the jurisprudential development of such crimes in the international and hybrid criminal tribunals since 1993.[1] I will not address human rights violations that do not rise to the level of magnitude and criminality found in the atrocity crimes or the gaps that may exist under U.S. federal law with respect to other violations of international human rights law. The latter would be a very extensive undertaking beyond the scope of my testimony. There is now a rich and continuing line of civil cases under the Alien Tort Statute (ATS) of 1789,[2] a truly unique American law, dealing with various human rights violations and seeking civil damages only, and the Torture Victim Prevention Act of 1991 (TVPA),[3] which again only permits civil damages with respect to acts of torture. I will not address ATS or TVPA litigation in this testimony; here I focus exclusively on criminal law and military law and how to ensure that U.S. law sufficiently empowers U.S. courts with appropriate jurisdiction to investigate and judge the culpability of alleged perpetrators of atrocity crimes.

Summary of Recommendations

1) The United States must eliminate any possibility that it would remain a safe haven for war criminals and atrocity lords who reach American shores and seek to avoid accountability for genocide, crimes against humanity, or war crimes ("atrocity crimes"). The United States must further demonstrate its willingness to hold its own citizens accountable for atrocity crimes as a commitment to the rule of law

[1] The international and hybrid criminal tribunals include the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the Special Court for Sierra Leone, the Iraqi High Tribunal, the Extraordinary Chambers in the Courts of Cambodia, and the International Criminal Court. The term "atrocity crimes" is explained in David Scheffer, *Genocide and Atrocity Crimes*, 1.3 Genocide Studies and Prevention 229 (2006); David Scheffer, *The Merits of Unifying Terms: 'Atrocity Crimes' and 'Atrocity Law,'* 2.1 Genocide Studies and Prevention 91 (2007).
[2] 28 U.S.C. §1350 (2006).
[3] 28 U.S.C. §1350 (2006).

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00136 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.100

and to America's rejection of impunity for such crimes regardless of who may be investigated at any level of civilian control or military command.

2) Enact the Genocide Accountability Act of 2007, the Child Soldiers Accountability Act of 2007, and the Trafficking in Persons Accountability Act of 2007 so that key gaps in federal law are filled.

3) Apply consistent rules of jurisdiction in the coverage of atrocity crimes in the federal criminal code, including application to all U.S. citizens, U.S. Government employees and contractors, and to all aliens present on U.S. territory for the commission of atrocity crimes anywhere in the world.

4) Eliminate from U.S. law all statutes of limitations for atrocity crimes.

5) Amend the federal criminal code, Title 18 of the U.S. Code, so that it enables U.S. courts to 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.

6) Amend the Uniform Code of Military Justice, Title 10 of the U.S. Code, so that U.S. courts-martial and military commissions can 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 defined as part of customary international law.

7) Recognize that until such amendments to Titles 10 and 18 of the U.S. Code are enacted, the United States has an antiquated criminal code and military code. Further recognize that the United States stands at a comparative disadvantage with many of its major allies which have modernized their national criminal codes

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00137 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.101

in recent years with incorporation of the atrocity crimes, in part so as to shield their nationals from investigation and prosecution by the International Criminal Court by demonstrating national ability to prosecute such crimes and thus invoke the Court's principle of complementarity. Paradoxically, even as a non-party to the Rome Statute of the International Criminal Court, the United States today essentially stands more exposed to its jurisdiction than do American allies which have modernized their criminal codes.

Introduction

In general, U.S. federal criminal law and military law have become comparatively antiquated during the last 15 years in their respective coverage of atrocity crimes as international criminal law has evolved significantly during that period. The prospects of U.S. courts exercising jurisdiction (subject matter, territorial, personal, passive, or protective jurisdiction) over atrocity crimes under current law remain relatively poor and U.S. attorneys, in even the best of jurisdictional circumstances, appear not to have pursued the types of investigations and possible prosecutions one might expect if there were an aggressive commitment to bringing perpetrators of atrocity crimes to justice and the law provided a clearer basis for such prosecutions.[4] Similar problems exist with respect to military courts-martial under the Uniform Code of Military Justice (UCMJ).[5] Some nations have leapt far ahead of the United States in terms of their national courts

[4] The notable exception has been the sole case (against Emmanuel "Chuckie" Taylor, the former leader of Liberia's Anti-Terrorism Unit) prosecuted under the criminal Torture Statute (10 U.S.C. §2340A) since its enactment in 1994.

[5] Uniform Code of Military Justice, 10 U.S.C. §§ 801-946 (2006). While it remains true that atrocity crimes likely could be prosecuted as multiple counts of common crimes under the UCMJ (such as genocide as multiple counts of murder or crimes against humanity as cruelty and maltreatment), the UCMJ does not provide for the specific atrocity crimes. The military prosecutor is left pondering whether to charge an atrocity crime under the general authority of UCMJ Article 18 or Article 134, which in fact are antiquated options rarely if ever employed.

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00138 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.102

being able to investigate and prosecute the full range of atrocity crimes.[6] Other nations are in the process of legislating incorporation of atrocity crimes into their respective criminal codes, and these include France, Japan, Mexico, Switzerland, Finland, Sweden, Brazil, and Norway.

In contrast, the United States remains an available safe haven for war criminals and atrocity lords who need not fear prosecution before U.S. courts for the commission of atrocity crimes if they reach U.S. territory either legally or illegally. Indeed, the fact remains that U.S. citizens and U.S. Government employees and contractors who may commit certain atrocity crimes not covered in federal law or common crimes for which there is no extraterritorial jurisdiction may entirely escape any prosecution in the United States. The recent experience with security contractors in Iraq, such as Blackwater USA and DynCorp International, is only one example of this dilemma.[7] The hypothetical possibilities, if not realities, arising from this shortcoming in U.S. federal law should be deeply disturbing to any rule of law society.

Before examining the gaps in U.S. federal law regarding atrocity crimes, I want to recognize the progressive work of this subcommittee during 2007. The Genocide Accountability Act of 2007, which Chairman Durbin and Senator Coburn co-sponsored,

---

[6] Examples include the United Kingdom (*International Criminal Court Act 2001*, Chapter 17, Part 5, 11 May 2001); Australia (*International Criminal Court (Consequential Amendments) Act* 2002, 28 June 2002]; Canada (*Crimes Against Humanity and War Crimes Act (2000, c. 24)*, 29 June 2000); Germany (*Code of Crimes against International Law*, 30 June 2002); The Netherlands (*International Crimes Act* (2003)); New Zealand (*International Crimes and International Criminal Court Act 2000*, 1 October 2000); Argentina (*ICC Implementation Law (2007)*); Spain (*The Organic Act 15/2003*); South Africa (*Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002*, 18 July 2002).

[7] Alissa J. Rubin and Paul von Zielbauer, *Blackwater Case Highlights Legal Uncertainties*, N.Y. TIMES, Oct. 11, 2007, at A1; *Hearing on Private Security Contracting in Iraq and Afghanistan Before the House of Representatives Comm. on Oversight and Gov't Reform*, 110th Cong. (2007) (October 3, 2007); James Glanz, *Security Guard Kills Iraqi Driver*, N.Y. TIMES, Nov. 12, 2007, at A1.

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00139 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.103

would close a critical gap in U.S. law regarding the crime of genocide.[8] Whereas existing law permits only the prosecution of a U.S. national who commits genocide anywhere in the world or an alien who commits genocide in the United States, the Genocide Accountability Act of 2007 would, if enacted, ensure that U.S. courts could judge any alien who commits genocide anywhere in the world provided that alien is found in the United States. This would close the gap that still creates a safe haven in the United States for alleged alien perpetrators of genocide who manage to reach U.S. territory.[9] Approved by the Senate on March 29, 2007, the Genocide Accountability Act of 2007 hopefully will be approved by the House of Representatives and placed on President Bush's desk for his signature before the end of this calendar year.

The Child Soldiers Accountability Act of 2007, which is co-sponsored by Chairman Durbin, Ranking Member Coburn, Senator Feingold, and Senator Brownback and is currently before this subcommittee,[10] would close a glaring gap in U.S. law regarding child soldiers. The legislation would criminalize 1) recruitment, enlistment,

---

[8] Genocide Accountability Act, S. 888, 110th Cong. (2007) (passed Senate without amendment by unanimous consent on March 29, 2007, referred to House Committee on the Judiciary, Subcommittee on Crime, Terror, and Homeland Security on April 20, 2007).

[9] This dilemma was glaringly apparent in two of my own experiences as Ambassador at Large for War Crimes Issues. The first was the inability to consider charging Elizaphan Ntakirutimana, who was indicted by the International Criminal Tribunal for Rwanda and arrested in Laredo, Texas, in December 1996, in federal court with the crime of genocide in the event he successfully blocked his transfer to the ICTR to stand trial in Arusha. Since he was an alien who was charged with committing genocide outside the United States, U.S. law barred prosecuting him for genocide. If we had not prevailed in federal court to uphold our authority to transfer him, he would have lived a free man in the United States. The federal litigation spanned four years: *Surrender of Ntakirtutimana*, 988 F.Supp 1038 (S.D. Tex. 1997); *In re Ntakirutimana*, 1998 WL 655708 (S.D. Tex. Aug. 6, 1998); *Ntakirutimana v. Reno*, 184 F.3d 419 (5th Cir. 1999); *Ntakirutimana v. Reno*, 528 U.S. 1135 (2000). The second experience concerned Pol Pot, whom we had wanted at least to have the option of bringing to the United States to stand trial for crimes against humanity and genocide in Cambodia from 1975 to 1979 in the event he could have been apprehended prior to his death in 1998. The Department of Justice advised that U.S. courts probably would have no jurisdiction over Pol Pot and thus we had to seek a foreign jurisdiction, which proved very time-consuming, where he could be transported if captured. In the end, time spent trying to overcome U.S. jurisdictional inadequacies enhanced Pol Pot's chances of avoiding imminent capture and sacrificed the opportunity to move more decisively against him.

[10] Child Soldiers Accountability Act, S. 2135, 110th Cong. (2007).

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00140 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.104

conscription, or use of child soldiers (less than 15 years of age) in the United States by anyone, and 2) recruitment, enlistment, conscription, or use of child soldiers (less than 15 years of age) anywhere in the world by a U.S. national or any alien present in the United States. It also would render any alien engaged in such conduct inadmissible to the United States or deportable from the United States. This legislation awaits action in both the Senate and House. As it now stands, there is no prohibition under U.S. federal law to the recruitment, enlistment, conscription, or use of child soldiers under 15 years of age, thus providing safe haven to any alien on U.S. territory who is engaged in such conduct and granting peace of mind to any American who recruits or uses children under 15 years of age anywhere in the world. This type of criminal conduct already has been prohibited under modernized criminal statutes in the United Kingdom, Australia, Canada, Germany, The Netherlands, New Zealand, South Africa, Spain, and Argentina (which raised the minimum age to 18) and in Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute of the International Criminal Court.[11]

The Trafficking in Persons Accountability Act of 2007,[12] approved by the Senate Judiciary Committee in September, would permit the prosecution of aliens found in the United States who are responsible for human trafficking offenses anywhere in the world. This would close the current gap in U.S. law, which permits such prosecutions only of U.S. citizens for human trafficking conducted anywhere in the world and of aliens who engage in human trafficking in the United States. If this legislation is enacted into law, the United States would no longer be a safe haven for alien human traffickers.

---

[11] Rome Statute of the International Criminal Court, art. 8(2), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].
[12] Trafficking in Persons Accountability Act, S. 1703, 110th Cong. (2007).

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00141 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.105

Unfortunately, genocide, human trafficking, and the recruitment, enlistment, conscription, or use of child soldiers compose only a fraction of atrocity crimes, and the United States remains an actual or a potential safe haven for perpetrators of a great many of the atrocity crimes which can now be prosecuted in a number of foreign jurisdictions and before the international and hybrid criminal tribunals. The United States cannot necessarily rely only upon its bilateral extradition treaties to resolve this impunity gap because 1) most extradition treaties require that the crime at issue (and for which the individual would be extradited to stand trial) must be punishable under the laws of *both* Contracting States, and many of the atrocity crimes are not punishable in either of the Contracting States, including the United States; 2) one can safely conclude that many of the jurisdictions that could exercise jurisdiction over an alleged alien atrocity lord or war criminal and with which the United States has an extradition treaty cannot be relied upon to seek extradition of the individual from the United States and guarantee credible prosecution of him or her; and 3) the United States has bilateral extradition treaties with just over 100 foreign jurisdictions, meaning that with respect to the almost 100 other nations, there is no option for extradition pursuant to a treaty obligation.

Beyond these recent developments in legislation, there is a broader landscape upon which well-recognized crimes against humanity and war crimes are absent from the federal criminal code (Title 18 of the U.S. Code) and from the U.S. military code (Title 10 of the U.S. Code). These gaps in U.S. law have become much more pronounced in recent years as other jurisdictions, particularly among America's major allies, have modernized their criminal codes. In this testimony, I will examine both Title 18 and Title 10 and how the two titles of the U.S. Code should be more coherently inter-related and

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00142 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.106

strengthened. But first the stage should be set with the jurisdictional reach of U.S. law for atrocity crimes.

Jurisdictional Reach of U.S. Law

Generally absent from U.S. law is the kind of jurisdictional regime that would provide the most pragmatic sphere of coverage to ensure that perpetrators of atrocity crimes cannot find safe haven in the United States. Current U.S. law on atrocity crimes typically exhibits a narrow range of jurisdiction, covering actions of U.S. citizens (although not necessarily if such action takes place abroad) or crimes which occur on U.S. territory. There is an expansive use of extraterritorial jurisdiction for terrorism, narcotics trafficking, and hostage-taking criminal laws, but similar extraterritorial applications have not yet reached atrocity crimes under U.S. law. This shortfall is beginning to be turned around with prospects for the Genocide Accountability Act of 2007, the Child Soldiers Accountability Act of 2007, and the Trafficking in Persons Accountability Act of 2007.

The gaps in U.S. law would be filled most pragmatically and effectively if the following jurisdictional criteria were established:

--*Territorial jurisdiction*: The crime has occurred in the United States or on any foreign territory under the effective control of U.S. authorities (including occupied territory and U.S. military facilities) or, if another jurisdictional prong described below exists, anywhere else in the world.

--*Personal jurisdiction*: The alleged perpetrator is a U.S. citizen or U.S. Government employee or contractor acting anywhere in the world or an alien who is

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00143 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.107

present on U.S. territory with respect to any commission of an atrocity crime anywhere in the world.

--*Subject matter jurisdiction*: The crime is an atrocity crime, namely genocide, a crime against humanity, or a war crime as such crimes are defined under U.S. law[13] and/or international law in terms of their magnitude and systematic or planned character.

--*Passive personality jurisdiction*: Federal jurisdiction should be triggered in respect of any American citizen who is a victim of an atrocity crime anywhere in the world and thus reach any perpetrator of an atrocity crime against such American victim.

--*Protective jurisdiction*: Where U.S. interests abroad are directly threatened by an atrocity crime, then U.S. courts should have the power to prosecute alleged perpetrators of any such crime. Such U.S. interests include threats to U.S. citizens, U.S. diplomatic and military facilities and assets, and U.S. sovereignty interests.

I have already addressed progress with respect to the crime of genocide, which will become a reality if the Genocide Accountability Act of 2007 is approved by the House of Representatives and becomes law. I will concentrate the rest of my testimony on crimes against humanity and war crimes.

Crimes Against Humanity

Crimes against humanity, as they are now defined in the statutes of the international and hybrid criminal tribunals and in modernized criminal codes of many foreign jurisdictions, require a particular context: that, with some exceptions, the individual crime is part of a widespread or systematic attack on a civilian population in

[13] In this testimony I recommend that U.S. law be amended to incorporate a comprehensive list of and definitions for atrocity crimes.

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00144 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.108

furtherance of a State or organizational policy. U.S. federal criminal law provides for the prosecution of some underlying substantive crimes found in the now conventional list of crimes against humanity, but federal law does not generally specify distinct criminal liability based on the extent of the planned attack or the link to State policy.

U.S. law certainly provides the means to prosecute as common crimes such acts as murder, torture, slavery, kidnapping, sexual abuse, or rape under narrowly-defined circumstances set forth in Title 18 of the U.S. Code.[14] But none of these codified crimes in Title 18 carry the additional requirements distinguishing crimes against humanity from common crimes. Nor does Title 18 include many of the well-established crimes against humanity, even as common crimes, which constitute the subject matter jurisdiction of the Nuremberg and Tokyo Military Tribunals and the international and hybrid criminal tribunals of the last 15 years,[15] as well as the modernized criminal codes of some American allies.[16]

Furthermore, there is generally no extraterritorial application of Title 18 common crimes; although there are some exceptions, U.S. courts are generally unable to prosecute an American citizen or an alien who is in the United States for alleged commission of either a Title 18 common crime outside the United States or a crime against humanity outside the United States. These are huge gaps in U.S. law which would permit alien

---

[14] *Inter alia*, 18 U.S.C. § 1111 (murder); § 2340 (torture); § 1584 (sale into involuntary servitude); § 1589 (forced labor); § 1201 (kidnapping); § 2242 (sexual abuse); § 2241 (aggravated sexual abuse).

[15] Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis art. 6(c), Aug. 8 1945, 59 Stat. 1546, 82 U.N.T.S 279 [hereinafter London Charter]; Charter for the International Military Tribunal of the Far East art. 5(c), Jan. 19, 1946, T.I.A.S. No. 1589, 4 Bevans 20 (1968), [hereinafter Tokyo Charter]; Statute of the International Criminal Tribunal for the Former Yugoslavia art. 5, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute]; See Statute of the International Criminal Tribunal for Rwanda art. 3, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute]; Statute of the Special Court for Sierra Leone art. 2, Jan. 16, 2002, 2178 U.N.T.S. 145 [hereinafter SCSL Statute]; Statute of the Iraqi High Tribunal art. 12, Oct. 18, 2005, *available at* www.law.case.edu/saddamtrial/documents/IST_statute_official_english.pdf [hereinafter IHT Statute]; Rome Statute, *supra* note 11, art. 7.

[16] *See supra* note 6.

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00145 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.109

atrocity lords to find safe haven in the United States and which deny U.S. courts the ability to prosecute American citizens who commit crimes against humanity anywhere in the world. This is the case even though prosecution under statutory circumstances of the common crime of murder or rape or torture or slavery or kidnapping or sexual abuse, typically with a single victim or very few victims, may provide a measure of justice. But such common crime prosecutions fall far short of what a successful prosecution of a crime against humanity, with multiple victims (sometimes in the tens of thousands), would entail and what it would signify as America's commitment to the rule of law.

Federal criminal law also has statutes of limitations that generally confine indictments to a five-year window following commission of the crime,[17] unless it is a capital offense, whereas such statutes of limitations have been abandoned in international and much foreign practice in light of the magnitude and serious character of crimes against humanity. Leaders engaged in such conduct and shielded by their continuing control of the government and law enforcement authorities (particularly in autocratic States) typically will not be exposed to apprehension or inclined to surrender to the courts for prosecution within such a relatively short period following commission of a crime against humanity.[18]

The stark reality is that under U.S. federal law there is no provision for any crime against humanity *per se*, meaning there is no defined and codified crime that must be committed as part of a *widespread or systematic* attack directed against a civilian

[17] *See* 18 U.S.C. § 3282.

[18] None of the international or hybrid criminal tribunals have any comparable statute of limitations on the prosecution of crimes falling within their jurisdiction. Further, there are no statutes of limitations in the modernized criminal codes covering atrocity crimes of the United Kingdom, Australia, Canada, France (for "serious crimes," defined by the French Constitutional Court as so serious as to be of concern to the international community as a whole), Germany, The Netherlands (except for the least serious war crimes which are limited to 12 years), New Zealand, and South Africa.

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00146 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.110

population, with knowledge of the attack, pursuant to or in furtherance of a State or organizational policy to commit such attack, and which constitutes the *multiple* commission of any of the following acts:

- Murder
- Extermination
- Enslavement
- Deportation or forcible transfer of population
- Imprisonment or other severe deprivation of physical liberty
- Torture
- Rape
- Sexually slavery
- Enforced prostitution
- Forced pregnancy
- Enforced sterilization
- Sexual violence
- Persecution
- Enforced disappearance of persons
- Apartheid
- Other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health.

These crimes against humanity have been defined and incorporated in the criminal codes of Australia, Canada, Germany, The Netherlands, New Zealand, South Africa, Spain, Argentina, and the United Kingdom. These countries previously had been in similar

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00147 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.111

circumstances as the United States but, because of their participation in the International Criminal Court, they modernized their criminal codes so as to enable them to prosecute the same crimes as are within the subject matter jurisdiction of the ICC. Under the principle of complementarity found in the Rome Statute of the ICC,[19] a nation's ability and willingness to prosecute the same crimes as found in ICC jurisdiction essentially shields that nation's nationals from ICC scrutiny. Paradoxically, some of America's allies, as states parties to the Rome Statute of the ICC, now are more insulated from ICC scrutiny than is the United States, even as a non-party to the Rome Statute, because our allies have modernized their criminal codes to fully incorporate genocide, crimes against humanity, and war crimes for possible investigation and prosecution against alleged civilian and military perpetrators.[20]

It is certainly possible to cherry pick one's way through Title 18 and cobble together barely plausible examples of common crimes, such as the federal kidnapping statute,[21] that could be prosecuted in the spirit of a particular crime against humanity, such as imprisonment or other severe deprivation of physical liberty in violation of the fundamental rules of international law. But U.S. attorneys would have to become exceptionally innovative, and take considerable risks in the courtroom, to prosecute one of the common crimes under Title 18 as a crime against humanity. I have not been able to find a single federal criminal prosecution of a crime against humanity, as such.

---

[19] Rome Statute, *supra* note 11, arts. 17-19.
[20] See Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20 (Mar. 2001) (This article received the American Bar Association's military writing award); see also Michael P. Hatchell, *Closing the Gaps in United States Law and Implementing the Rome Statute: A Comparative Approach*, ILSA J. INT'L & COMP. L. 183 (Fall 2005).
[21] 18 U.S.C. § 1201.

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00148 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.112

A similar predicament arises when examining how a crime against humanity would be prosecuted against military personnel in U.S. military courts. There is no provision in the Uniform Code of Military Justice (UCMJ)[22] which explicitly codifies a crime against humanity. It would be a stretch and entail similar risks for a military prosecutor to seek to refashion the common crimes set forth in the UCMJ, with their narrow definitions and relatively short (typically five year) statutes of limitations,[23] into full-fledged crimes against humanity. Since there is no UCMJ crime that could easily be translated into, for example, the crime against humanity of persecution or of enslavement or of enforced pregnancy, U.S. military courts are without the power to prosecute military personnel under any circumstances for some crimes against humanity that do not interface with any of the common crimes set forth in the UCMJ.

In fact, there exists no explicit authority under Title 10 of the U.S. Code to prosecute any crime against humanity as a stand-alone codified crime. This means that it may prove very difficult to frame relevant charges (thus requiring resort to charges of common crimes) against any suspected perpetrators of crimes against humanity who are U.S. military personnel anywhere in the chain of command, including at the highest levels of military leadership. The prosecutor's alternative would be to charge one of the UCMJ's common crimes, which may fall far short of a crime against humanity charge. While an antiquated notion of military justice—focusing on common crimes and a general jurisdiction over war crimes—may remain useful under the UCMJ, the inability of U.S. military lawyers to bring an explicit *crime against humanity* charge may enable the individual to escape liability under U.S. law while exposing such individual to the

[22] Uniform Code of Military Justice, 10 U.S.C. §§801-946 (2006).
[23] 10 U.S.C. § 843 (2006).

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00149 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.113

scrutiny of a foreign court (with a modernized criminal code and where the crime may have allegedly occurred) or international or hybrid criminal tribunals that are accustomed to, and exercise vigorous jurisdiction over, crimes against humanity prosecutions of military personnel. (Much of the litigation before the international criminal tribunals involves indictments that charge both crimes against humanity and war crimes against military commanders and there have been convictions for commission of both types of crimes.)[24] Ideally, Title 10 of the U.S. Code would be amended so as to enable military lawyers to bring full-bodied crimes against humanity charges against U.S. military personnel and thus deflect any foreign or international tribunal scrutiny of any such alleged conduct by an American serviceman.

Under federal criminal law, the United States remains in large measure a free haven for perpetrators of crimes against humanity. This is particularly true of any alien who is found on U.S. territory who may have perpetrated a crime against humanity outside the United States. It is also largely true of any U.S. citizen who may perpetrate a crime against humanity overseas or, if responsible for one on U.S. territory, may only be charged with a common crime that does not reflect the magnitude or importance of the atrocity crime for which he or she should be held responsible.

---

[24] *Prosecutor v. Tadic*, Case No. IT-94-1, Trial Chamber Opinion and Judgment, ¶¶ 741-3 (May 7, 1997) (defendant charged and convicted of crimes against humanity and war crimes); *Prosecutor v. Jelisic*, Case No. IT-95-10, Trial Chamber Judgment, ¶ 58 (Dec. 14, 1999) (defendant charged with and convicted of crimes against humanity and war crimes); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber Judgment, ¶¶ 638, 645 (Sep. 2, 1998) (defendant charged with crimes against humanity and violations of the Geneva Conventions); *Prosecutor v. Rutaganda*, Case No. ICTR-96-3, Trial Chamber Judgment and Sentence, ¶¶ 403-445 (Dec. 6, 1999) (defendant charged with crimes against humanity and violations of the Geneva Conventions).

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00150 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.114

War Crimes

It may seem remarkable to some that there are gaps in both U.S. federal law and U.S. military law in the ability of federal courts and courts-martial and even military commissions to prosecute war crimes. After all that has been experienced since the precedents of the Nuremberg and Tokyo Military Tribunals and the scores of cases prosecuted by the international criminal tribunals during the last 15 years, one would be forgiven to assume that surely, in the United States, the law is now well established to enable U.S. courts (criminal and military) to investigate and prosecute the full range of war crimes that have been codified in treaty law and defined as a matter of customary international law. That, however, is not the case.

While there certainly are some war crimes that can be fully prosecuted under U.S. law, there are many for which there is no jurisdiction in U.S. criminal law and there is uncertain or vague jurisdiction in U.S. military law. The primary federal law, the War Crimes Act of 1996, as amended,[25] is enforceable only in circumstances where the perpetrator or the victim of the war crime is a U.S. citizen or a member of the U.S. Armed Forces. An alien can be prosecuted only if the victim is a U.S. citizen or a member of the U.S. Armed Forces. If an alien arrives in the United States having committed war crimes against victims of a foreign nationality on foreign territory or the alien commits such war crimes on U.S. territory and the only victims are other aliens, there is no basis for prosecuting that individual in a federal criminal court on war crimes charges. (Of course, there may be grounds to bring charges for common crimes against the alien unleashing violence on U.S. territory.) In contrast, modernized criminal codes of some of America's major allies now empower their criminal courts to prosecute the

[25] 18 U.S.C. § 2441.

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00151 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.115

full range of war crimes and to do so against a far wider range of potential defendants, including aliens found on the prosecuting state's territory.[26]

The most commonly-known group of war crimes—the "grave breaches" during international armed conflicts under the 1949 Geneva Conventions[27]—could not be prosecuted in federal courts against civilians and members of the U.S. Armed Forces until enactment of the War Crimes Act of 1996. Thus the grave breaches of torture, inhuman treatment, biological experiments, willfully causing great suffering, destruction and appropriation of property, compelling service in hostile forces, denying a fair trial, unlawful deportation and transfer, unlawful confinement, and hostage-taking can, as of 1996, be prosecuted in U.S. federal courts but, remarkably, never have been.[28] The War Crimes Act of 1996 also empowers federal courts to prosecute civilians and members of the U.S. Armed Forces for a group of war crimes sourced back to the Annex to Hague Convention IV, Respecting the Laws and Customs of War on Land (1907).[29] These war crimes consist of attacking undefended places, killing or wounding a person *hors de combat*, improper use of a flag or truce, improper use of a flag, insignia or uniform of the hostile party, treacherously killing or wounding, denying quarter, destroying or seizing

---

[26] For example, The United Kingdom has criminalized all of the war crimes set forth in Article 8.2 of the Rome Statute of the ICC (*International Criminal Court Act 2001 (c. 17)*, Section 50(1)) and can prosecute any alien who commits war crimes (or genocide or crimes against humanity) outside the United Kingdom provided such person subsequently becomes resident in the United Kingdom (*International Criminal Court Act 2001 (c. 17)*, Section 68(1)).

[27] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field arts. 49-50, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 33; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea arts. 50-51, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 86; Geneva Convention (III) Relative to the Treatment of Prisoners of War arts. 129-30, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War arts. 146-7, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 288.

[28] 18 U.S.C. § 2441(c)(1).

[29] Regulations Respecting the Laws and Customs of War on Land, annexed to Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague Convention]; *see* 18 U.S.C. § 2441(c)(3).

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00152 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.116

the enemy's property, depriving the nationals of the hostile power of rights or actions, compelling participation in military operations, pillaging, and employing poison or poisoned weapons. Again, however, no such war crimes have ever been prosecuted under the War Crimes Act of 1996.

In 1997 the War Crimes Act was amended to include violations of Common Article 3 of the Geneva Conventions.[30] This meant that with respect to conduct during non-international armed conflicts, all of the following violations could be, but never were, prosecuted in U.S. federal courts between 1997 and 2006:

- Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- Taking of hostages;
- The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

However, the United States regressed in this field of criminal law with enactment of the Military Commissions Act of 2006 (MCA).[31] The MCA de-criminalized certain war crimes set forth in Common Article 3 of the 1949 Geneva Conventions for purposes of

[30] The amended provision read: "(c) DEFINITION – As used in this section the term "war crime" means any conduct....(3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflicts..." 18 U.S.C. § 2441(c)(3) (as it was codified from 1997 to 2006).

[31] Military Commissions Act of 2006, 10 U.S.C. § 948(b) (2006).

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00153 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.117

U.S. prosecution.[32] Specifically, the following violations described in Common Article 3 can no longer be prosecuted in U.S. courts following the nine-year period during which they had been criminalized: "violence to life and person," murder "of all kinds" (as opposed to the limited and defined circumstances set forth in the MCA), "outrages upon personal dignity, in particular humiliating and degrading treatment," and "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

Furthermore, in the President's Executive Order of July 20, 2007,[33] which he issued pursuant to Section 6(a)(3) of the MCA to govern "a program of detention and interrogation approved by the Director of Central Intelligence," President George W. Bush defined the Common Article 3 violation of "Committing outrages upon personal dignity, in particular humiliating and degrading treatment" in a manner that narrowed its scope in comparison to international practice and comparable definitions found in the modernized criminal codes of key American allies and friends.[34] The President introduced a cascade of qualifiers that do not appear elsewhere in U.S. law or practice, including in the latest Army Field Manual.[35] The acts must be "willful and outrageous" as matters of fact rather than general recognition; they must be done "for the purpose" of *everything* described in the interpreted violation (as opposed to simply being done); the acts must be done "in a manner so serious" rather than simply done as a matter of degree; and "*any* reasonable person, considering the circumstances, would deem the acts to be

[32] Military Commissions Act § 6(b).
[33] Exec. Order No. 13,440, 72 FR 40707 (July 20, 2007).
[34] Among those allies and friends are the United Kingdom, Australia, Canada, Germany, The Netherlands, New Zealand, Spain, Argentina, and South Africa.
[35] Department of the Army, *Field Manual 2-22.3: Human Intelligence Collector Operations* (2007).

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00154 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.118

beyond the bounds of human decency" (emphasis added), which raises the bar for a Common Article 3 violation given that there might be at least one reasonable person who would deem the acts acceptable and given that "beyond the bounds of human decency" could be construed as a higher bar to jump than "outrages upon personal dignity."[36] (One can easily imagine a CIA interrogator concluding that a particular form of interrogation may diminish (perhaps in someone else's mind "outrageously") a detainee's "personal dignity" but that the "bounds of human decency" have not (yet) been crossed.) The end result is another gap in American criminal law on Common Article 3 violations when compared to what existed prior to the Executive Order of July 20, 2007, and the MCA and during the period of enforceability of the War Crimes Act of 1996, as amended in 1997 (namely, 1997 to 2006).

In addition, the MCA denies penal sanctions for certain conduct otherwise criminalized by the MCA (murder, mutilation or maiming, and intentionally causing serious bodily injury) under the War Crimes Act of 1996, as amended, or with respect to crimes triable by the military commissions, *in the event such conduct occurs in connection with "collateral damage" or "death, damage, or injury incident to a lawful attack."* [37] These terms are left undefined and one is left to speculate why the designation of either consequence necessarily extinguishes any criminal liability whatsoever. The long-standing rule of proportionality in the law of war appears to be tested here. Interestingly, in the criminal codes of various foreign jurisdictions and in the Rome Statute of the International Criminal Court, a bright line has been drawn on the issue of collateral damage: it is a war crime to intentionally launch an attack in the

[36] Exec. Order No. 13,440, 72 FR 40707 (July 20, 2007), at § 3(b)(i)(E).
[37] Military Commissions Act § 6(b)(3).

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00155 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.119

knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment *which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.*[38] The latter caveat, of "clearly excessive" character, would be a difficult one to achieve for purposes of prosecution but it is a standard that has gained widespread acceptance, including among the U.S. Armed Forces. The MCA's apparent "collateral damage" gap, one that permits collateral damage even if it is inflicted in a manner that is "clearly excessive in relation to the concrete and direct overall military advantage anticipated," thus narrows the scope of liability for war crimes under American law.

Despite what may appear to be an impressive compilation of war crimes that can be prosecuted under the War Crimes Act of 1996, even in its truncated version following the amendments of it under the MCA in 2006, there remain a significant number of war crimes under customary international law as confirmed in both the practice of the international and hybrid criminal tribunals and the Rome Statute of the ICC which have not been codified in U.S. law. In contrast, most if not all of these war crimes have been codified in the criminal codes of some of America's major allies, thus empowering them to prosecute explicit war crimes, particularly with respect to their own nationals. The list includes the following war crimes, stated in abbreviated form:

Pertaining to international armed conflicts:

- Attacking civilians
- Attacking civilian objects

[38] Rome Statute, *supra* note 11, art. 8(2)(b)(iv).

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00156 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.120

- Attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission
- Improper use of a flag, insignia or uniform of the United Nations
- Improper use of the distinctive emblems of the Geneva Conventions
- Transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory
- Attacking protected objects
- Mutilation
- Medical or scientific experiments
- Employing prohibited gases, liquids, materials or devices (but see BWC/CWC)
- Employing prohibited bullets
- Outrages upon person dignity
- Rape
- Sexual slavery
- Enforced prostitution
- Forced pregnancy
- Enforced sterilization
- Sexual violence
- Using protected persons as human shields
- Attacking objects or persons using the distinctive emblems of the Geneva Conventions

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00157 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.121

- Starvation as a method of warfare
- Using, conscripting, or enlisting children (unless and until the Child Soldiers Accountability Act of 2007 is adopted and enacted).

Pertaining to non-international armed conflicts:

- Attacking civilians
- Attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission
- Attacking protected objects
- Pillaging
- Rape
- Sexual slavery
- Enforced prostitution
- Forced pregnancy
- Enforced sterilization
- Sexual violence
- Using, conscripting, and enlisting children (unless and until the Child Soldiers Accountability Act of 2007 is adopted and enacted)
- Displacing civilians
- Treacherously killing or wounding
- Denying quarter
- Mutilation
- Medical or scientific experiments
- Destroying or seizing the enemy's property

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00158 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.122

While it remains possible through innovative interpretation of indictable common crimes under the U.S. Code to prosecute an American citizen or a narrow range of aliens for one or more common crimes that may overlap with one or more of these unindictable war crimes, the haphazard methodology of any such prosecution in the context of war crimes denies the United States the opportunity to prosecute such war crimes *per se* and hence identifies the country as a virtual safe haven for those who commit such crimes. The complexity of the exercise may explain why there has been no war crimes prosecution under the War Crimes Act of 1996, as amended, and why no U.S. attorney has sought to portray any prosecution in the federal courts as a war crimes prosecution.

When one examines the situation with respect to U.S. military courts, there exist many uncertainties and largely a theoretical power to prosecute war crimes rather than any significant precedents of doing so. Much would turn, if the opportunity arose, on the military courts' interpretation of the law of war under international law. Under 10 U.S.C. § 818, general courts-martial "have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal..." This general provision is elaborated by the *Manual for Courts-Martial United States*, which states: "General courts-martial may try any person who by the law of war is subject to trial by military tribunal for any crime against: (a) The law of war;..."[39] The *Manual* also provides, "Nothing in this rule limits the power of general courts-martial to try persons under the law of war."[40] In addition, jurisdiction resides with military commissions and other military tribunals of "concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may

[39] Manual for Courts-Martial, United States, R.C.M. 201(f)(a)(B)(i) (2005).
[40] *Id.* R.C.M. 202(b).

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00159 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.123

be tried" by them.[41] The reach of U.S. military courts and military commissions over civilians in certain circumstances, enemy belligerents of either military or civilian character, or foreign nationals of countries not at war with the United States remains problematic and may turn on how well-established any particular war crime is under principles of universal jurisdiction in international law.[42]

Rather than try to parse the myriad of possibilities for military court jurisdiction over the commission of war crimes by U.S. nationals of civilian or military character or by aliens of any number of different characterizations, I emphasize one point: It is not possible to extract from the UCMJ, Title 10 of the United States Code, or the jurisprudence of U.S. military courts any definitive list of explicit war crimes which such military courts are empowered to prosecute against U.S. military personnel, enemy belligerents, or civilians engaged or caught up in hostilities or on occupied territory. One exception is the Military Commissions Act of 2006. Military Commissions established thereunder are empowered to prosecute "any offense made punishable by [and defined in the Military Commissions Act of 2006] or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001."[43] Although a detailed list of triable offenses that cover many explicit war crimes is set forth in the MCA,[44] that list does not cover all established war crimes and thus the Commissions' supplemental jurisdiction over the "law of war" may need to trigger the prosecution of additional war crimes in the future.

---

[41] 10 U.S.C. § 821.
[42] Douglass Cassel, *Empowering United States Courts to Hear Crimes Within the Jurisdiction of the International Criminal Court*, 35 NEW ENG. L. REV. 421, 430-32 & nn.40-49 (2001).
[43] Military Commissions Act § 948d(a).
[44] Military Commissions Act § 950(v).

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00160 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.124

The UCMJ Article 32 investigations[45] and, in some cases, courts-martial of U.S. service personnel arising from U.S. military operations in Afghanistan and Iraq have not to date been grounded on charges of war crimes, even though on the surface many of the incidents might invite serious scrutiny as possible war crimes and certainly, to the rest of world, appear to exhibit characteristics of war crimes. Rather, these investigations and courts-martial have relied upon the punitive articles of the UCMJ,[46] few of which constitute a war crime *per se* and are more properly understood as common crimes that may be committed by American soldiers. Typical charges in connection with cases arising from Iraq or Afghanistan are assault, failure to obey an order or regulation, murder, cruelty and maltreatment, dereliction of duty, manslaughter, rape, and conduct unbecoming an officer and a gentleman—all charges that also could be brought as crimes against fellow soldiers or civilians in the United States. Because the UCMJ does not have a clearly identifiable list of war crimes in its punitive articles (perhaps one that could read "Acts Against the Laws and Customs of War"), it remains difficult to describe the military justice system as one focused on, or even defined by, the prosecution of war crimes. The primary exception in the UCMJ, discussed above, turns on trials governed by the "law of war," an option rarely invoked by military courts.

In 2005 an Air Force JAG officer, Mynda L.G. Ohman, who at the time was one of my top students seeking an LL.M. in international law, wrote a excellent thesis for me on Titles 10 and 18 of the U.S. Code and succinctly summarized how antiquated the UCMJ has become in the context of war crimes prosecutions. The following is an extract

[45] 10 U.S.C. § 32.
[46] 10 U.S.C. §§ 77-134.

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00161 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.125

(exclusive of footnotes) from her thesis that I believe merits the subcommittee's attention:

"As part of federal statutory law, the War Crimes Act may be incorporated and charged under the UCMJ. Article 134 of the UCMJ, the "general article," allows the military to import non-capital federal criminal statutes and charge them in a military court-martial. This broadens the subject matter of criminal offenses available to a court-martial. Not only are the punitive articles of the UCMJ available to the military prosecutor, any federal criminal statute that applies where the crime was committed could also be charged under the general article. This provision would generally allow military authorities to incorporate the War Crimes Act into military prosecutions and charge U.S. service members with certain war crimes.

"While the UCMJ has the flexibility to import federal law into trials by courts-martial, it has its limits. Courts have interpreted the language of the general article to bar importation of federal capital crimes into UCMJ proceedings. Where federal civilian courts have jurisdiction over criminal offenses that authorize the death penalty, these federal crimes may not be brought before a court-martial under Article 134. For example, the most serious crimes under the War Crimes Act—those in which the victim dies as a result of the defendant's conduct—trigger the authorization of the death penalty under the federal criminal statute. Therefore, such crimes cannot be charged as war crimes in a trial by court-martial. Still, military prosecutors may charge the underlying conduct as a violation of another punitive article, as has been the practice for more than one hundred years.

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00162 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.126

"This has created a lopsided result. The Department of Defense is normally the agency that prosecutes members of the United States armed forces. Federal criminal law allows for punishment of certain war crimes, yet, the federal law may not be utilized in military prosecutions to the same extent as in federal civilian courts. The effect of this limitation is that courts-martial must continue to largely rely on the offenses defined by Title 10 when charging crimes that occur during an armed conflict. *As a result, the most egregious crimes under the laws of war committed by U.S. military members are charged as common crimes under the UCMJ.* For example, the intentional, fatal shooting of a person protected by the Geneva Conventions will likely be charged as murder under Article 118, and torture will likely be charged as an assault under Article 128. Compared to federal prosecutions, offenses tried by courts-martial will often carry lower maximum penalties.

"The UCMJ currently defines offenses that fall into three broad categories: crimes that are purely military offenses with no corresponding civilian provisions, common crimes that appear in both the UCMJ and in most state and federal criminal codes, and offenses that by definition or explanation are related to military operations, combat, or war. *Where the UCMJ appears to have stagnated is in codifying breaches of evolving international humanitarian laws affecting warfare.* The UCMJ was enacted in 1950, five years before the United States ratified the Geneva Conventions. During every conflict, reports of serious misconduct by U.S. forces emerge, and the U.S. military has responded by bringing such offenders before courts-martial. Yet, the convictions are for common crimes, not war crimes."[47]

---

[47] Mynda L.G. Ohman, *Integrating Title 18 War Crimes into Title 10: A Proposal to Amend the Uniform Code of Military Justice*, a Thesis submitted to Professor David J. Scheffer in partial satisfaction of the

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00163 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.127

Among the various options for how to modernize the UCMJ, Major Ohman proposed "adding a new War Crimes article to the UCMJ to 1) align the UCMJ with existing federal criminal law, 2) better insulate U.S. military members from the use of military commissions, and 3) seize upon the secondary preventive benefits of having a separate article that specifically defines and punishes war-related crimes."[48] In such a new War Crimes article should be listed, with particularity, the U.S. Government's confirmation of the war crimes which now exist under customary and codified international law. The new UCMJ article should mirror those war crimes fully listed and incorporated into Title 18 as a matter of federal criminal law. The new UCMJ article also should incorporate a comprehensive listing of crimes against humanity in the event Title 18 were to be amended to include such crimes, as discussed earlier in this testimony.

Conclusion

The federal criminal code and military code exhibit significant gaps in their respective coverage of atrocity crimes, namely genocide, crimes against humanity, and war crimes—categories of crimes which have evolved rapidly in international criminal law and human rights law during the last 15 years. Other major nations—America's allies—have modernized their codes to enable their courts to prosecute the full range of atrocity crimes, thus reflecting their democratic choice to strengthen the rule of law in their own societies. Such modernizing exercises also reflect their pragmatic choice to minimize the exposure of the nationals of such nations to the scrutiny of international criminal tribunals because national courts will be able to carry that responsibility.

---

requirements for the degree of Masters of Laws, The George Washington University Law School, May 24, 2005 (on file with Professor Scheffer).

[48] Id.

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00164 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.128

Progress is being made to modernize the federal criminal code through the Genocide Accountability Act of 2007, the Child Soldiers Accountability Act of 2007, and the Trafficking in Persons Accountability Act of 2007. Further work is required, however, to amend Title 18 of the U.S. Code so that the full range of crimes against humanity and war crimes can be prosecuted in federal courts without any question as to the ability of such courts to exercise complete subject matter jurisdiction over such international crimes. Title 10 of the U.S. Code requires amendment to enable military courts to fully prosecute war crimes and crimes against humanity. The jurisdiction of federal criminal courts should extend to all U.S. nationals who perpetrate atrocity crimes anywhere in the world and to any alien who commits an atrocity crime in the United States or anywhere else in the world and, in the latter situation, who also is present on U.S. territory.

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 Titles 10 and 18 in the manner proposed in this testimony would signal the end to exceptionalism in atrocity crimes and place the United States on an equal footing with many of its allies which already have recast their criminal law to reflect the reality of international criminal and humanitarian law in our own time.

Thank you. I would be pleased to answer any questions.

VerDate Aug 31 2005 11:20 Oct 21, 2008 Jkt 043914 PO 00000 Frm 00165 Fmt 6633 Sfmt 6011 S:\GPO\HEARINGS\43914.TXT SJUD1 PsN: CMORC

43914.129