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Prosecuting Core Crimes in the United States: Recent Changes and Prospects for 2010

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**PROSECUTING CORE CRIMES IN THE UNITED STATES:
RECENT CHANGES AND PROSPECTS FOR 2010**

NAOMI ROHT-ARRIAZA *

I. Introduction	80
II. What Crimes Are Prosecutable?.....	81
A. Genocide	81
B. Torture.....	82
C. War Crimes	83
D. Hostage Taking	85
E. Specific Crimes.....	85
1. Recruitment of Child Soldiers.....	86
2. Slavery and Trafficking in Persons	86
III. Enforcement.....	87

I. INTRODUCTION

With end of the Bush administration, attention has turned to prosecution of Bush-era officials for international crimes, including war crimes and torture. At the same time, a new administration has begun, offering new possibilities. I will, for the most part, leave the discussion concerning prosecution of former Bush administration officials to my colleagues, and turn instead to consideration of issues around prosecuting in the U.S. those who have committed international crimes abroad, such as genocide, war crimes, crimes against humanity, torture, and forced disappearance.

Here are a couple of bookends to the issue:

In 2002, Amnesty International issued a report on safe haven for torturers in the U.S. that said that over a thousand known torturers or war criminals were then living in the U.S., and the U.S. government was not doing much about it.¹ The U.S., Amnesty complained, provided a nice

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1. AMNESTY INTERNATIONAL, U.S.: A SAFE HAVEN FOR TORTURE (2002).
www.amnestyusa.org/stoptorture/safehaven.pdf.

retirement home for dictators and thugs.²

Fast forward to January 2009. Chuckie Taylor, Jr.³, the son of former Liberian strongman Charles Taylor, was convicted in a Miami courtroom of torture and sentenced to 97 years in prison. A month later, General José Guillermo García, former Defense Minister of El Salvador, was arrested on charges of immigration fraud for not revealing his role in serious human rights violations during the 1980s.⁴

What has changed, and where is the U.S. going with respect to dealing with the dictators and torturers in our midst? I will start with an overview of which of the international “core crimes” are now prosecutable under U.S. law, then look at a few emblematic cases, and conclude with some thoughts on strategy for both the new administration and human rights advocates.

II. WHAT CRIMES ARE PROSECUTABLE?⁵

A. Genocide

The crime of genocide has been criminalized in U.S. law since 1988, but only where committed by U.S. citizens or in the U.S. In 2007, the Genocide Accountability Act extended jurisdiction to legal permanent residents and, most importantly, to any offender brought into or found in U.S., even if the prohibited conduct occurred abroad.⁶ The

2. *Id.*

3. Sometimes referred to as Charles Emmanuel or Chuckie Emmanuel. *See id.*

4. *See Arce v. Garcia*, 434 F.3d 1254 (11th Cir. 2006). *See also* CENTER FOR JUSTICE AND ACCOUNTABILITY, EL SALVADOR: CARLOS EUGENIO VIDES CASANOVA AND JOSE GUILLERMO GARCIA, available at <http://www.cja.org/cases/romagoza.shtml> (last visited Nov. 8, 2009).

5. *See generally* Douglass Cassel, *Empowering United States Courts to Hear Crimes Within the Jurisdiction of the International Criminal Court*, 35 NEW ENG. L. REV. 421 (2001); Sandra Coliver, Jennie Green & Paul Hoffman, *Holding Human Rights Violators Accountable by Using International Law in U.S. Courts: Advocacy Efforts and Complementary Strategies*, 19 Emory Int'l L. Rev. 169 (2005).

6. 18 U.S.C. § 1091 (2007). (The statute states in relevant part: (d) Required circumstance for offenses. The circumstance . . . is that—(1) the offense is committed in whole or in part within the United States; (2) the alleged offender is a national of the United States (as that term is defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101)); (3) the alleged offender is an alien lawfully admitted for permanent residence in the United States (as that term is defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101)); the alleged offender is a stateless person whose habitual residence is in the United States; or (5) after the conduct required for the offense occurs, the alleged offender is brought into, or found in, the United States, even if that conduct occurred outside the United States).

definition of genocide follows that found in the 1948 Convention.⁷ It is not clear exactly what the "brought into" language is about—it seems to refer to capture abroad and/or extradition from elsewhere. The change was apparently triggered by congressional debates and the Administration's finding that genocide was occurring in Darfur.⁸

Despite this step forward, a few of the definitions in the statute will make it extremely difficult, in practice, to prosecute genocide. For example, "incite" is defined as "urges another to engage imminently in conduct in circumstances under which there is a substantial likelihood of imminently causing such conduct."⁹ Thus, if the prohibited conduct is part of a long-term campaign it may not meet the imminence requirement. Similarly, the Genocide Convention's requirement of an intent to destroy in whole or in part has become a requirement to intend to destroy "a part of a group of such numerical significance that the destruction or loss of that part would cause the destruction of the group as a viable entity within the nation of which such group is a part."¹⁰ This requirement goes further than both the Convention itself and the current jurisprudence of international tribunals on the subject, and raises the bar for a prosecutor to an impossible height.

B. Torture

The Federal Criminal Torture Statute¹¹ gives U.S. courts jurisdiction over cases involving torture committed outside the U.S., where the offender is a U.S. citizen, the offender is a resident of the U.S., or the offender is present in the U.S., regardless of his or her nationality or where the acts took place. The law was passed as part of the package of implementing legislation for the Convention Against Torture, which

7. Genocide Convention Implementation Act of 1987, Pub. L. No. 100-606, § 1091, 102 Stat. 3045 ((a) Basic offense. Whoever, whether in time of peace or in time of war, in a circumstance described in subsection (d) and with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group as such (1) kills members of that group; (2) causes serious bodily injury to members of that group; (3) causes the permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques; (4) subjects the group to conditions of life that are intended to cause the physical destruction of the group in whole or in part; (5) imposes measures intended to prevent births within the group; or (6) transfers by force children of the group to another group; or attempts to do so, shall be punished as provided in subsection (b))

8. BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR AND BUREAU OF INTELLIGENCE & RESEARCH, U.S. DEP'T OF STATE, PUB. NO. 11182, DOCUMENTING ATROCITIES IN DARFUR (2004); Glenn Kessler & Colum Lynch, *U.S. Calls Killings in Sudan Genocide*, WASH. POST, Sept. 10, 2004, at A1.

9. 18 U.S.C. § 1093 (3) (2007).

10. 18 U.S.C. § 1093 (8) (2007).

11. 18 U.S.C. § 2340 (1994).

requires states to extradite or prosecute those found within their territory as well as their own citizens accused of torture.¹² For years after the law passed, no prosecutions took place. Although human rights organizations consistently submitted *dossiers* on suspected torturers within the U.S. to the Department of Justice (DOJ), the Attorney General refused to authorize prosecutions.

On October 30, 2008, Charles Taylor, Jr., a.k.a. Chuckie Emmanuel, was the first person to be convicted under the Federal Criminal Torture Statute.¹³ A jury convicted Taylor of torturing prisoners when he was head of Liberia's anti-terrorist unit, otherwise known as "Demon Forces." On March 30, 2006, Taylor was arrested when he attempted to enter the U.S. with a passport obtained through false documents from Trinidad. He pled guilty to the immigration violation on Sept. 15, 2006 and was sentenced to 11 months in prison. During the time he was imprisoned on this violation, various groups provided information on his participation in torture, and the U.S. attorney's office in Miami filed charges.

The Taylor conviction is a positive first step. But it does not necessarily represent the application of a species of universal jurisdiction, in that Taylor had U.S. citizenship and could have been prosecuted even had there been no "present in the U.S." provision in the statute.

C. War Crimes

The Federal Criminal War Crimes Statute¹⁴ reads: "(a) . . . Whoever, whether inside or outside the U.S., commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death." The law only applies where the perpetrator or the victim is a member of the armed forces of the U.S. or a national of the U.S. Substantively, it covers grave breaches of the Geneva Conventions, some violations of the 1907 Hague Conventions and prohibited ordinances. It also covers some but not all violations of Common Article 3 (CA3) applicable to non-international armed conflicts, but with restrictive "specific intent"

12. G.A. Res. 39/46, at 197, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (June 26, 1987).

13. Yolanne Almanzar, *Son of Ex-President of Liberia is Convicted of Torture*, N.Y. TIMES, October 31, 2008 at A16, available at <http://www.nytimes.com/2008/10/31/us/31taylor.html>.

14. 18 U.S.C. § 2441 (2008).

language added.

The Military Commissions Act of 2006 left intact sub-sections (1), (2), and (4) penalizing the grave breaches of the Conventions, and certain provisions of the Hague and Mines Conventions.¹⁵ It significantly altered, however, the ability of the U.S. to prosecute violations of CA3. Moreover, it substantively changes U.S. incorporation into domestic law of Common Article 3 in ways that are intended to sharpen and clarify the elements of the crimes, but does so in a way that at least arguably narrows the prohibited conduct. For example, compare the Statute's definition of cruel or inhuman treatment: "The act of a person who commits, or conspires or attempts to commit, an act intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions), including serious physical abuse, upon another within his custody or control." Compare this language to that of Common Article 3 itself, which prohibits, in addition to torture and cruel treatment "outrages upon personal dignity, in particular humiliating and degrading treatment;"¹⁶

There have been no prosecutions to date under this section. It deliberately does not extend to universal jurisdiction. The legislative history states:

The State Department and Defense Department have recommended that H.R. 3680 be amended to provide for universal jurisdiction which would allow for criminal proceedings to be brought against a war criminal for crimes taking place outside of the U.S. where neither the victim nor perpetrator are American, as long as the perpetrator is present in the United States . . . The Committee decided that the expansion of H.R. 3680 to include universal jurisdiction would be unwise at present. Domestic prosecution based on universal jurisdiction could draw the United States into conflicts in which this country has no place and where our national interests are slight. In addition, problems involving witnesses and evidence would likely be daunting. This does not mean that war criminals should go unpunished. There are ample alternative venues available which are more appropriate. Prosecutions can be handled by the nations involved or by international tribunal. If a war criminal is discovered in the United States, the federal government can extradite the individual upon request in order to facilitate prosecution overseas. The Committee is not presently aware that these alternative venues are

15. Military Commissions Act of 2006, 10 U.S.C. §§ 948a – 949s (2008).

16. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

inadequate to meet the task.¹⁷

D. Hostage Taking

In 1984, Congress enacted the hostage taking statute to implement the International Convention Against the Taking of Hostages. The statute provides in relevant part:

(a) Except as provided in subsection (b) of this section, whoever, whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained, or attempts or conspires to do so, shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment.

(b)(1) It is not an offense under this section if the conduct required for the offense occurred outside the United States unless—

(A) the offender or the person seized or detained is a national of the United States;

(B) the offender is found in the United States; or

(C) the governmental organization sought to be compelled is the Government of the United States.¹⁸

In *U.S. v. Yunis*, the court held that these provisions "reflect[] an unmistakable congressional intent, consistent with treaty obligations of the United States, to authorize prosecution of those who take Americans hostage abroad no matter where the offense occurs or where the offender is found."¹⁹ The court also found that customary international law contains a "universal" principle of extraterritorial jurisdiction under which a state can prosecute certain offenses recognized by the community of nations as of universal concern.²⁰

E. Specific Crimes

Two new provisions were introduced into the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (Dec. 23, 2008).²¹

17. H.R. REP. NO. 104-698, at 7 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2166, 2172.

18. 18 U.S.C. § 1203 (Supp. II 2008).

19. 924 F.2d 1086, 1091 (D.C. Cir. 1991).

20. *Id.*

21. Pub. L. No. 110-457, 122 Stat. 5044 (codified in scattered sections of 22 U.S.C.

1. Recruitment of Child Soldiers

The Child Soldiers Accountability Act of 2007, 18 U.S.C. § 2442 (2008), punishes the recruitment of child soldiers (defined as under the age of 15) for service in an armed force or group with twenty years to life imprisonment.²² The law defines “armed force or group” as “any army, militia, or other military organization, whether or not it is state-sponsored.” The law was a first product of the newly formed Senate Sub-committee on Human Rights and the Law, chaired by Senator Richard J. Durbin. Under the law, “[t]here is jurisdiction over an offense described in subsection (a), and any attempt or conspiracy to commit such offense, if—(1) the alleged offender is a national of the United States . . . (2) the alleged offender is a stateless person whose habitual residence is in the United States; (3) the alleged offender is present in the United States, irrespective of the nationality of the alleged offender; or (4) the offense occurs in whole or in part within the United States.”²³ The crime has a ten-year statute of limitations, and also constitutes an immigration offense, making a perpetrator inadmissible and not eligible for political asylum. By enacting this legislation, the U.S. is complying with its obligations under the Optional Protocol to the Convention on the Rights of the Child,²⁴ which was ratified in 2002.

2. Slavery and Trafficking in Persons

The Trafficking in Persons Accountability Act of 2008, S. 1703 110th Cong., was introduced by Sen. Durbin on Jun. 27, 2007 and passed the Senate on Oct. 1, 2008.²⁵ It covers slavery and trafficking in persons. It creates a limited form of extraterritorial jurisdiction allowing U.S. prosecution when the offender is either a U.S. national or permanent resident, or when the alleged offender is present in the U.S., irrespective of nationality. The bill also makes clear that U.S. jurisdiction is subsidiary to the jurisdiction of other states, at least to the extent that if the case is being prosecuted elsewhere it can only be heard in the U.S. with special DOJ approval. The language reads:

(Supp. II 2008)).

22. Pub. L. No. 110-340, 122 Stat. 3735 (codified in scattered sections of 18 U.S.C. (Supp. II 2008)).

23. *Id.*

24. *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, May 25, 2000, 2173 U.N.T.S. 222 (ratified by the United States on December 23, 2002).

25. S. 1703. 110th Cong. (2008).

Sec. 1596(b): No prosecution may be commenced against a person under this section if a foreign government, in accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting such person for the conduct constituting such offense, except upon the approval of the Attorney General or the Deputy Attorney General (or a person acting in either such capacity), which function of approval may not be delegated.

In addition to these recent legislative changes, Sen. Durbin also held a hearing on June 24, 2008, on creating extraterritorial jurisdiction over crimes against humanity.²⁶ A specific legislative proposal to that effect was introduced on June 24, 2009 as Senate Bill 1346 and is still pending.²⁷

III. ENFORCEMENT

Despite the new legislative efforts, enforcement of these laws remains spotty. There are two agencies in the government tasked with rooting out human rights violators in the U.S. In the Justice Department, the Office of Special Investigations, formed to find and denaturalize former Nazi war criminals, has merged with the Domestic Security Section of the Department to form the Human Rights and Special Prosecutions Section and expanded its purview to encompass naturalized war criminals and human rights violators from other conflicts or repressive regimes.²⁸ Within the Immigration and Customs Enforcement (ICE) branch of the Department of Homeland Security, the National Security Investigations Division has a Human Rights Violators and War Crimes Unit. Its stated mission is to “prevent the admission of foreign war crimes suspects, persecutors and human rights abusers into the United States [and] identify, prosecute and ultimately remove such offenders who are already unlawfully in the United States.”²⁹

There are five different enforcement mechanisms that can be used to deal with human rights violators located within the U.S. First, they

26. *From Nuremberg to Darfur: Accountability for Crimes Against Humanity: Hearing Before the Subcomm. On Human Rights and the Law of the S. Judiciary Comm.*, 110th Cong. 786 (2008).

27. *Crimes Against Humanity Act of 2010*, S. 1346, 111th Cong. (as reported by S. Comm. on the Judiciary, May 6, 2010).

28. ABOUT THE HUMAN RIGHTS AND SPECIAL PROSECTIONS SECTION, *available at* <http://www.justice.gov/criminal/hrsp/about/> (last visited Sept. 26, 2010).

29. HUMAN RIGHTS VIOLATORS AND WAR CRIMES UNIT, HISTORY AND MISSION *available at* http://www.ice.gov/investigations/national_security/hrv.htm (last visited Sept. 26, 2010).

can be subject to civil suits under the Alien Tort Statute (ATS) and/or the Torture Victims Protection Act (TVPA). Second, they can be prosecuted for the crimes listed above. Third, they can be arrested and deported if they are in the country unlawfully. Fourth, they can be prosecuted for immigration fraud or other immigration violations related to non-disclosure of their participation in abuses. Fifth, they can be extradited to another state that wants to prosecute them. It is the combination, priority, and interaction among these mechanisms that provide the most interesting possibilities going forward.

With respect to civil suits, they are discussed elsewhere, so I will not go into detail here. However, it is important to stress that an intersection exists between civil suits under the ATS and TVPA with the other mechanisms I listed. For example, perpetrators come to the attention of U.S. authorities often through civil suits against defendants found in the U.S. that perpetrators come to the attention of U.S. authorities. It is through the efforts of groups like the Center for Justice and Accountability, the Center for Constitutional Rights, EarthRights International and others that defendants are found, evidence collected, and pressure brought to bear on authorities in the U.S. and elsewhere to prosecute. The reluctance of prosecutors in the U.S. to move against human rights violators has made civil suits not only the vehicle of choice for victims, but the only way in which they can be the main protagonists rather than simply potential witnesses in the case. In contrast, other countries allow victims to intervene in the criminal process and obtain damages after a criminal conviction in the U.S.

While there are many advantages to civil suits, deportation is often the worst outcome with respect to human rights violators found in the U.S. From the perspective of human rights advocates, alleged perpetrators, if deported, have been sent to the one place where, at least until recently, they were least likely to be held accountable either criminally or civilly—their home state. After all, in many of these cases the alleged perpetrators held positions of power, and in many post armed conflict states the justice system still works imperfectly. True, deportation does remove such people from immigrant communities where they could encounter traumatized survivors, and it does serve as punishment to some degree because the defendant no longer has the option of U.S. medical care or a luxurious U.S. retirement. However, it provides little access to information about the crime for victims, and certainly neither reparation nor penal sanctions. It can deprive victims of their chance to confront the defendant in civil court; even if they win a default judgment; the (often remote) chance of finding assets is a poor

substitute.

The U.S. has recently determined a better way to deport violators. In cases where there is communication with, and credible assurances from, the violator's home country such that they will be prosecuted upon return, the deporting authorities can arrange for representatives of the local prosecutors' office to meet the deportee's plane upon arrival and take him into custody. For example, Juan Rivera Rondón is a former army lieutenant accused of participation in the Accomarca massacre in Peru in 1985. Rondón was initially civilly sued by two survivors in civil court, who were twelve years old at the time and witnessed the massacre of family members. The Center for Justice and Accountability (CJA) sent copies of some of the evidence against him to ICE. He was arrested on immigration charges, but ICE held off deporting him until CJA could put the authorities in contact with prosecutors in Lima. After he was deported, prosecutors met his plane in Lima and immediately detained him pending trial on criminal charges.

In addition to ensuring that prosecuting authorities in the home country will follow up on allegations of human rights-related crimes, ICE authorities might also consider timing deportation so that the defendant can participate in the civil proceedings, if these have already been filed. Immigration authorities might also consider earlier communication with human rights lawyers and activists when they have violators under investigation. Many lawyers and activists groups distrust the immigration service precisely because they are seen as wanting to deport prematurely, before arrangements can be made to ensure effective investigations in the suspect's home country. Additionally, they are seen as insisting on deportation rather than prosecution in the U.S., even when it is clear that the home country has no interest in, or ability to, prosecute.

Several treaties commit the U.S. to either extraditing or prosecuting those suspected of crimes like torture and grave breaches of the Geneva Conventions. Prosecution is often the mechanism of choice for victims, and also has clear expressive value in reaffirming global norms prohibiting the crime and the U.S.' commitment to those norms. The DOJ has been extremely reluctant to prosecute even clear-cut cases: as mentioned, only one case has been brought to trial under section 2340, the prohibition on torture, and that case arguably involved a U.S. national. Over the last three years, a number of new laws allowing prosecution of crimes committed abroad have come into effect, but they will face the same problem that initially dogged the use of the torture statute: the retrospective nature of its application. During the 1990s, the

DOJ argued that it could not prosecute acts that took place before 1994 because that would require retroactive application of a criminal statute, which would violate the principle of legality. This argument was not supported in international law, which makes quite clear that there is no *ex post facto* problem when the behavior at issue has been criminalized in national or international law.³⁰ We can expect the same arguments to be raised now in cases involving genocide or child soldiers. It is not yet clear whether the Obama administration will be more aggressive than its predecessors in bringing prosecutions, but the incentives for prosecutors already overburdened by local crime to pursue investigations that require significant resources and expertise would seem to cut against any large-scale prosecutions policy. The use of universal jurisdiction to investigate wrongdoing by U.S. officials elsewhere might also end up dampening prosecutors' enthusiasm for universal jurisdiction-based prosecutions at home, lest they be seen as endorsing the principle.³¹

U.S. official antipathy at least until recently, to the use of universal jurisdiction might also complicate requests for extradition to other countries for trial. These cases would not involve U.S. nationals (whom the U.S. would almost certainly argue should be tried at home) but rather nationals of other states wanted at home or by third countries. Treaty obligations regarding torture and war crimes as well as many terrorism-related crimes require the state where the defendant is found to either extradite or prosecute, but don't specify which extraditing states. For example, Spain is now investigating core crimes committed in El Salvador and Guatemala. If a potential defendant in one of those cases turns out to be located in the U.S., will the DOJ under the Obama

30. See, e.g., Art. 15 of the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR, 21st Sess. Supp. No. 16 at 52, U.N. Doc A/6316 (Dec. 16, 1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by the U.S. Sept. 8, 1992, which states in pertinent part that "[no] one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed." See also Art. 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos. 3, 5, 8, and 11 which entered into force on Sept. 21 1970, Dec. 20 1971, 1 Jan. 1, 1990, and Nov. 1, 1998, respectively. See also *Yunis*, *supra* note 19 at 1091.

31. See, e.g. the investigations in Spain into torture of detainees at Guantánamo and elsewhere, and the continuing efforts to bring a prosecution in Germany. For Spanish investigations, see Marlise Simons, *Spanish Court Weighs Inquiry on Torture for 6 Bush-Era Officials*, N.Y. Times, Mar. 28, 2009, <http://www.nytimes.com/2009/03/29/world/europe/29spain.html>; *Spain Court Mulls U.S. Torture Case*, BBC News Americas, Mar. 29, 2009, available at <http://news.bbc.co.uk/2/hi/americas/7970425.stm>. See Center for Constitutional Rights, www.ccrjustice.org (last visited Nov. 4, 2009) (the German prosecution effort).

administration agree to extradite them to Spain to stand trial?

Prosecutors have proven reluctant to bring charges on these core crimes even when they already have the defendant in custody. A case in point is the prosecutions of some 20 Colombian paramilitary leaders on drug trafficking charges. The paramilitaries were extradited by the Colombian government to the U.S., and a number have already pled guilty to trafficking and been sentenced to long prison terms.³² The only problem is that those same paramilitary leaders were also admittedly responsible for hundreds of killings of civilians, torture, and stealing of the property of local peasants, leading to massive displacement.³³ Had they stayed in Colombia they would have participated in a process by which they were required, in exchange for reduced sentences, to confess their human rights-related crimes, pay restitution to victims and give information on the structure and functioning of their operations.³⁴ Indeed, for many Colombian human rights groups the extraditions, even though they will result in long prison terms, thwart the goals of the Justice and Peace law in that they have removed all incentive for paramilitary leaders to testify about their activities, including their links to the ruling party and to President Alvaro Uribe.

The most likely prosecutions are likely to not involve the core crimes but rather immigration fraud. Immigrants who enter the U.S. under several visa statuses are asked whether they have persecuted others or committed one of a number of violations, including “particularly

32. *E.g., Plea Agreement for U.S. v. Vanoy-Rodriguez*, No. 0:99-cr-06153-KMM (So. Dist. Fla. Oct. 9, 2008). The plea agreement for the defendant includes the following paragraph:

D. Justice and Peace

The United States and the defendant agree that nothing in this Agreement precludes the defendant from continuing to meet his obligations under *La Ley de Justicia y Paz* (the Justice & Peace law), a provision of Columbian law. The defendant acknowledges and agrees, however, that any information he provides to the Columbian government in this regard shall not provide a basis for a downward departure or reduction of the defendant’s sentence under U.S.S.G. § 5K1.1, Federal Rule of Criminal Procedure 35, or Title 18, United States Codes, Section 3553(a).

Plea Agreement at 5, *Vanoy-Ramirez*, No. 99-06153-CR (S.D. Fla. 2008). However, nothing in the sentence reflects this agreement. Other plea agreements and sentences contain no mention of the Justice and Peace Law.

33. HUMAN RIGHTS WATCH, *BREAKING THE GRIP?: OBSTACLES TO JUSTICE FOR PARAMILITARY MAFIAS IN COLOMBIA* 3 (Oct. 16 2008), *available at* <http://www.hrw.org/en/reports/2008/10/16/breaking-grip-0>.

34. Colombia’s Justice and Peace Law, Law 975 of July 25, 2005, also know as *La Ley de Justicia y Paz*, provides for reduced sentences of 5-8 years for demobilized members of armed groups who agree to refrain from further armed activity, compensate their victims, and give a full accounting of their crimes. *Id.* at 6.

severe violations of religious freedom.”³⁵: if they answer in the negative and the immigration service obtains proof that they lied, that is punishable by 5-10 years in prison. Permanent residents applying for naturalization face similar questions, and similar penalties for lying.

As with drug trafficking charges in the Colombian case described above, this is the “Al Capone” strategy: if it’s tax evasion rather than murder that puts the defendant in prison, does it matter? Five to ten years in prison is a not insubstantial sentence, especially if combined with seizure of assets and eventual deportation, but it is not as severe as the sentences that would accompany convictions for the core crimes. On the other hand, some of the legal and proof difficulties may be eased. For example, participation in persecution would cover crimes, like crimes against humanity, not now criminalized for conduct by non-nationals outside the U.S.

On the other hand, the expressive value of punishment for visa fraud is far different, especially in the defendant’s home country, than the value of punishment for human rights violations. The “truth-telling” function of criminal trials, so important to victims, is lost. Plea agreements in either drug trafficking or visa fraud cases have required little in the way of acknowledgement of a defendant’s human rights-related crimes or reparation for those crimes. Perhaps if the U.S. authorities were more attuned to the need for such measures in any plea agreement, no matter what the charges, victims’ groups would be less unhappy with the “Al Capone” strategy.

In addition to the example of Salvadoran retired General García, mentioned earlier, this is the route the DOJ is taking with respect to other accused torturers, *genocidaires* and terrorists.³⁶ For example, Cuban national Luis Posada Carrilles is accused in the 1976 bombing of a

35. International Religious Freedom Act of 1998 § 604, 22 U.S.C. § 6401 (2008) (established immigration restrictions for any individual who, while serving as a foreign government official, was responsible for particularly severe violations of religious freedom in the preceding 24-month period);

The Holtzman Amendment, 8 U.S.C. § 1182(a)(3)(E) (Oct. 28, 2008) (states that any alien from a Nazi-occupied country, or that of a collaborator, who “ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion” is ineligible for a U.S. visa and eligible for deportation. The law also covers those who commit genocide, torture, or extrajudicial executions.).

36. More recently, the DOJ in September 2010 obtained the conviction of a Guatemalan former soldier accused of participation in a massacre in 1982. Gilberto Jordan was sentenced to ten years in prison on charges of visa fraud stemming from his non-declaration of his participation in his citizenship application. See BBC News, “US Jails Guatemalan Ex-Soldier for hiding massacre role,” Sept. 15, 2010.

Cubana airplane, killing 73 people, including Cubans, Venezuelans, Surinamese and Barbadians. Venezuela indicted him for the crime, but he escaped before trial and came to the U.S., where he filed for asylum. He eventually became a naturalized U.S. citizen, but as the Cold War eased he was indicted on charges of giving a false statement during naturalization. After the federal district court dismissed those charges, the Fifth Circuit Court of Appeals reversed and remanded, and he is now awaiting trial.³⁷ The U.S. has said it will not extradite him to Venezuela for fear that any trial would not meet due process standards – but then, under the Montreal Convention on aircraft bombings, does it have an obligation to try him for the bombing itself, and not just for the immigration fraud? And if an admitted bomber of civilian aircraft is not prosecuted in his U.S. home for the crime, what does that say about the U.S. commitment to fighting terrorism more generally?

In conclusion, these five mechanisms—civil suits, prosecutions for the core crimes, prosecutions for immigration fraud, extradition and deportation—will continue to be used to one degree or another. The question of how they will be combined, where the emphasis will lie, and how the U.S. government will interact with civil society groups pursuing human rights violators at home and abroad, can be expected to change with the advent of a new administration. How much change, and how fast, is still not known. In large part, decisions on how to deal with those in the U.S. who have committed human rights-related crimes elsewhere is inextricably linked to the issue of U.S. officials' own possible commission of such crimes. So far, the Obama administration has expressed little willingness to bring prosecutions. However, the complexities of dealing with our own officials' past wrongdoing will, for better or worse, color all efforts to deal with wrongdoers from the rest of the world.

37. U.S. v. Posada Carriles, 486 F.Supp.2d 599 (W.D.Tex. 2007) (dismissing charges); U.S. v. Posada Carriles, 541 F.3d 344 (5th Cir. 2008) (reversing district court and remanding for trial); Carriles v. U.S. 129 S.Ct. 1657 (2009) (denying writ of certiorari).