Answers to Written Questions of Senator Richard Durbin
Chairman, Subcommittee on Human Rights and the Law
Hearing on "No Safe Haven: Accountability for
Human Rights Violators in the United States"
November 14, 2007

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1. *Please explain why you believe most or all of the statutes of limitations for atrocity crimes under U.S. law should be eliminated.*

Answer: First, Article 29 of the Rome Statute of the International Criminal Court requires that, "The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations." Because the United States, even as a non-party State to the Rome Statute, realizes the full protection (and benefit) of the complementarity principle under that treaty, then U.S. law should not extinguish the power of the courts to adjudicate atrocity crimes because of a legal obligation to apply a statute of limitations to offenses which qualify as atrocity crimes. Imagine the difficulty U.S. authorities would face if a 5-year federal statute of limitations runs its term pertaining to a particular atrocity crime allegedly committed by a U.S. national who remains exposed to the jurisdiction of the International Criminal Court (because the atrocity crime was committed on the territory of a State Party to the Rome Statute) and, in responding to requests and diplomatic pressures from the ICC and other governments, the State Department must confirm that U.S. courts no longer have the power to investigate and, if merited, prosecute the alleged perpetrator. That admission would render the United States "unable" to prosecute (even if it were willing to do so but for the statute of limitations) and thus open up the possibility of controversial efforts by the ICC to gain custody of the alleged perpetrator, particularly if he or she travels abroad. I see no reason to invite that disarming of American options.

Second, as a matter of sound policy the U.S. Government should retain throughout the lifetime of any alleged perpetrator of atrocity crimes the power to investigate and, if merited, prosecute such individual for the heinous acts that constitute atrocity crimes. Anything less would likely lead to extreme embarrassment for the United States and a perception that we are mocking the rule of law. Such a situation (of statutes of limitations applying to, and ultimately blocking prosecution of, atrocity crimes) would sustain the United States as a safe haven for war criminals and atrocity lords—precisely what the Subcommittee has been seeking to shut down with the Genocide Accountability Act of 2007 and the pending legislation of the Child Soldiers Accountability Act and the Trafficking in Persons Accountability Act. How does one explain to the victims' families that if the alien perpetrator can reach American territory and avoid indictment for the duration of the relevant U.S. statute of limitations, he or she may succeed in achieving permanent sanctuary in the United States? Even if an international criminal tribunal still would pursue such an individual for commission of an atrocity crime in the past, the United States would thwart any such prosecution by having closed the door to federal prosecution even though U.S. law might also recognize the criminality of the heinous act (but only within the time frame afforded by the relevant statute of limitations). Atrocity lords and war criminals often have support networks, the capacity and will to intimidate potential witnesses into silence, and political advantages (such as holding onto office for years following commission of atrocity crimes) that can stymie investigations and the indictments of national prosecutors and thus realize the maximum benefit of statutes of limitations.

Third, there remains considerable variance among national criminal codes on the applicability of statutes of limitations for common offenses that may rise to the gravity of atrocity crimes, so it may be premature to conclude that there is a customary international rule prohibiting statutes of limitations for atrocity crimes. [*See* Antonio Cassese, *International Criminal Law* 316-319 (2003).] It is noteworthy that Article 29 of the Rome Statute of the ICC confirms the view of at least the 105 States Parties as of November 2007 that there should be no such statute of limitations for international prosecution of atrocity crimes. Further, many States Parties have eliminated statutes of limitations for atrocity crimes in their implementing legislation for the Rome Statute. There are 45 States Parties (not including the United States) to the United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (26 November 1968), which entered into force on 11 November 1970, and which was favorably noted during the negotiations leading to Article 29 of the Rome Statute of the ICC. [*See* M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text,* v. 2, 221 (2005).] The European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes (25 January 1974), though negotiated and finalized by European Governments, has not entered into force.

Fourth, while the case can be made for statutes of limitation for lesser common crimes under federal criminal law, the magnitude and international significance of atrocity crimes, combined with the growing trend in international law towards rejection of statutes of limitation for atrocity crimes, points to the value of their denial in federal criminal law.

2. *You testified that certain countries have incorporated atrocity crimes into their national criminal codes as a way to preempt International Criminal Court (ICC) jurisdiction over their nationals. Please explain how reforming our human rights laws would allow the United States to preempt ICC jurisdiction over U.S. nationals.*

Answer: Either as a current non-party State or as a potential future State Party to the Rome Statute of the International Criminal Court (ICC), the United States is able to ensure that U.S. nationals who may be or become the targets of investigation by the ICC for atrocity crimes in a "situation" of atrocities in fact would be subject to U.S. rather than ICC jurisdiction. That is the "complementarity" regime set forth in Articles 17, 18, and 19 of the Rome Statute and its intent is to maximize domestic investigations and prosecutions of atrocity crimes, looking to the ICC as a last resort court if the State "is unwilling or unable genuinely to carry out the investigation or prosecution" or a national decision not to prosecute results "from the unwillingness or inability of the State genuinely to prosecute." [Rome Statute, Art. 17(1)(a)&(b)] The United States delegation to the United Nations talks on the Rome Statute was deeply influential in the drafting and negotiation of the complementarity regime because it was a methodology and reasonable restraint on the ICC that we strongly believed should be incorporated into the Rome Statute.

It is essential, however, that the United States be able to demonstrate that it is able genuinely to carry out investigations and, if merited, prosecutions of U.S. national suspects of atrocity crimes falling within the subject matter jurisdiction of the Rome Statute. [Rome Statute, Arts. 5, 6, 7, and 8] Only when the federal criminal code provides for federal jurisdiction over all atrocity crimes will the U.S. Government be able to demonstrate such ability in all relevant cases and thus inform the ICC, if it were to pursue a U.S. national, to stand down and let U.S. authorities address the matter on a comparable basis under U.S. law. Certain States Parties, as identified in my written testimony, have undertaken or are undertaking such a modernizing exercise of their criminal codes so as to strengthen their own domestic abilities to investigate and prosecute atrocity crimes and thus prevent ICC jurisdiction over their own nationals. We should not want even to contemplate the possibility of any ICC judge pondering whether the federal criminal code covers any particular atrocity crime set forth in the Rome Statute so that he or she may conclude that the United States is not "able" to investigate or prosecute a particular crime falling within the subject matter jurisdiction of the Rome Statute, even if it were to demonstrate a willingness to do so.

Thus, for both pragmatic and legalistic reasons, the United States would protect its interests by amending the federal criminal code so that U.S. courts rather than the ICC seize jurisdiction over U.S. nationals who may be responsible for the commission of atrocity crimes anywhere in the world. If it were to take such a modernizing step, then the United States would join some of its major allies which already have modernized their criminal codes with the result of minimizing their exposure to ICC jurisdiction.

3. *Based on your experience as U.S. Ambassador at Large for War Crimes Issues, can you think of situations where the U.S. government would have liked to assert jurisdiction over non-U.S. nationals who committed atrocity crimes but was not able to do so under current laws?*

Answer: There are two clear examples from my own experience. The first concerns senior Khmer Rouge leaders Pol Pot and Ta Mok. Until Pol Pot died in March 1998 and Ta Mok was captured by the Cambodian military in early 1999, I undertook intensive diplomatic and operational efforts to apprehend and bring both individuals to justice outside of Cambodia pursuant to strategies that ideally would avoid their presence on U.S. territory but, if either was detained on U.S. territory, would minimize that period of detention prior to transfer to a foreign jurisdiction that would prosecute either of them. The elaborate strategies were required because the Justice Department determined that it would be strongly preferable not to risk trying to prosecute non-U.S. nationals in U.S. courts, or afford them the opportunity for *habeus corpus* petitions before U.S. courts and potentially enable them to achieve safe haven in the United States, because U.S. statutory law did not permit the prosecution of non-U.S. nationals for genocide that was not committed on U.S. territory or for crimes against humanity. The Genocide Accountability Act of 2007 now corrects part of that old deficiency in U.S. law, but in the late 1990's the option of prosecution of a non-U.S. national for genocide committed outside the United States did not exist. Pol Pot and Ta Mok more likely would have been charged primarily with crimes against humanity, for which there was not then and there still is not jurisdiction in U.S. courts to prosecute the likes of those two individuals.

The second example concerns former Iraqi leader Saddam Hussein and other leaders in his regime. During the Clinton Administration I waged an often lonely campaign to obtain U.N. Security Council authorization for the establishment of a commission of experts on the atrocity crimes of the Saddam Hussein regime and, as a final step, the creation of an international criminal tribunal to investigate and, if merited, indict Saddam Hussein and his regime colleagues for atrocity crimes. Gaining custody for prosecution, we knew, might be a long time coming but the strategy was to create the legal net within which to snare them, and degrade their domestic legitimacy. I could not consider the option of indicting and, one hoped, ultimately prosecuting Saddam Hussein and his colleagues in U.S. courts for a wide range of atrocity crimes, including war crimes against U.S. soldiers and diplomats during the First Gulf War in 1990-91. (The war crimes charges had been key priorities of the Pentagon until they were eclipsed by other issues in the mid-1990's.) I was advised by the Justice Department that U.S. statutes of limitations prevented any such prosecution for the war crimes charges relating to U.S. personnel and that there was no law to apply towards genocide and crimes against humanity charges pertaining to the Iraqi leadership. To a large extent, these realities continue to cripple U.S. law.

Answer to Question from Senator Jon Kyl to David Scheffer:

1. *In your statement and testimony, you said that the United States, as a non-party to the Rome Statute of the International Criminal Court, is more exposed to the International Criminal Court's jurisdiction than are other countries who have modernized their criminal codes to deal with atrocities and human rights violations. Give specific examples of how the United States has greater exposure to the International Criminal Court's jurisdiction and the ramifications of such exposure.*

Answer: When one considers the relatively antiquated character of the federal criminal code as it concerns atrocity crimes and combine that with the non-party status of the United States under the Rome Statute of the International Criminal Court, the United States could find itself subject to greater exposure to the ICC's jurisdiction than would a number of countries which are States Parties to the ICC and have modernized their criminal codes to more effectively address atrocities and human rights violations.

First, it is important to recognize that regardless of how U.S. authorities or judicial officers or any American observers might interpret the Rome Statute or understand international law, the predominant foreign perspective is that a U.S. national can be subject to the jurisdiction of the ICC—even though the United States is a non-party to the Rome Statute—if he or she perpetrated an atrocity crime on the territory of a State Party to the Rome Statute. [*See* Rome Statute, Art. 12(2)(a).]

Second, for example, if a U.S. national allegedly commits the crime against humanity of persecution [*See* Rome Statute, Art. 7(1)(h)], which is a legal charge that often arises when ethnic cleansing has been committed, no U.S. court has statutory authority to prosecute such a crime *per se*. If the United States were to claim its "complementarity" right under Articles 17, 18, and 19 of the Rome Statute in order to prevent ICC jurisdiction, the ICC judges likely would conclude that given the inability of U.S. courts to prosecute the crime against humanity of persecution, the ICC would have jurisdiction to indict and seek custody of the U.S. national for trial in The Hague. Gaining custody might become a realistic option for the ICC if the U.S. national travels outside the United States. Further ramifications would be the diplomatic uproar that might result as Washington sought to restrain the ICC and any nation in which the individual travels from acting against him or her. In contrast, the ICC could not reach such a conclusion based solely on the inability to prosecute the crime against humanity of persecution if the State in question had modernized its criminal code to include such crime, which, for example, the United Kingdom, Australia, Canada, and Germany have accomplished.

Third, the War Crimes Act of 1996, as amended, creates only a partial set of war crimes for which U.S. nationals can be prosecuted. There is a wide gap between U.S. statutory law and the full listing of war crimes set forth in Article 8 of the Rome Statute. Again, key countries have now incorporated the Article 8 war crimes into their domestic criminal codes and thus empowered their national courts to prosecute the full range of such crimes and thus avoid ICC jurisdiction. If, for example, U.S. nationals employed by American contractors providing security services to U.S. diplomats in Iraq or

Afghanistan allegedly commit war crimes that are not covered by the War Crimes Act of 1996, as amended, and yet are war crimes covered by the much broader listing in Article 8 of the Rome Statute, then the ICC might find a basis for exercising jurisdiction over such U.S. nationals provided other jurisdictional pre-conditions under the Rome Statute are satisfied (which is a real possibility). It would be far safer for U.S. interests if one were to amend U.S. law so that U.S. courts have the unquestioned authority, by statute, to prosecute the full range of war crimes which, as expressed in Article 8 of the Rome Statute, are well understood to constitute customary international law. With such authority, the United States would be able to use the complementarity principle in the Rome Statute to deflect ICC jurisdiction, in a manner identical to that of other countries which have modernized their criminal codes accordingly.

Those who might argue that in some cases the so-called "Article 98 bilateral non-surrender agreements" that have been negotiated during the Bush Administration would protect all U.S. nationals from surrender to the ICC, are, in my view, mistaken. See my article entitled, *Article 98(2) of the Rome Statute: America's Original Intent*, 3 J. INT'L CRIM. JUSTICE No. 2, 333 (2005).