

15. DEPORTATION OF HUMAN RIGHTS ABUSERS: ISSUES, GROUNDS FOR CONCERN AND RECOMMENDATIONS

by: Sandra Coliver*

Amnesty International and other credible sources estimate that at least one thousand human rights abusers now live in the United States,¹ and dozens more visit every year.

The Center for Justice & Accountability (CJA), based in San Francisco, brings civil lawsuits against human rights abusers who are physically present in the U.S. and works to get them criminally prosecuted or deported. Since CJA was launched in 1998, we have brought nine suits against seven perpetrators who were living in the U.S. and two visiting foreign officials. This article addresses (a) the reasons CJA has chosen to work with the Department of Homeland Security to get perpetrators deported, rather than to press exclusively for criminal prosecution; (b) the laws available in the U.S. to prosecute human rights abusers and to deport them for a limited range of human rights crimes, (c) the need for substantial law reform; and (d) concerns raised by current legislative proposals.

Why CJA Works for the Deportation of Human Rights Abusers

CJA is well aware of the challenges and pitfalls in working with lawyers and agents in the Department of Homeland Security (DHS). Even those persons who are motivated by the best of intentions are limited in what they can do, and the laws at their disposal can be easily abused. Nonetheless, CJA has decided to explore the possibilities of collaboration for several reasons.

First off, we only urge arrest once we are convinced, to a moral certainty, that our defendants are guilty.

Second, deportation is undoubtedly a penalty. If it were not, then our defendants would not sit in detention centers for two years and more while they fight their expulsion. Of course, deportation is not a penalty that fits their crimes, but then, what penalty is?

Third, all of our defendants committed their crimes before November 1994 and thus, as explained below, the only crimes for which they can be prosecuted are fraud or misrepresentation in the completion of their immigration forms. This in turn requires the establishment of an immigration violation. Finding cases of post-1994 torture is undoubtedly difficult. CJA has not learned of any post-1994 perpetrators in the U.S. against whom witnesses are prepared to testify. In one case, a file was compiled against a suspected death squad killer in the U.S., but the Department of Justice (DOJ) declined to prosecute on grounds that the crime was a clean kill – no torture. The case highlights the inadequacy of the laws and the difficulties of investigation (the suspect left the U.S. after U.S. agents questioned some witnesses).

Fourth, deportation proceedings offer some of the advantages of civil cases. Survivors and other victims have the opportunity to present evidence against their tormentors. Moreover, the proceedings can be public, although immigration judges have discretion to close them and often do so upon the defendant's request. (Here we could use some First Amendment help. For instance, a progressive magazine ultimately decided not to challenge its expulsion from a defendant's deportation hearing for lack of resources and time.)

Fifth, DHS is engaged in deporting human rights abusers whether we like it or not. In June of this year, the Bureau of Immigration & Customs Enforcement (BICE), in DHS, announced the formation of a Human Rights Violators Unit to identify, investigate, and assist in the removal of human rights abusers from the

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United States.² BICE reports that it currently is investigating and litigating more than 200 cases involving alleged human rights abusers from more than 50 countries around the globe. By working with BICE, CJA hopes to (a) focus BICE's efforts on the worst human rights abusers, and (b) provide BICE with information that will lead to the termination of proceedings against those suspects who do not warrant further investigation. CJA has already had successes in both endeavors.

A final reason that CJA is working with DHS and to a lesser extent DOJ is that our clients – survivors of torture and other crimes against humanity – are THRILLED when their tormentors are taken into custody, especially when it is our clients' testimony that has helped to put them there. What a feeling! The power of truth and courage to put those who were above the law behind bars. If we or our clients felt that the detentions were unjust, we certainly would not relish, nor press for, them. We hope that these detentions will contribute to the process of developing the laws, procedures, political will and relationships necessary to motivate criminal prosecutions.

U.S. Laws Available to Prosecute Human Rights Abusers

In 1994, Congress passed legislation to implement some of the obligations the U.S. government accepted when it ratified the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The law (18 U.S.C. § 2340A) enables the DOJ to criminally prosecute people who committed torture anywhere in the world, so long as they thereafter enter the United States. To date, the DOJ has not filed a single indictment. In one case, the DOJ, in March 2000, stopped for questioning Major Anderson Kohatsu, one of Peru's most notorious suspected torturers, based on a tip from CJA and another human rights organization that requested anonymity. However, the State Department

intervened, claiming that Anderson Kohatsu had diplomatic immunity, a claim that was disputed by independent experts as well as some State Department officials.

The DOJ also has the capacity to prosecute human rights abusers for fraud or misrepresentation in obtaining entry to the U.S. under 18 U.S.C. §§ 1001, 1426 and 1546. These crimes carry a penalty of up to five years' imprisonment (and more if the offense was committed to facilitate terrorism). Foreigners who seek to gain entry into, or permanent residency in, the United States must complete certain immigration forms, depending on the nature of the visa or status they seek. Some of these forms require the applicant to swear that he or she had not "participated in the persecution of any person." It is likely that hundreds of human rights abusers now in the United States have committed perjury in completing these forms. Until 2002, not a single one had been prosecuted for perjury.

Finally, in 2001, the DOJ (based on investigation conducted by the immigration service) brought charges against Eriberto Mederos, a Cuban nurse, who had entered the U.S. in 1984 and had become a U.S. citizen in 1993, despite well-documented reports of his violent past. On August 2, 2002, a jury found that he had administered electric shocks and other forms of torture to political opponents of the Castro regime, and accordingly found him guilty of false statements on his visa and citizenship applications.³ CJA has urged such prosecutions against CJA and other defendants who, we have evidence, made material misrepresentations. We have been told that a handful of investigations are underway.

New Laws and More Congressional Oversight Needed

If the DOJ is to place a higher priority on investigating and prosecuting torturers, Congress will need to, first, ensure adequate funding and, second, exercise oversight to

motivate the necessary political will within both the Justice and State Departments. To motivate prosecution for other crimes, new laws are needed.

As an initial step, Congress needs to encourage the Bureau of Citizenship and Immigration Services (BCIS) to amend its forms so that they all include the questions necessary to enable prosecution of human rights abusers for misrepresentation.

In addition, Congress needs to strengthen several criminal laws. One important law is the above-mentioned 1994 law that makes torture a crime. To the crime of torture should be added extrajudicial killing (a term that is clearly defined by extensive U.S. jurisprudence developed in civil cases) and the crimes within the jurisdiction of the International Criminal Court, namely, genocide, crimes against humanity, and war crimes.

The U.S. has laws that criminalize war crimes and genocide, but they are limited. The war crimes law (18 U.S.C. § 2441) applies only if the offender or victim is a member of the U.S. armed forces or a U.S. citizen. The law on genocide (18 U.S.C. § 1091) applies only if the offense is committed within the United States or the alleged offender is a U.S. citizen. The U.S. has no law whatsoever on crimes against humanity.

As desirable as the above criminal law reforms are, there is virtually no support for them in the Administration or even in Congress.

For this reason, Senator Patrick Leahy – motivated by sincere human rights concerns – has chosen to pursue reforms to the Immigration and Naturalization Act as a first step. For the past four years, he has introduced legislation, the Anti-Atrocity Alien Deportation Act (AAADA), to add participation in torture and extrajudicial killings to the (small) list of human rights atrocities that justify expulsion and exclusion, namely, participation in Nazi persecution, genocide, and “particularly severe violations of religious freedom” by a public official. This year, the legislation was co-

sponsored by Senators Hatch and Feingold but has not moved out of the Judiciary Committee. The advantage of such legislation is that passage would give a big boost to efforts to revise the immigration forms. Insiders tell us that, while passage is not technically necessary for revision of the forms, the changes for which we are calling are unlikely to be made without new legislation.

The AAADA is problematic, however, especially in the current climate, for several reasons:

- (a) The legislation provides that aliens may be *excluded* as well as deported on human rights grounds, but does not include adequate safeguards to ensure that the human rights grounds will not be applied arbitrarily or discriminatorily. This omission is particularly problematic concerning exclusion given that aliens generally have no access to counsel or right to appeal adverse decisions.
- (b) There is inadequate emphasis on prosecution of human rights abusers as the preferred option over deportation.
- (c) The legislation does not expressly extend to command responsibility, although Sen. Feingold successfully pressed for command responsibility language to be included in the 2002 bill’s legislative history.⁴

The Administration reportedly is working on a bill, the Human Rights Abusers Act, which also would add human rights grounds for deportation. However, it most likely will not include command responsibility.

Marc Grossman, U.S. Under-Secretary of State for Political Affairs, in announcing the U.S. government’s repudiation of the International Criminal Court treaty, stated that

the United States "will take steps to ensure that gaps in United States' law do not allow persons wanted or indicted for genocide, war crimes, or crimes against humanity to seek safe haven on our soil in hopes of evading justice."

CJA has presented testimony to the Congressional Human Rights Caucus, and sent letters, along with other human rights organizations, to the National Security Council, urging the Caucus and NSC to do all that they can to (a) press for laws criminalizing genocide, crimes against humanity, and war crimes, and (b) ensure that penalties for commanders, and adequate protections against abuse, are included in any immigration bill aimed at excluding human rights abusers. We pointed out that to toughen the rules regarding subordinates while allowing the higher-ups to live in this country with impunity sends all the wrong signals. Any bill that excludes commanders will be viewed as promoting selective enforcement, not human rights.

Revision of the immigration forms – to ask questions about participation in human rights atrocities, and to define “participation” to include command responsibility – would be an important first step.

For further information about the Center for Justice & Accountability, please see our website: www.cja.org. For documents or information mentioned in this article, please email scoliver@cja.org.

Endnotes

¹ AIUSA, *The United States: Save Haven for Torturers* (April 2001).

² BICE Press Release, June 12, 2003, “*Somali Human Rights Abuser To Be Ousted From U.S. After BICE Investigation.*”

³ He also was found guilty for having falsely sworn that he had never been a member of the Communist Party.

⁴ For the text of the bill, go to <http://thomas.loc.gov>, click 107th Session. In the bill number space, type in S864. For the Senate Report, No. 107-144, go to http://thomas.loc.gov/cgi-bin/cpquery/?&dbname=cp107&maxdocs=100&report=sr144.107&sel=TOC_26118&

The language re command responsibility 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. 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.”