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

NOVEMBER 14, 2007

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

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.

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.

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

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).

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).

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."

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).