

**Written Statement of Melanie Morgan**

**On Behalf of the Federal Public and Community Defenders**

**Before the United States Sentencing Commission  
Public Hearing on Human Rights Offenses**

**March 14, 2012**

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My name is Melanie Morgan and I am a partner in the law firm of Morgan Pilate LLC in Olathe, Kansas as well as a member of the Criminal Justice Act panel in the District of Kansas and the Western District of Missouri. I would like to thank the Commission for holding this hearing and giving me the opportunity to testify on behalf of the Federal Public and Community Defenders regarding Human Rights Offenses.

Before addressing the Commission's proposed amendments for human rights offenses, I thought I would explain my experience with these issues. Together with co-counsel Kurt Kerns, I represented Mr. Kobagaya in what was the first Rwandan genocide-related prosecution in the United States. He was not actually charged with genocide but instead with unlawfully obtaining his citizenship and immigration fraud. The government alleged that Mr. Kobagaya had lied on an immigration form about where he lived which enabled him to come to the United States and obtain a green card. He was then able to use this green card to obtain his citizenship. In the course of obtaining his citizenship, Mr. Kobagaya submitted a form and participated in an interview in which he was asked a number of questions including whether he had ever committed any other offenses regardless of whether he had been arrested, charged or convicted, whether he had participated in any genocide and whether he had lied on any immigration form. The government's theory was that Mr. Kobagaya had lied in answering these questions because they maintained he was a participant and leader in the Rwandan genocide. Over the course of two years, we prepared for trial. The preparation included hundreds of hours in non-legal and legal research, hundreds of hours in investigative trips throughout the United States and world, and hundreds of hours in motion practice. The five week trial included approximately 26 witnesses from countries throughout the world, many others were brought to the United States but did not testify. The jury was unable to reach a verdict as to Count 1, unlawfully obtaining citizenship and returned a guilty verdict on immigration fraud. Subsequently, without waiting for a ruling on the defense Rule 29 motion, the government moved to set aside the verdict, agreed not pursue a retrial on Count 1 and agreed not to pursue civil remedies for removal.

To be called a war criminal is a very serious matter. To adequately defend someone who has been alleged to have committed a serious human rights offense is a difficult, time consuming and expensive task. I have deep concerns about the Commission's proposal to use sentencing as the forum where we determine whether someone has committed such an offense. This approach does not seem to take the charges, or the need to scrutinize the evidence, very seriously. If we, as a country, as Americans, are going to carry the mantle of calling to justice people who have committed serious human rights offenses in other countries, we should do so directly, in a forum

that accords the crimes and the accusations the gravity they deserve. We should not shy away from proving guilt beyond a reasonable doubt, and insisting that the evidence be as reliable as that which we require to secure any criminal conviction. If we cannot, or choose not to, provide that level of procedural protection, non-criminal options are available to remove the person from the United States and allow his home country to decide the veracity and consequences of the allegations.

My testimony focuses on the Commission's proposal to more than double the base offense level where the charged offense of immigration fraud "reflected an effort to avoid detection or responsibility for a serious human rights offense." I will also briefly address the proposal to create a new chapter two offense guideline or a chapter three adjustment for direct and serious human rights offenses.

## **I. Introduction**

The Commission has proposed several amendments to the guidelines to address serious human rights offenses. Defenders encourage the Commission to make no changes to the guidelines for these offenses. The offenses are adequately addressed under the current guidelines, and the proposed amendments, by attempting to fix what is not broken, create more problems than they solve.

The term "serious human rights offense" encompasses a broad range of conduct that is best addressed, as it is currently, by reference to several different offense guidelines. From sexual abuse, to rape, to torture, to murder, the offenses are all serious, but there are still differences among them. The differences are best addressed, as they are now, by referencing the Chapter Two offense guidelines that apply to the specific conduct at issue. These specific offense guidelines, combined with Chapter Three adjustments and Chapter Five departures can work together to address the wide range of culpability these offenses and offenders present. A single Chapter Two offense guideline, a single Chapter Three adjustment, and a single enhancement for immigration fraud cannot account for the range of conduct at issue.

## **II. Immigration Fraud**

### **A. Another Tail that Wags the Dog: The Proposed Human Rights Enhancement for Immigration Fraud.**

Defenders are deeply troubled by the proposed enhancement of [10]-[18] levels for immigration fraud offenses "if the offense reflected an effort to avoid detection or responsibility for a serious human rights offense." This enhancement, even at its lowest proposed level, would more than double the base offense level for these offenders, almost all of whom are sentenced under USSG §2L2.2, on the basis of uncharged or acquitted conduct. While the charge-based guidelines have always allowed for some consideration of the "real offense," there are real limits

on the scope of what constitutes the real offense.<sup>1</sup> The proposed amendment points to conduct so far removed, in kind and time, from the charged offense of immigration fraud, that it cannot properly be considered part of the real offense.

The proposed enhancement would provide an end-run around fundamental constitutional rights,<sup>2</sup> and undermine respect for the law. A defendant convicted of nothing more than misrepresenting the years he resided in a certain location,<sup>3</sup> or a family member's membership in a military or paramilitary organization,<sup>4</sup> and *acquitted* of misrepresenting whether he had personally engaged in a serious human rights offense, would have an offense level more than double what it would be based solely on the conduct for which he was convicted.

Sentencing enhancements based upon uncharged or acquitted conduct give prosecutors "indecent power"<sup>5</sup> over sentencing and much leverage during plea negotiation because they can

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<sup>1</sup> See, e.g., USSG §1B1.3 (defining and thus limiting "Relevant Conduct"); *United States v. Hahn*, 960 F.2d 903 (9th Cir. 1992) (discussing limits of "similarity, regularity and temporal proximity").

<sup>2</sup> While use of acquitted conduct is generally upheld by appellate courts, there are serious questions about whether reliance on such conduct violates the Sixth Amendment. In *United States v. Watts*, 519 U.S. 148 (1997), the Supreme Court held only that the use of acquitted conduct did not violate the Double Jeopardy Clause. See generally Eang Ngov, *Jury Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 Tenn. Law Rev. 235 (2009). Additionally, six dissenting judges on the Sixth Circuit concluded *Watts* did not govern this issue and "[b]ecause the sentence cannot be upheld as reasonable without accepting as true certain judge-found facts, the sentence represents an as applied violation of [the defendant's] Sixth Amendment rights." *United States v. White*, 551 F.3d 381, 387, 392 (6th Cir. 2008) (en banc) (Merritt, J., dissenting).

<sup>3</sup> In *United States v. Kobagaya*, No. 09-cr-10005 (D. Kan.), one count alleged a material false statement related to whether Mr. Kobagaya had lived in Burundi from 1993 to 1995 as stated on the immigration form. The government ultimately dismissed this and other charges against Mr. Kobagaya. Similarly, in *United States v. Cvinjanovic*, No. 10-cr-280 (E.D. Wis.), the defendant is charged with falsely representing that from 1992 until October 9, 2001, "he was living in the Former Republic of Yugoslavia (FYR), when in fact, during this period, he was living and working in Bosnia-Herzegovina as a police officer." Trial is set to begin in *Cvinjanovic* on August 27, 2012.

<sup>4</sup> In *United States v. Kantengwa*, No. 09-cr-10385 (D. Mass), one of the allegations is that the defendant failed to disclose her husband's membership in the Service de Renseignement in Rwanda. Trial is set to begin in this case on April 23, 2012. In *United States v. Kordic*, No. 06-cr-496 (M.D. Fla.), the defendant was charged with a single count related to him having "failed to report his service in the Vojska Republike Srpske (Army of the Serb Republic) by stating 'None' in the section requiring him to list any foreign military service." (Dkt. No. 1). He was acquitted.

<sup>5</sup> Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L. J. 1420, 1425 (2008).

inflate guideline ranges.<sup>6</sup> Specific offense characteristics, like those proposed here for immigration fraud, provide prosecutors with tools to threaten a defendant with the enhancement to extract guilty pleas.

Defenders<sup>7</sup> are not alone in their concern about the role of supposed relevant conduct in the guidelines. Justice Scalia has stated that punishment of uncharged conduct produces an “absurd result.”<sup>8</sup> A majority of judges believe it is not appropriate to consider dismissed conduct (69% of judges), uncharged conduct presented at trial or admitted by the defendant (68%) and acquitted conduct (84%).<sup>9</sup> In addition, John Steer, former General Counsel and Vice-Chair for the Commission, has called for the Commission to exclude “acquitted conduct” from the guidelines, permitting its use only as a discretionary factor.<sup>10</sup>

This proposed enhancement makes great mischief by expanding the role and concept of “relevant” conduct in the guidelines when the Commission should be moving in the other direction.<sup>11</sup>

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<sup>6</sup> American College of Trial Lawyers, *Proposed Modifications to the Relevant Conduct Provisions of the Federal Sentencing Guidelines*, 38 Am. Crim. L. Rev. 1463 (2001); Kate Stith & Jose Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 140, 159 (1998); David Yellen, *Illusion, Illogic and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines*, 78 Minn. L. Rev. 403, 524-54 (1993); Kevin R. Reitz, *Sentencing Facts: Travesties of Real Offense Sentencing*, 45 Stan. L. Rev. 523, 524 (1993); Paul J. Hofer, *Implications of the Relevant Conduct Study for the Revised Guideline*, 4 Fed. Sent’g. Rep. 334 (May/June 1992).

<sup>7</sup> Defenders have long advocated that the guidelines rely less on “relevant” conduct. *See, e.g.*, Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti Saris, Chair, U.S. Sentencing Comm’n., at 29-33 (Aug. 26, 2011); *see also* Statement of Jacqueline A. Johnson Before the U.S. Sentencing Comm’n, Chicago, Ill., at 21-25 (Sept. 10, 2009); Statement of Jason D. Hawkins Before the U.S. Sentencing Comm’n, Austin, Tex., at 17-19 (Nov. 19, 2009).

<sup>8</sup> *Blakely v. Washington*, 542 U.S. 296, 306 (2004).

<sup>9</sup> USSC, *Results of Survey of United States District Judges January 2010 through March 2010*, Question 5 (2010).

<sup>10</sup> *An Interview with John Steer*, 32 *Champion* 40, 42 (2008).

<sup>11</sup> The Commission at various different times has considered limiting relevant conduct. “[O]ptions to limit the use of acquitted conduct at sentencing” was a priority in the 1996-97 amendment cycle, and for future amendment cycles, the Commission raised “[s]ubstantively changing the relevant conduct guideline to limit the extent to which unconvicted conduct can affect the sentence.” 61 Fed. Reg. 34,465 (July 2, 1996). And proposals to abolish the use of acquitted conduct were published for comment in 1992, 1993 and 1997. *See* 57 Fed. Reg. 52, 832 (1992); 58 Fed. Reg. 67,541 (1993); 62 Fed. Reg. 152, 161 (1997).

**B. The Proposed Immigration Fraud Enhancement is Worse in Kind than Other “Relevant” Conduct in the Guidelines.**

The proposed enhancement is especially troublesome because it is qualitatively worse than other types of “relevant” conduct. It is too far removed from the charged offense – fraud – and requires courts to decide whether a person participated in a serious human rights offense based on evidence subject to limited scrutiny, when, if anything, it should be subject to additional testing.

**1. Too Removed**

To determine if the offense “reflected an effort to avoid detection or responsibility for a serious human rights offense,” a sentencing court necessarily must consider whether the defendant committed a serious human rights offense. That conduct is far removed in kind – and often time – from the charged offense: fraud. As to time, it is not at all unusual for the alleged serious human rights offense to have occurred many years, if not decades, before the charged fraud.<sup>12</sup> As to kind, the vague term “reflected” does nothing to tether the serious human rights offense to the fraud.<sup>13</sup>

**2. Sentencing is Not the Appropriate Forum to Determine Whether a Person Committed a Serious Human Rights Offense.**

The type of conduct at issue here – participating in a serious human rights offense and avoiding detection or responsibility for it – is particularly problematic because there can be “difficult line-drawing problems” when it comes to assessing whether someone committed a serious human rights offense.<sup>14</sup> While there are certainly obvious cases, many cases are not obvious at all. As has been said in defense of U.S. combat troops charged with violent crimes against Iraqi civilians, “You just can’t put people under a microscope when the lines of combat

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<sup>12</sup> See, e.g., *United States v. Kobagaya*, No. 09-cr-10005 (D. Kan.) (Mr. Kobagaya, the first person to be tried in the United States in connection with the Rwandan genocide of 1994, was charged in 2009 for false statements in 2005 and 2006); *United States v. Jordan*, No. 10-cr-80069 (S.D. Fla.) (Mr. Jordan was charged in 2010 for false statements in 1996 and 1999 related to alleged crimes in Guatemala in 1982); *United States v. Cvinjanovic*, No. 10-cr-280 (E.D. Wis.) (Mr. Cvinjanovic was charged in 2010 for false statements in 2001 regarding his employment during the war in Bosnia-Herzegovina in 1995).

<sup>13</sup> If the enhancement read “If the defendant committed the offense intending to avoid detection or responsibility for a serious human rights offense” the mens rea would at least be more closely tied to the fraud. But such a change in language still does not cure the fundamental defects with the enhancement, as explained below.

<sup>14</sup> See *Fedorenko v. United States*, 449 U.S. 490, 512 n.34 (1981) (addressing different statute; noting that outside the context of a Nazi-guard at a concentration camp, there may be “difficult line-drawing problems” in determining whether someone assisted in the “persecution of civilians”).

are so blurred.”<sup>15</sup> This determination requires careful scrutiny of the evidence, which includes not only the defendant’s conduct, but the current and historical political environment. Sentencing is not the appropriate forum for engaging in the careful testing that is required here.

#### **a. Unreliable Evidence**

The problem of unreliable evidence is particularly acute in these cases. Fact witnesses play a critical role, but in many cases, complaining witnesses may have ulterior motives for reporting the conduct.<sup>16</sup> In some situations, witnesses from war-torn areas may have their own personal agendas; for example they may believe they have a better chance of obtaining refugee status in the United States if they report that they were victims of serious human rights offenses. In other cases, broader forces may be at work. As a lawyer from Human Rights Watch stated about Rwanda, “[t]hese cases are very, very difficult” and “[p]eople that might have relevant information may not be willing to come forward for fear of the consequences for them inside Rwanda.”<sup>17</sup> When in Mr. Kobagaya’s case we raised the possibility that the current government in Rwanda may have intimidated witnesses to further its own political agenda, the government responded that this concern could be explored at trial using the “time-tested tool provided by the Constitution: cross-examination.”<sup>18</sup> Unfortunately, if these issues are litigated only at sentencing with the lax “sufficient indicia of . . . probable accuracy” standard of USSG §6A1.3, and the government can simply call a case agent to relate hearsay from witnesses in Rwanda or any other country, this time-tested tool will not be available.

#### **b. Expensive and Time Consuming Investigation**

It is very expensive and time consuming to investigate and defend against allegations that an individual – often many years ago – committed a serious human rights offense. As one court noted in connection with a case that is currently on trial in New Hampshire:

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<sup>15</sup> Paul von Zielbauer, *Charged with War Crimes, U.S. Troops Get Legal Help From Home*, New York Times (Jul. 22, 2007), <http://www.nytimes.com/2007/07/22/world/americas/22iht-troops.4.6769309.html>.

<sup>16</sup> Some in the United States have claimed that allegations made by Iraqi civilians against U.S. troops are a new tactic of the insurgency. Paul von Zielbauer, *Charged with War Crimes, U.S. Troops Get Legal Help From Home*, New York Times (Jul. 22, 2007), <http://www.nytimes.com/2007/07/22/world/americas/22iht-troops.4.6769309.html>.

<sup>17</sup> Dan Gorenstein, *N.H. Woman Allegedly Had Role in Rwandan Genocide*, <http://www.npr.org/templates/story/story.php?storyId=129000948> (Aug. 12, 2010).

<sup>18</sup> Gvmt.’s Response in Opposition to Defendant’s Motion to Dismiss the Indictment Based on Alleged Due Process Violations at 8, *United States v. Kobagaya*, No. 09-cr-10005 (D. Kan. Feb. 22, 2010).

Critical witnesses for the government and defendant reside in Rwanda, and counsel for both sides must necessarily travel to Rwanda to investigate, marshal evidence, and make arrangements for witnesses to come to the United States to testify. . . . Language barriers, differences in customs, and international relations issues all add other complexities that must be navigated. Discovery and relevant investigatory materials are voluminous.<sup>19</sup>

The reality is even more difficult than it sounds. At the investigation stage, defense counsel, with investigators and interpreters, need to travel to interview complaining witnesses and conduct their own investigation. Sometimes this requires visiting unstable countries on the State Department's Travel Warning list.<sup>20</sup> For example, to investigate Mr. Kobagaya's case, defense counsel traveled to Africa more than five times – for weeks at a time – including to some countries on the State Department's Travel Warning list. The investigation stage also requires defense counsel to talk extensively with their client; these conversations often necessitate the services of an interpreter. Obtaining documents is also difficult and time consuming, sometimes requiring issuing letters rogatory to secure the cooperation of foreign governments.<sup>21</sup> In addition, adequate investigation in these cases requires defense counsel to become knowledgeable about the history of the defendant's home country as well as its current and past politics. Defense counsel acquires this knowledge through extensive non-legal research and reading, and by retaining at least one expert, often an academic, on the country.

Presenting a defense is also unusually complex, time consuming and expensive. After locating witnesses, most often in other countries, the next challenge is figuring out how to get them to the United States to testify. If they are unwilling to come, no subpoena authority exists to force their appearance, so depositions remain the only option. In Mr. Kobagaya's case, defense counsel, interpreters and a court reporter had to take two different international trips to depose defense witnesses. For the witnesses willing to come to the United States to testify, it took considerable time and expenditure of resources to obtain their appearance. In addition to arranging for and securing payment for transportation, lodging and witness fees, we had to

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<sup>19</sup> Order at 1, *United States v. Munyonyezi*, No. 10-cr-85 (D.N.H. Apr. 20, 2011).

<sup>20</sup> [http://travel.state.gov/travel/cis\\_pa\\_tw/tw/tw\\_1764.html](http://travel.state.gov/travel/cis_pa_tw/tw/tw_1764.html).

<sup>21</sup> The State Department advises execution of letters rogatory “may take a year or more worldwide.” [http://travel.state.gov/law/judicial/judicial\\_683.html#summary](http://travel.state.gov/law/judicial/judicial_683.html#summary).



overcome the many legal obstacles (and health screenings) to bringing people – many of whom are not eligible to be here – into the United States.<sup>22</sup>

Presenting a defense in Mr. Kobagaya's case also meant securing expert testimony to address the political motivations the defense believed were behind the prosecution. Specifically we needed expert testimony on the "scientific and political data which supports that more than just a genocide was occurring during the time period at issue."<sup>23</sup> To help the jury understand the bias that underlay the accusations, we required an expert who could explain the discrimination between the groups in Rwanda. And because some of the government witnesses had been accused and/or convicted within a special court system in Rwanda, the gacaca, which is vastly different than any system in the United States, we needed an expert to explain what happened in that court process. In particular, the expert testimony was needed to explain that "[o]ne of the things that happens is that persons within the [gacaca] must implicate someone else."

All of this is very expensive. In Mr. Kobagaya's case, my best estimate is that the cost of the case to U.S. taxpayers was well over one million dollars.<sup>24</sup>

### **C. The Immigration Fraud Enhancement Would Create Unwarranted Disparity By Treating Dissimilar Defendants the Same.**

Another problem with the proposed enhancement is that its one-size-fits-all approach would produce unwarranted disparity by treating people involved in very different conduct, with dissimilar offender characteristics, the same.<sup>25</sup> As mentioned above, the enhancement does not

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<sup>22</sup> Even the Department of Justice faces unique challenges and hurdles in bringing witnesses to the United States to testify in connection with human rights cases. *See* [http://www.justice.gov/usao/briefing\\_room/vw/liberia.html](http://www.justice.gov/usao/briefing_room/vw/liberia.html) (outlining DOJ efforts regarding the witnesses in the prosecution of Roy Belfast, Jr.).

<sup>23</sup> Motion for Deposition of Dr. Filip Reyntjens Pursuant to Fed. R. Crim. P. 15 at 5, *United States v. Kobagaya*, No. 09-cr-10005 (D. Kan. July 26, 2010), ECF No. 196.

<sup>24</sup> Ron Sylvester, *Case Dismissed Against Wichita Man Accused of Rwandan Crimes*, The Wichita Eagle (Aug. 25, 2011), <http://www.kansas.com/2011/08/25/1988025/prosecutors-dismiss-case-against.html#storylink=misearch>; Roxana Hegeman, *AP Newsbreak: Prosecution of Kan. Man Suspected of Genocide Costly in Manpower, Expenses*, The Republic (Feb. 7, 2012), <http://www.therepublic.com/view/story/c2e44626562045c497fef1e2c5fdb39/KS--Genocide-Trial-Costs/>.

<sup>25</sup> Unwarranted disparity occurs both when there is "different treatment of individual offenders who are similar in relevant ways," and "similar treatment of individual offenders who differ in characteristics that are relevant to the purposes of sentencing." USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 113 (2004) (emphases omitted).

account for the broad range of conduct – from beating to rape to murder to mass murder – that all falls within the category of serious human rights offenses. In addition, it fails to give any consideration to the many mitigating circumstances that can exist in these cases.

### 1. Mitigating Factors

First, it is mitigating when the defendant is forced against his will to participate in the alleged serious human rights offenses. Conscripted is common in the areas where serious human rights offenses have occurred.<sup>26</sup> And for some who participated in serious human rights offenses, the choice was quite literally to kill or be killed. For example, in the case of Marko Boskic, when he was ordered to participate in a mass execution, he initially refused until his commander “threatened him with death, pressing a pistol to Boskovic’s head.”<sup>27</sup>

Sometimes those who fail to provide certain information on their immigration forms are themselves the victims of serious human rights offenses, because they have been raped, beaten on the basis of their ethnicity, or conscripted while they were still children. Additionally, many people who have survived these brutal wars, whether they were directly involved in human rights offenses or not, suffer severe mental health problems including Post-Traumatic Stress Disorder.<sup>28</sup>

It is also a mitigating factor when one of these defendants, accused of making a false statement many years ago, and having been somehow involved in a serious human rights offense

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<sup>26</sup> See, e.g., Opening Brief at 4, *United States v. Boskovic*, No. 10-30336 (9th Cir. Aug. 23, 2011) (“Like all Serbian men in [the area where he lived], Mr. Boskovic was conscripted in to the [Serbian Army of the Republika Srpska (VRS)] and the Zvornik Brigade”); Transcript at 184-85, 219-20, *United States v. Causevic*, No. 09-33 (S.D. Iowa Jul. 28, 2009), ECF No. 77 (Investigator with the Human Rights Violators and War Crimes Unit of Immigration and Customs Enforcement testified that the paramilitary organization at issue “conscripted men of all ages” and that he was familiar with cases where individuals claimed “they did not want to be a part of that force but felt they had no choice”).

<sup>27</sup> Defendant’s Sentencing Memorandum at 4, *United States v. Boskic*, No. 04-cr-10298 (D. Mass. Oct. 19, 2006), ECF No. 156. Another participant in the same offense who was tried before the International Criminal Tribunal for the former Yugoslavia, explained he was told by the leader, “[i]f you don’t want to do it, give up your gun and join [the victims].” Government’s Sentencing Memorandum at 11, *United States v. Boskic*, No. 04-cr-10298 (D. Mass. Oct. 19, 2006), ECF No. 158.

<sup>28</sup> “[P]sychiatric morbidity associated with mass violence in civilian and refugee populations is elevated when compared with nontraumatized communities.” Richard F. Mollica, et al., *Disability Associated with Psychiatric Comorbidity and Health Status in Bosnian Refugees Living in Croatia*, 281 J. Am. Medical Assoc. 433 (Aug. 4, 1999); See also Stefan Priebe, et al., *Consequences of Untreated Posttraumatic Stress Disorder Following War in Former Yugoslavia: Morbidity, Subjective Quality of Life, and Care Costs*, Croatian Medical J. (Oct. 2009), <http://www.cmj.hr/2009/50/5/19839070.htm> (concluding “[p]eople with untreated war-related PTSD have a high risk of still having PTSD a decade after the traumatic event.”). Indeed, participants in all wars on all sides suffer from PTSD. See generally <http://www.ptsd.va.gov>.

sometime before that, has led a productive, law abiding life here in the United States. While such conduct does not excuse the offense, it is appropriate to consider it as a mitigating factor.<sup>29</sup>

Finally, and most directly linked to the charge of immigration fraud, is the mitigating factor that in some cases, defendants are instructed by the officials processing the paperwork to omit certain information. This scenario was well explained in the case of Zeljko Boskovic, a Bosnian refugee charged with fraud and misuse of a visa pursuant to 18 U.S.C. § 1546(a) and with making a false statement pursuant to 18 U.S.C. § 1001(a)(2) when he “failed to reveal” that he “was a member of the Zvornik Infantry Brigade Military Police, Army of the Republika Srpska, in 1995.”<sup>30</sup> Following a jury conviction, Mr. Boskovic was sentenced to three years of probation,<sup>31</sup> and his case is currently on appeal in the Ninth Circuit. Counsel for Mr. Boskovic described the situation as follows:

Because so many people were displaced, the international community began a massive effort to resettle refugees. The United States Government contracted with the International Organization for Migration (IOM) to assist in processing applications for admission to the United States. The IOM processed about 20,000 applicants during the time that Mr. Boskovic was applying for refugee status. IOM caseworkers and registrars did not receive formal training. Some applicants, like Mr. Boskovic, would write down preliminary information on forms, but they would not fill out the formal application documents themselves; that was done either by the registrar or during the interview. The applicants were just told to sign the formal documents. Due to time constraints, not all of the forms would be fully interpreted to applicants. When he went to the IOM offices to apply for refugee status, Mr. Boskovic first spoke with an intake worker/registrar who filled out the basic forms for him. He showed her his identification card, clearly marked as a 1996 refugee. That person explained that in the

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<sup>29</sup> Cf. *Gall v. United States*, 552 U.S. 38, 59 (“The District Court quite reasonably attached great weight to Gall’s self-motivated rehabilitation, which was undertaken not at the direction of, or under supervision by, any court, but on his own initiative. This also lends strong support to the conclusion that imprisonment was not necessary to deter Gall from engaging in future criminal conduct or to protect the public from his future criminal acts.”).

<sup>30</sup> Indictment, *United States v. Boskovic*, No. 07-cr-01 (D. Or. Jan. 3, 2007), ECF No. 1.

<sup>31</sup> Judgment, *United States v. Boskovic*, No. 07-cr-01 (D. Or. Nov. 15, 2010), ECF No. 111.

application process, they did not want to hear about any civil war activities, such as the Zvornik Brigade.<sup>32</sup>

When officials are – at least in part – responsible for the offense conduct, the defendant surely is not as culpable as the person who without such encouragement failed to reveal requested information.

## **2. A Graded Enhancement Is No Answer.**

In its Issues for Comment, the Commission asks whether there are aggravating and/or mitigating circumstances that should be taken into account when deciding what level of enhancement should apply. While the above discussion reveals that Defenders believe there are mitigating circumstances in these cases, so many problems exist with the proposed enhancement that simply adding tiers does not save it.

### **D. Application of a Serious Human Rights Enhancement Must Be Based on More than Merely Having Concealed Membership in a Military or Paramilitary Organization.**

In its Issues for Comment, the Commission queries whether an enhancement should apply solely because the defendant has concealed his membership in a military or paramilitary organization, or whether such membership plus evidence that the organization was involved in a human rights violation is enough. In either case, the Commission proposes this enhancement would apply even when the “evidence is not sufficient to establish that the defendant was involved in the human rights violation.” Frankly, this is one of the most disturbing proposals we as Defenders have seen from the Commission in recent years. It stretches relevant conduct, inference, and proxy punishment beyond their breaking points. Members of the United States Army have committed serious human rights offenses,<sup>33</sup> but no one would seek to hold another soldier responsible for such conduct if they had no involvement in it other than that they were both wearing the same uniform. Indeed, it is hard to think of a military in the history of the world that has not had at least some soldiers involved in serious human rights offenses. To hold someone responsible for war crimes simply because he was a cook in the same military or paramilitary organization as someone who did commit war crimes is unconscionable. It utterly fails to account for those who attempted to escape military organizations but were captured, beaten and forced to return to service. Or those who were themselves forced as children to

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<sup>32</sup> Opening Brief at 5-6, *United States v. Boskovic*, No. 10-30336 (9th Cir. Aug. 23, 2011) (internal citations omitted).

<sup>33</sup> See, e.g., DOJ Press Release, *Former Ft. Campbell Soldier Sentenced to Life in Prison After Conviction on Charges Related to Deaths of Iraqi Civilians* (Sept. 4, 2009), <http://www.justice.gov/opa/pr/2009/September/09-crm-932.html>.

become soldiers. They might later conceal their membership because they feared being held responsible for the actions of others, not because they personally had engaged directly in any criminal conduct. Hiding forced or nominal membership does not necessarily indicate direct involvement or even complicity in serious human rights offenses.

The Courts appear to agree with Defenders on this issue. It is noteworthy that when courts have imposed lengthy sentence in these cases it has been when there is evidence that the defendants directly participated in a serious human rights offense.<sup>34</sup>

#### **E. A Departure Is a Better Option.**

While Defenders are opposed to any addition to the immigration fraud offenses that address the supposedly relevant conduct of offenses committed in other countries, if the Commission disagrees and believes it is necessary to do something to incorporate serious human rights related offenses into the immigration guidelines, a departure is the better way to do this. An invited departure would acknowledge both that there have been some cases where judges have imposed above-guideline sentences, and that these cases have yielded different results based on the specific conduct at issue and the characteristics of the defendants.<sup>35</sup> A departure provision also has the advantage of providing symmetry with the terrorism departure in USSG §2L2.2, comment. (n.5). It would avoid the unwarranted disparity that would otherwise arise from providing on the one hand a one-size-fits-all enhancement that more than doubles the base offense level for offenders who lie to conceal a broad range of human rights offenses outside of and before entering the country, and on the other hand a more flexible departure for offenders who lie to conceal plans to engage in terrorist activities here in the United States.

### **III. Direct Human Rights Offenses**

In addition to the enhancement for immigration fraud offenses, the Commission has proposed two possible changes to the guidelines to address the direct prosecution of serious human rights offenses: (1) promulgate a new Chapter Two offense guideline; or (2) add a new Chapter Three adjustment. Defenders encourage the Commission to reject both options and let the current guideline structure do its work. Although the current guidelines do not have a special section dedicated to serious human rights offenses, the guidelines take these offenses very seriously and reference some of the most severe offense guidelines in the book.

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<sup>34</sup> See, e.g., Judgment, *United States v. Boskic*, No. 04-cr-10298 (D. Mass. Nov. 20, 2006), ECF No. 165 (imposing sentence of 63 months); Judgment, *United States v. Jordan*, No. 10-80069-CR (S.D. Fla. Sept. 17, 2010), ECF No. 51 (imposing sentence of 120 months).

<sup>35</sup> *Id.*

Specifically, torture offenses under 18 U.S.C. § 2340A are referenced to a variety of different Chapter Two guidelines including First Degree Murder and Kidnapping. Offenses involving the recruitment of child soldiers under 18 U.S.C. § 2442 are referenced to peonage guideline (§2H4.1) which starts with a base offense level of 22, and quickly climbs based on factors similar to those included in the Commission’s proposed new §2H5.1. Genocide under 18 U.S.C. § 1091 is referenced to §2H1.1 (Civil Rights), which sets the base offense level by looking at “the offense guideline applicable to any underlying offense.” War Crimes, which include a range of conduct, are not currently specifically referenced to specific offense guidelines, but §2X5.1 quickly directs sentencing courts to “the most analogous offense guideline.”

In addition to these Chapter Two offense guidelines, a number of Chapter Three adjustments and Chapter Five departures also may apply to those convicted of serious human rights offenses. For example, §3A1.1 enhances sentences for hate crimes and offenses involving vulnerable victims; §3A1.3 adds 2 levels when a victim was physically restrained during the offense; §3B1.1 increases sentences for defendants who were organizers, leaders, and supervisors; §3B1.3 increases sentences even further if the defendant abused a position of trust or used a special skill; and §3B1.4 enhances the penalty when a defendant used a minor to commit a crime. Similarly, Chapter Five provides for upward departures in cases involving death (§5K2.1), physical injury (§5K2.2), extreme psychological injury (§5K2.3), abduction and restraint (§5K2.4), and extreme conduct such as torture (§5K2.8).

With only one prosecution under any of these statutes ever, resulting in a 97 year sentence, there is no evidence that the current approach is not working.<sup>36</sup> If at some later juncture, the government prosecutes more than one of these cases, and some evidence emerges that the current guidelines do not adequately address the severity of these offenses, then it may be appropriate for the Commission to revisit the matter. At this juncture, however, there is no reason to believe the changes are necessary, and there is ample reason to believe they are unwise.

#### **A. The Proposed Chapter Three Adjustment**

Defenders oppose further complicating the guidelines by adding another Chapter Three adjustment to address conduct that is already adequately covered by the guidelines. The adjustment that would apply where the defendant [committed] a serious human rights offense is particularly troubling, and raises all of the same relevant conduct concerns discussed above in the context of the immigration fraud enhancement.

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<sup>36</sup> Roy M. Belfast, Jr., a.k.a. Chuckie Taylor, was convicted for having committed atrocities in Liberia from 1999-2003 during the presidency of his father, Charles Taylor. He was sentenced to 97 years, and that sentence was affirmed on appeal. *United States v. Belfast*, 611 F.3d 783 (11th Cir. 2010).

The version of the adjustment that applies where the defendant [was convicted of] a serious human rights offense is marginally better, but as with the one-size-fits all enhancement discussed above, it would result in unwarranted disparity by treating dissimilar defendants the same. There is a broad range of conduct that falls within the scope of “serious human rights offense” and an adjustment of a certain number of levels for individuals who have committed any of those offenses, without regard to any mitigating circumstances, is not appropriate. The current structure, which references the human rights offenses to the Chapter Two offenses most analogous to the actual conduct, will guide sentencing courts to appropriate sentences that consider differences in the actual conduct and between offenders.

### **B. The Proposed Chapter Two Offense Guideline**

Of the two proposals, Defenders believe a new Chapter Two Offense Guideline is preferable to an undifferentiated Chapter Three adjustment, but only marginally so.<sup>37</sup> We urge the Commission to be wary of attempting to create a single guideline that covers a broad spectrum of offenses as previous efforts in that regard have been fraught with problems (e.g., fraud). At the risk of repeating myself, I wish to reiterate that the current guidelines adequately address the conduct and distinguish between the wide range of offenses that fall within the definition of serious human rights offenses. There is no need to further bloat and complicate the guidelines.

### **IV. Conclusion**

As I stated at the beginning, it is a very serious matter to allege that someone committed a serious human rights offense. Due to the gravity of the allegation, the difficulty of defending against it, and because the conduct is often far removed from the charge of immigration fraud, Defenders oppose the proposed amendments to the immigration fraud guidelines. In addition, the proposed changes to the guidelines for direct human rights offenses are a solution in search of a problem and should be rejected. There is no evidence the current guideline structure, which references serious human rights offenses to some of the most serious offense guidelines in the book, is inadequate in any way. We encourage the Commission to leave well enough alone in this area – the proposed changes simply bring more harm than good.

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<sup>37</sup> Defenders believe there are many problems with the specifics of the proposed §2H5.1, including but not limited to: (1) the new §2H5.1 provides not only a 6-level enhancement for sexual exploitation, but also an 8-level enhancement for sexual exploitation of someone under age 16, and a 10-level enhancement for sexual exploitation of someone under age 12. In contrast, the guideline for kidnapping provides a single 6-level enhancement for any and all sexual exploitation; and (2) the new §2H5.1 provides for enhancements based on the number of victims, and also provides in the commentary that the vulnerable victim adjustment in §3A1.1 might also apply if there were vulnerable victims. §3A1.1 also provides an enhancement for a large number of vulnerable victims. This would result in inappropriate double counting.