



THE CENTER FOR JUSTICE & ACCOUNTABILITY
Bringing Human Rights Abusers To Justice.

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, PART II**

OCTOBER 6, 2009

**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, Part II**

October 6, 2009

Chairman Durbin, Ranking Member Coburn, and Members of the Subcommittee; thank you for inviting the Center for Justice and Accountability (CJA) to submit written testimony on this very important follow up hearing on the government's efforts to investigate, prosecute and remove human rights abusers. I am the Executive Director of CJA and a former federal prosecutor.

One of our clients, Dr. Juan Romagoza Arce, and I had the great privilege of testifying before this historic Subcommittee two years ago in the first ever Congressional hearing on the enforcement of human rights laws in the United States. Dr. Romagoza provided powerful testimony about his torture at the hands of the National Guard in El Salvador. He also explained that the men responsible for his torture were living legally, comfortably and openly in Southern Florida. In 2002, plaintiffs Dr. Romagoza, Carlos Mauricio and Neris Gonzalez, 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 U.S. federal court with the help of CJA and pro-bono counsel Morrison & Foerster LLP.¹

On behalf of Dr. Romagoza and all who seek justice on behalf of the tens of thousands of others who suffered serious human rights abuses at the hands of the Salvadoran military, we applaud the Department of Homeland Security for its

¹ In 2002, following a four week trial, a federal jury in the Southern District of Florida in West Palm Beach returned a verdict of \$54.6 million against Generals Vides Casanova and Garcia for their responsibility for the torture of Juan Romagoza, Neris Gonzalez and Carlos Mauricio in the early 1980s. The verdict was upheld by the Eleventh Circuit in 2006. *See, Arce v. Garcia*, 434 F.3rd 11254 (11th Cir. 2006).

recent efforts to initiate deportation proceedings against the Generals.² We also applaud this Subcommittee and the leadership of Senators Durbin and Coburn for actively encouraging the government to pursue charges against the Generals.

CJA further applauds the leadership of Chairman Durbin, Senator Coburn, Senator Leahy and this Subcommittee in closing the gaps in the U.S. criminal code through the introduction and passage of the Genocide Accountability Act, the Child Soldiers Accountability Act and the Trafficking in Persons Accountability Act. We are hopeful that the Crimes Against Humanity Act of 2009 will also become law to further modernize U.S. human rights law.

CJA is a nonprofit legal organization dedicated to deterring torture and other severe human rights abuses and to seeking justice. We represent survivors of torture and other severe human rights abuses in cases against individual human rights abusers in civil litigation using the Alien Tort Statute (ATS) and the Torture Victim Protection Act (TVPA). We also engage in other transnational efforts to hold human rights abusers accountable. In the past ten years, we have brought cases in the U.S. against human rights abusers from Bosnia, Chile, China, El Salvador, Haiti, Honduras, Indonesia, Peru and Somalia.

The principle guiding CJA's work is that perpetrators of gross human rights violations should not be able to hide under the cloak of impunity. Because a culture of impunity invites abuse, we can only end gross human rights abuses by holding perpetrators accountable. Impunity persists and deepens when human rights abusers find a safe haven in the U.S., denying survivors and their communities the right to truth, justice and redress.

CJA applauds the work of the Department of Justice (DOJ), the Department of Homeland Security (DHS), the Department of State and the Federal Bureau of Investigation to prosecute, remove or extradite human rights abusers. In particular, CJA applauds these agencies' work in obtaining a jury conviction under the Torture Statute against Emmanuel "Chuckie" Taylor, Charles Taylor's son and the former leader of Liberia's notorious Anti-Terrorism Unit. CJA also congratulates DHS on its prosecution of numerous human rights violators for immigration fraud. We look forward to many more prosecutions, and support efforts to extradite human rights abusers to stand trial in the country where their

² From 1980 to 1992 over 75,000 civilians were killed, and tens of thousands of others suffered from other serious human rights abuses at the hands of Salvadoran military forces. *See*, U.N. Security Council, *Report of the United Nations Truth Commission on El Salvador*, § III (April 1, 1993).

abuses took place once judicial proceedings in that country meet international standards.

I would now like to offer recommendations concerning, first, the criminal prosecution of human rights abusers; second, extradition; and third, witness safety and witness visas.

1. Criminal Prosecution of Human Rights Abusers

Our first recommendation regarding criminal prosecutions is that Congress must continue to expand legislation enabling the prosecution of human rights abusers. The enactment of the Genocide Accountability Act, the Child Soldiers Accountability Act, and the Trafficking in Persons Accountability Act are critical steps in the right direction. However, in order to effectively prosecute those responsible for the most heinous human rights violations, Congress must also enact legislation targeting crimes against humanity and extrajudicial killing. These crimes are well established under international law as crimes that are punishable by every state, no matter where the crime is committed. This norm of international law ought to be codified into U.S. law.

Second, 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 punishable crimes since the Nuremberg trials. The Torture Statute's current effective date of November 1994 renders the statute ineffective for all abuses committed, for example, in Latin America and Africa during the eighties and early nineties.

The case of former Salvadoran Generals Vides Casanova and Garcia illustrates the shortcomings of the current statutory scheme. While we applaud the recent deportation orders issued against them by DHS, it is important to note that the only penalty they will experience is deportation to El Salvador where they will be set free. El Salvador has a blanket amnesty law that prevents any prosecution for human rights abuses committed against the civilian population during the Salvadoran civil war. So, unless the amnesty law is amended or repealed, Generals Garcia and Vides Casanova will never be criminally prosecuted for their responsibility for having ordered and supervised torture and other atrocities committed in El Salvador from 1980 to 1992.

Many of the defendants in CJA's cases reside in the U.S., and while they face civil liability for torture, extrajudicial killings, crimes against humanity, war crimes and

other abuses, to date, the most serious offense any of them has been charged with is immigration fraud.³

Third, existing legislation should be more rigorously enforced. CJA congratulates all government agencies responsible for the conviction of Chuckie Taylor under the Federal Criminal Torture Statute.⁴ It is worth noting, however, that since it was enacted in 1994, this is the first and only time this statute has been used. We are optimistic that this statute, as well as the recently passed statutes, will be used to bring many more prosecutions.

By way of example, at least seventeen human rights abusers have been extradited to the U.S. from Colombia since 2007 to be prosecuted on drug charges. As is discussed more fully below, in many instances, these human rights abusers have already confessed in Colombia to their role in torture, extrajudicial killing, massacres and other human rights abuses. We invite the government to file amended indictments against these Colombian human rights violators which include human rights charges.

Fourth, all existing criminal human rights law should incorporate command responsibility as a basis for liability. Command responsibility is a well-established theory of liability which covers military officers or civilian superiors for crimes committed by their subordinates and who knew or should have known about these abuses and failed to take steps to stop the abuses or punish the offenders. It has been applied in criminal trials in the U.S. and internationally, as well as in civil litigation.⁵ Legislation that strengthens the rules regarding the responsibility of subordinates while allowing those with the command responsibility for human rights abuses to live in this country with impunity sends the wrong message about our commitment to human rights.

³ See, e.g., *Chavez v. Carranza*, 2:03-cv-02932-JPM (W. D. TN 2005) (cert denied); *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005); *Doe v. Saravia*, 348 F. Supp. 2d 1112 (E.D. CA 2004)

⁴ 18 U.S.C. §2340, 2340A (1994).

⁵ 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).

In addition, the U.S. Citizenship and Immigration Services should amend immigration forms to include direct questions about participation in human rights atrocities as a commander.⁶

Fifth, as with common law murder, there should be no statute of limitations on torture or other international human rights crimes.⁷

Sixth, in those cases where it is not possible to bring a criminal prosecution for the abusive conduct itself, perpetrators of human rights violations should, when possible, be prosecuted for immigration fraud. Once again, CJA applauds the recent enforcement proceedings brought by the DHS and DOJ.

While immigration law allows criminal prosecution of human rights violators who might otherwise escape liability, crimes such as false statements, visa fraud and the like typically carry light sentences in relation to the underlying crime. The Sentencing Guidelines ought to be amended to enhance sentences of human rights abusers convicted under immigration laws.

2. Extraditions

First, human rights abusers should be extradited to the country where the crime was committed when that country has the capacity to fairly prosecute the abuser. The goal of U.S. human rights law and policy should be that human rights abusers are prosecuted, either in the U.S. or in their home country. Extradition should be considered in conjunction with the possibility of prosecution in the United States. Extradition may be preferable to prosecution in the U.S. when the country where the crime was committed meets the following conditions: 1) the country has a functioning and fair judiciary; 2) the country has given sufficient assurance that the individual will be prosecuted; 3) the penalty will be commensurate with the crime; 4) the safety of witnesses is assured; 5) the defendant will not be subjected to abusive treatment; and 6) reintroducing the human rights abuser to his or her home country will not result in violence or further destabilize the receiving country.

⁶ 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.

⁷ 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 Trafficking in Persons Accountability Act and Child Soldiers Act both have ten year statutes of limitation. The Genocide Accountability Act has no statute of limitations.

The case of Major Telmo Hurtado is one example where extradition would further accountability. Hurtado is a former Peruvian military officer who commanded one of the military units responsible for the Accomarca Massacre, which took place in 1985 in the Ayacucho region of Peru. He came to the U.S. in 2002 after an amnesty law protecting him from prosecution in Peru was nullified. Survivors of the massacre initiated a criminal case in Peru against Major Hurtado and filed a civil suit in the U.S. under the ATS and TVPA with the assistance of CJA and pro-bono counsel Morgan Lewis & Bockius.⁸ In March 2007, Hurtado was arrested for immigration fraud, served his sentence and is currently incarcerated in a detention center. In 2007, the Government of Peru initiated an extradition request to have Hurtado prosecuted for his role in the Accomarca Massacre. On June 16, 2009, the U.S. government granted Peru's extradition. Although Hurtado should have been extradited within thirty days, the extradition has not yet occurred.

Second, the U.S. should work cooperatively with governments who seek to prosecute human rights abusers or are using other accountability mechanisms.

The case of Colombia illustrates the need for better coordination. As mentioned above, the U.S. currently holds in its federal prisons the bulk of the leadership of the Colombian paramilitary organization, *Autodefensas Unidas de Colombia* (AUC). These individuals were extradited to the U.S. to face drug-trafficking charges. However, their presence here has stymied the Colombian government's investigation of their human rights abuses.

While the U.S. has a long history of successful cooperation with Colombian law enforcement to prosecute drug crimes,⁹ there appears to be no established mechanism through which U.S. and Colombian authorities can coordinate drug trafficking prosecutions with human rights prosecutions.

The human rights prosecutions in Colombia are being conducted largely through Law 975/2005 (the "Justice and Peace Law"), a special criminal law passed as part of the peace negotiations to demobilize the paramilitary forces. Under this law, participating individuals receive a drastically reduced sentence in exchange for 1) turning in all weapons; 2) ceasing all illegal activity; 3) fully disclosing all past

⁸ *Ochoa v. Hurtado*, Case No. 67-21783-Civ-Jordan. On March 4, 2008 a federal court judge in Miami ordered Major Hurtado to pay \$37 million in damages to the plaintiffs Teófila Ochoa Lizarbe and Cirila Pulido Baldeón and the estates of their family members who were killed in the Accomarca Massacre. The judgment and damages award in this case represents the first time that anyone has been held to account for atrocities committed in connection with the Accomarca Massacre.

⁹ Since 2002 more than 950 individuals have been extradited to the U.S. to face federal criminal charges related to drug trafficking.

crimes; and, 4) turning over illegally obtained property for victim reparations. Participants also must give testimony (similar to a deposition) where they confess to all crimes committed.¹⁰ These confessions have so far led to the investigation, indictment, and prosecution of dozens of members of the Colombian government with ties to paramilitaries and human rights abuses. These confessions also provide the only opportunity for thousands of victims to learn about what happened to their loved ones.

The leaders of the AUC are the main informants and witnesses in these cases. To date, the Colombian government has had limited success in coordinating with the U.S. to ensure that the AUC witnesses are able to give testimony in ongoing human rights prosecutions in Colombia. For example, in March 2009 the Colombian Supreme Court of Justice released a defendant from pre-trial detention for excessive delay. The reason the court gave for the release was the fact that the prosecution was unable to successfully coordinate with the U.S. to secure the testimony of a key witness who has been in custody in the U.S. since May 2008 on drug charges.

The lack of cooperation has been such that the Colombian Supreme Court of Justice recently declared that it would no longer authorize the extradition of Justice and Peace participants to the U.S. to face drug charges because attempts to coordinate depositions from the U.S. have been largely unsuccessful. The Court concluded that, although very serious, charges of drug-trafficking pale in comparison with the crimes of systematic torture, murder, recruitment of child soldiers, forced displacement and disappearance, for which these individuals are charged in Colombia.¹¹

3. Witness Safety and Visas

As we noted two years ago, witnesses are crucial to human rights prosecutions, yet they may be silenced if they fear for their safety or cannot enter the U.S. to testify. To address this problem, our first recommendation is to establish safety protocols to protect 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. For example, individuals in the Liberian community who supported the criminal prosecution against Chuckie Taylor received death threats, and one person was shot at in broad

¹⁰ This process is known as "versión libre" because participation is voluntary.

¹¹ Concepto Desfavorable a la Solicitud de Extradición de Édgar Medina Flórez [Rejection of the Extradition Request for Édgar Medina Flórez], Corte Suprema de Justicia, Sala de Casación Penal [Supreme Court], Aprobado Acta No. 260, Aug. 19, 2009.

daylight to discourage him from cooperating with the prosecution. Likewise, a witness in our trial against former Salvadoran Vice Minister of Defense Nicholas Carranza decided not to testify at trial because of death threats the witness received in El Salvador. In the vast majority of CJA's cases we have clients who remain anonymous due to very real safety concerns for themselves or for family members who remain in the country where the abuse occurred.

Specifically, witnesses and their families should have access to a witness protection program similar to that used for witnesses in organized crime trials. Specific threats should be reported, documented and investigated in a timely manner. Each witness who has received a threat should be offered protection and support. When necessary, asylum and derivative petitions of family members should be made available to witnesses and their family members prior to the public testimony.

If the U.S. is to effectively prosecute human rights abusers, it cannot stop at simply protecting witnesses. It must also issue visas to bring witnesses to the U.S. to testify against their abusers. 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. 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.

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. Once here, these witnesses can participate in criminal prosecutions and be safe from retaliation in their home country for their participation.

As of January 2009, only 65 U-Visas had been issued, despite the fact that 10,000 are allowed annually.¹² U-Visas should be more frequently granted and expanded to cover all human rights litigation including civil litigation. The practice of issuing visas to witnesses in exchange for their participation is commonly used in the prosecution of organized crime through the use of S-Visas. There is no reason why this same practice could not be used to bring victims of human rights abuse to the U.S. to testify as witnesses against their abusers.

¹² Jordana Hart, *U Visa for Crime Victims Falters; Only 65 Visas Issued Since 2007*, Jan. 27, 2009, <http://www.immigrateusa.us/content/view/1770/48/>.

In conclusion, CJA encourages the U.S. to serve as a leading country in the struggle against impunity and to prosecute human rights abusers aggressively, extradite human rights abusers when appropriate, and use existing immigration law to protect witnesses and facilitate their participation in the prosecution of their abusers.

I would like to thank you very much for this opportunity to submit testimony. I would be pleased to answer in writing any questions that the Subcommittee may have and to submit any additional information for the record.