

JUSTICE THROUGH LITIGATION: THE CENTER FOR JUSTICE AND  
ACCOUNTABILITY

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Good morning. I'm going to talk about the legacy of Nuremberg as it is being implemented here in the United States, in particular through the work that I do for the Center of Justice and Accountability.

As Naomi mentioned, I think the key idea that came out of Nuremberg is individual accountability and a part of that I think is the notion of what we now call "command responsibility" - that the people at the top are as responsible as those who actually carried out the crimes. I very much liked the quote about these are not the people who have blood on their hands because they won't do that. And that's what always happens. Those that are the commanders at the top, in rare instances, do they have blood on their hands, but their defense is always, 'I had nothing to do with it. These were soldiers acting out on their own, this was not any sort of scheme that we had. I didn't give any orders and I certainly didn't know anything about it.' And so I think that's the other important step in addition to just individual accountability, also command responsibility, this is the idea that came out of Nuremberg.

Additionally, the idea of universal jurisdiction that David just mentioned; I think this grew out of Nuremberg and the subsequent important human rights advances after World War II - the Geneva Conventions and the Genocide Convention. This idea that not only can people be prosecuted anywhere that they're found, but they must be prosecuted. The idea that a country where a particular human rights abuser is found has to either extradite that person to a country that is going to prosecute him or has to prosecute that person itself.

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And these are the ideas behind the work that we do at CJA: universal jurisdiction and individual accountability. For those who aren't familiar with CJA, we try to combine the idea of accountability with service to clients, namely survivors of torture and people whose family members have been killed in government killings or who have "disappeared." Those are our clients. And so what we try to do is gain some measure of accountability against the perpetrators who are responsible for them, but also combine it with social services, therapy, other services that our clients desperately need.

Our original focus at CJA, and we've only been around since 1998, was on civil cases in the United States. That continues to be the core of our work, but we also have a bit more of a global focus now. One of the criticisms, and I think an important criticism, is that civil lawsuits in the United States are not real accountability, that accountability is putting people in jail. And I don't disagree with that.

Let me describe the U.S. scheme and how we implement jurisdiction here and then address some of the advantages and disadvantages of that. The U.S. scheme here, many of you will know but I'll tell you for those who don't, is largely implemented through two statutes: the Alien Tort Claims Act, or Alien Tort Statute, and the Torture Victim Protection Act. These are both civil statutes, so they allow individuals to go into court and to bring cases against human rights abusers, but they're only entitled to ask for either money damages or an injunction. Usually, it's just money damages. And there are very important limitations on that, I think one of the most important being that there's a ten-year statute of limitations, so you have ten years from the time that the abuse has happened until actually bringing a case. Luckily, courts have recently found that that particular time period can be delayed for certain reasons.

Now we do have a criminal statute in the United States that would allow us to put people in jail for torture. It is a universal jurisdiction statute. Regardless of where the crime was committed, regardless of where the perpetrator is from, we do have a law on the books here that allows us to prosecute those people. It was passed in conjunction with the United States ratification of the Convention Against Torture. The problem is that it has been interpreted first of all to only apply after its passage, so from November 1994 on, and a prosecution cannot be initiated by an individual U.S. Attorney, it has to be initiated at the top level at the Department of Justice. So as you can guess, there have never been any prosecutions.

So there's obviously a need in the United States to have stronger laws that implement criminal penalties for universal jurisdiction but there also needs to be application of the laws that we currently have. So what we're essentially left with, at least as far as private citizens, are these civil statutes. The U.S. work that we do at CJA is focused on those. I would say that

although there's definitely a need for strong criminal prosecution, there are some advantages to the civil process that we have right now. A very important one, certainly for us at CJA, is that our clients have a strong role in the process. There is an avenue for victims to be very involved in going forward against human rights abusers. Different schemes in different countries, depending on how their systems work, have varying degrees of victim participation. However, I do like the process that we have in the United States. The victims have a couple of opportunities to testify and they are involved in decision-making in the cases. With our ethical obligations as lawyers, we have to incorporate their wishes into the decisions that we make, and I think that's very important.

Potentially the most important thing is that in civil cases in the United States, we have really broad discovery rules. The idea is to get as much information out as possible with the idea of avoiding trial, and that's the way our civil system is set up. And it's a little bit odd in these cases, because these cases really are criminal cases just disguised as civil cases. But the discovery rules are really important because in a criminal context, the defendant would never have to testify. In the civil context, as long as they answer the lawsuit, they have to testify and the plaintiffs have the power over taking that testimony. We get to submit interrogatories and requests for them to produce documents. We get to take their depositions and, if we want, call them at trial. And I think that's really important. They are forced to answer questions about what they did. Now of course usually at least in terms of individuals, others can talk about the corporations, but individuals of course tend to say they had nothing to do with it, they didn't know anything. Their memories amazingly fade when they're sworn under oath. But there are important examples of this in our work.

Our most recent trial that concluded in November 2005 in Memphis, Tennessee was against the former Vice Minister of Defense in El Salvador and the man who was widely considered to be sort of the operational commander of the armed forces in El Salvador in 1980 in the year when between ten and twelve thousand civilians were murdered. And there's something interesting that happens when people have to testify under oath. They will deny, deny, deny on certain points and give in on others. And so, Colonel Carranza had since 1984 been alleged to have been working with the CIA. There was a big article in *The New York Times* that he received \$90,000 a year from the CIA. Well of course he denied it, and denied it for twenty years. We reached a point in his deposition, towards the end, when my co-counsel asked if he had ever received money from the CIA. And he looked up and he said, "Well, I'm going to tell you something I haven't even told my own wife." His wife was sitting right there. He said, "Yes, I did receive money from the U.S. government." Well this was a striking moment; we never expected that he would ever say that. But he said it was

because he was under oath that he was going to make that declaration. And it was a very powerful moment, and it was something that was very important for people who cared about human rights in El Salvador. And it was an important connection with the United States and its role in Central America.

CJA is, however, working on more foreign cases involving criminal prosecution. The case that Naomi Roht-Arriaza mentioned earlier that had a very important result in Spain, defining the concept of universal jurisdiction there, was a case brought by Rigoberta Menchu for genocide in Guatemala. Our international attorney, Almudena Bernabeu, is heavily involved in that case, which is really I think leading the way in the universal jurisdiction movement. We've had a lot of responsibilities and played a role in tracking one of the defendants who will hopefully be arrested and extradited to Spain to stand trial. We're working with several European and Latin American countries on criminal investigations that they have going on. One of our advantages as an NGO is we don't have any red tape. Our red tape is five permanent employees and that's it, so pretty much we just walk into the other's room and cut right through it. We can play an important role with governments who are trying to conduct investigations and talk to other governments and we can get things done a lot more efficiently. And so people have come to CJA for assistance on those kinds of things. I'm not going to have enough time to talk about some of those cases, but I'd be happy to later.

The framework of Nuremberg is what led to the laws in the cases that we're doing today. There are basically two claims that are the heart of every case that we do at CJA: torture and extrajudicial killing. But in almost all of our cases, we have a charge of crimes against humanity and that's really the key claim. A charge of crimes against humanity brings in what happened to all the other people in that country other than just the plaintiffs and there are usually just a handful of plaintiffs. And the idea of crimes against humanity was started at Nuremberg and grew out of Nuremberg and it's because of that that we are able to bring these claims now.

Part of CJA's role in this sort of movement in the United States of universal jurisdiction through these civil lawsuits—and there are many here today who are going to be talking about corporate cases and cases against U.S. officials—but part of CJA's role is, I think, establishing good case law in the United States, which is really important. And we've been able to do that with crimes against humanity. We've had three successful jury trials, we've had several other damages hearings or default hearings, but we've had three defended jury trials that we've won and those sort of show the progression of crimes against humanity in the United States as a concept. In 2002, in our trial against two Salvadoran generals, one of whom was the

boss of Colonel Carranza and the other who was below him, we had a claim of crimes against humanity but the trial team made a decision that it was going to be too tricky for the jury. They decided to just narrow the claims down to torture and go to the jury with those, and luckily we won that.

In our next trial against a member of the Caravan of Death in Chile who was responsible for the murder of the brother of our clients, this was not a command responsibility case as the case against the Salvadoran generals. Against the Salvadoran generals, we had no evidence that they had ordered or participated in any murders or torture, but it was all based upon this idea of command responsibility that had grown out of Nuremberg. And so this next case, the Chile case, we didn't have to deal with command responsibility and so we were able to go forward with the crimes against humanity charge. So we were able to get the first jury verdict in the United States in a contested case, that somebody was responsible for crimes against humanity. So then in our case against Colonel Carranza recently, we had the same situation that we had had in the case against the generals and we decided to stick with crimes against humanity. There were a lot of gut-wrenching decisions about whether we should go forward with that, we were worried that we might be risking the result in the case, but we won. And as far as I know, that's the first U.S. jury verdict in a contested case on crimes against humanity in the command responsibility context. So we hope that can continue to create precedents in U.S. courts that can be applied not only in future U.S. cases, but also abroad.

The last thing I want to say is just to bring it back to our clients. One of the criticisms of Nuremberg is that it was victor's justice. One thing I like about our cases is that, although we are at the mercy of the U.S. Congress and the courts in terms of how they interpret the civil lawsuits or the civil statutes that we use, it's the opposite of victor's justice. It is people who were powerless, who were tortured, who were in prison, who had family members killed and who had no power to do anything, who have now turned the tables on those who used to be powerful. And I'm glad that is the legacy of Nuremberg that has been able to be implemented in the United States. Thank you.