



THE CENTER FOR JUSTICE & ACCOUNTABILITY

Bringing Human Rights Abusers To Justice.

March 16, 2012

The Honorable Patti B. Saris, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002

RE: Center for Justice & Accountability Comments on Proposed Amendments to the Federal Sentencing Guidelines on Human Rights Offenses, Published in the Federal Register on January 19, 2012

Dear Judge Saris:

On behalf of the Center for Justice & Accountability, we submit the following comments on the proposed amendments to the federal sentencing guidelines and issues for comment published in the Federal Register on January 19, 2012. These comments are limited to the proposed amendments that concern human rights offenses.

The Center for Justice & Accountability (CJA) is a nonprofit legal organization dedicated to *ending torture and seeking justice for human rights crimes*. We represent hundreds of survivors of torture and other human rights abuses in civil litigation using the Alien Tort Statute and the Torture Victim Protection Act in the United States. In addition, we work as a private prosecutor in criminal prosecutions in Spain where we are lead counsel on the *Jesuits Massacre Case* and the *Guatemala Genocide Case*. Further, we currently represent 45 Civil Parties in the Second Khmer Rouge Trial in Phnom Penh which began in November of last year and is expected to last for two years.

In the past twelve years, we have brought cases against human rights abusers in the U.S. from Bosnia, Chile, China, Colombia, 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 sentencing in these cases and are particularly attuned to the importance of having the sentencing guidelines address the underlying crimes in a fair and consistent manner.¹ CJA supports amendments to the sentencing guidelines on human rights offenses as the current guidelines do not adequately address the gravity of these crimes.

Criminal prosecutions for substantive human rights crimes such as torture, crimes against humanity, and extrajudicial killing are the most important form of accountability for victims of human rights abuses. The strongest message that the U.S. can send to human rights abusers around the world is that we will take steps to ensure that they are held criminally accountable for

¹ CJA's Executive Director is a former federal prosecutor and spent eight years as a prosecutor with the Criminal Division of the U.S. Department of Justice first under Attorney General William Barr and then Attorney General Janet Reno. She also was a prosecutor with the Commonwealth of Massachusetts and the State of California.

their human rights crimes. Any such prosecution should not seek the death penalty.²

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 or for failing to punish their subordinates after the commission of these crimes. The focus of enforcement efforts, therefore, should include command responsibility of those in power who enabled, or at the very least allowed, systematic and widespread human rights abuses.

Part A. Human Rights Offenses

As mentioned above, CJA strongly supports the amending the sentencing guidelines on human rights offenses as the current guidelines do not adequately address the gravity of these crimes. More specifically, we support Option 1 because we believe that it provides proportionate sentencing for the broad range of human rights violations it encompasses accounts for aggravating circumstances that often arise in these types of offenses. Option 2, although preferable to the current guidelines, does not capture the same breadth of offenses or levels of culpability.

CJA also supports the increase in the base level offense for genocide, torture, war crimes, and the recruitment or use of child soldiers and for incitement to genocide. We believe that these baselines are appropriate in light of the base offense levels associated with similar serious criminal conduct.

Specific Offense Characteristics

The specific offense characteristics proposed are appropriate given the nature of serious human rights offenses, and in light of similar types of enhancements for similar conduct. CJA also recommends including mental injury or pain and suffering in §2H5.1(b)(1), which currently only accounts for bodily injury. Many forms of torture are intended to inflict psychological pain in addition to physical pain or injury, and some are even solely intended to inflict psychological pain.

CJA also recommends including **command responsibility** as an aggravating circumstance in the specific offense characteristic concerning public and military officials under §2H5.1(b)(6). Command responsibility is a well-established form of liability in 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.³ The sentencing guidelines should provide appropriate and

² While CJA supports the proposed guidelines amendments, CJA does not support any prosecution that would result in the death penalty. Under current law, convictions of genocide, torture, and war crimes can result in the death penalty where such conduct resulted in death to the victim. See 18 U.S.C. § 1091(b)(1) (genocide), 18 U.S.C. § 2340A(a) (torture), 18 U.S.C. § 2441(a) (war crimes).

³ 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,

proportionate sentences for those in power who enabled, or at the very least allowed, systematic and widespread human rights abuses. CJA supports the proposal made by DOJ in this regard and agrees that the amendment should not be limited to public or military officials, but should also account for persons that commanded under “color of authority.”⁴ CJA agrees with the proposed language from DOJ that §2H5.1(b)(6) read as follows: “If (A) the defendant was a public official or military official at the time of the offense; or (B) the defendant commanded individuals who committed the human rights offense, increase by 6 levels.” This language would properly reflect federal and international jurisprudence on this liability doctrine and captures the increased responsibility of both officials and any others who were in command of perpetrators of human rights violations.

Part B. Immigration and Naturalization Offenses Involving Human Rights Offenses

CJA supports the additional specific offense characteristics that are proposed for various immigration and naturalization offenses involving human rights offenses. CJA also recommends expanding the definition of “serious human rights offense” and using a graduated approach to applying enhancements.

Expanding the Definition of “Serious Human Rights Offense”

CJA suggests broadening the definition of “serious human rights offense” in this proposed amendment to include extrajudicial killing under the color of law⁵ and crimes against humanity.⁶ These are among the most serious human rights offenses and perpetrators must be sentenced accordingly. In particular, crimes against humanity encompasses the conduct of other serious human rights offenses, but adds the additional element that the conduct is widespread or systematic.⁷ In addition, the definition of “serious human rights offense” should make it clear that reference to the underlying statute is a reference to the conduct committed, and that the definition does not also incorporate the jurisdictional requirements set forth in the statute.

Graduated Approach of Applying Enhancements

CJA is generally in favor of a tiered approach given the realities of the range of abuses at issue. However, we also recommend taking command responsibility into account for the reasons

owing to the circumstances at the time, that his subordinates had committed, were committing, or planned to commit acts violative 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).

⁴ See, e.g., *Kadic v. Karadzic*, 70 F.3d 232, 239, 242 (2d Cir. 1995) (recognizing command responsibility in the case of the leader of an unrecognized Bosnian-Serb paramilitary group).

⁵ See, e.g., Torture Victims Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73, codified at 28 U.S.C. § 1350 (and also incorporated by reference in the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638) (defining extrajudicial killing as “a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.”); *United States v. Jordan*, 43 Fed.Appx. 950 (11th Cir. 2011).

⁶ See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 762 (Breyer, J., concurring in part and concurring in the judgment) (ban on torture and crimes against humanity among universally recognized international norms); *Doe v. Constant*, 354 F. Appx. 543, 547 (2d Cir. 2009), cert. denied, *Constant v. Jane Doe 1*, 131 S. Ct. 179, 178 L. Ed. 2d 249 (2010).

⁷ *Id.*

explained above. The offense level and enhancements should reflect the level of culpability of the individual and the magnitude of the harm they allowed or created.

With regard to the hypothetical concerning members of military or paramilitary organizations, CJA notes that many individuals are forced to become members of foreign military or paramilitary groups against their will. In those situations, individuals face the choice of joining such groups, or risking their own lives or the lives of their family members. Although CJA strongly supports punishing perpetrators of human rights violations, we are concerned that this enhancement could also apply to those unwilling members of military and paramilitary organizations. We recommend, therefore, that there be clear language that this enhancement would not apply to those who joined these organizations under duress and for other extenuating circumstances.⁸

Part C. Further Response to the Commission's Request for Comments

CJA does not support the application of mitigating circumstances, or any deference to situations where amnesty was awarded to a perpetrator of human rights offenses in the country where the conduct occurred. Amnesty laws contravene U.S. treaty obligations and international law and undermine accountability efforts. At least one circuit court has held that the amnesty law in El Salvador is not applicable in the U.S.⁹

The U.S. is a signatory to a number of treaties and conventions that do not recognize amnesties for human rights crimes. The Convention against Torture¹⁰ and the Genocide Convention¹¹ create an affirmative duty on the U.S. to adequately prosecute crimes of torture and genocide. Under the International Covenant on Civil and Political Rights, the right to life, the right to be free from torture and other inhumane or degrading treatment or punishment and the right to be free from slavery are recognized as inviolable rights that may not be violated even in times of public emergency. Accordingly, impunity for these types of violations would contravene such treaty obligations to uphold these rights. Moreover, amnesty laws do not typically have an extraterritorial effect. For example, the International Criminal Court and the ad-hoc tribunals are able to assert jurisdiction, even when the individual has been granted immunity in a national jurisdiction.

⁸ This hypothetical raises issues similar to the bars to asylum for persecutors of others and material support to terrorist organization, which do not have exceptions for duress and coercion. *See, e.g., Negusie v. Holder*, 555 U.S. 511, 523-25 (2009) (holding that the Board of Immigration Appeals' finding that there was no duress or coercion exception to the persecutor bar was based on a legal error, and remanding for the BIA to interpret the relevant provision of the Immigration and Naturalization Act; the BIA does not appear to have decided this issue); Kyle Michael Butler, Considering the Totality of the Circumstances for Asylum Applicants: Why the Bars to Asylum Are in Desperate Need of Reform, 88 U. Det. Mercy L. Rev. 307 (2010) (discussing the lack of duress exceptions in the persecutor bar and the terrorist bar).

⁹ *See, e.g., Chavez v. Carranza*, 559 F.3d 486, 494-96 (6th Cir. 2009) (finding that El Salvador's amnesty law was not applicable to a claim against a former Salvadoran military officer brought in U.S. courts).

¹⁰ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc., No. 100-20, 1465 U.N.T.S. 85.

¹¹ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

We thank the members of the Commission, and the Commission staff, for allowing us this opportunity to address this important issue. We would be pleased to answer any questions that the Commission and staff may have and to submit any additional information.

Sincerely,

A handwritten signature in black ink that reads "Pamela Merchant". The signature is written in a cursive style with a large, looped initial "P".

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