

Written Testimony on
Accountability for Perpetrators of Genocide, Crimes
against Humanity, and War Crimes in Iraq and Syria

before

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By

Ambassador David Scheffer
Mayer Brown/Robert A. Helman Professor of Law
Director, Center for International Human Rights
Northwestern University Pritzker School of Law
Chicago, Illinois

Former U.S. Ambassador at Large for War Crimes Issues (1997-2001)

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Mr. Chairman and distinguished members of the Commission on Security and Cooperation in Europe: I am pleased to testify in support of the Iraq and Syria Genocide Relief and Accountability Act of 2016 (H.R. 5961), which Helsinki Commission Chairman Chris Smith has introduced and of which Representatives Anna Eshoo, Trent Franks, and Jeff Fortenberry are original co-sponsors. I do so as a law professor at Northwestern University Pritzker School of Law, as the former U.S. Ambassador at Large for War Crimes Issues (1997-2001), and as the Chair of the American Bar Association Working Group on Crimes Against Humanity, which has been examining options for legislation to incorporate crimes against humanity in the federal criminal code. Since January 2012 I also have been the U.N. Secretary-General's Special Expert on U.N. Assistance to the Khmer Rouge Trials. However, the views I express here today are my personal views and do not necessarily reflect the position of any institution to which I am associated.

H.R. 5961 demonstrates an undeniable logic: The survivors of genocide, crimes against humanity, and war crimes (which many sources, including the United Nations, non-governmental organizations, and I collectively describe as "atrocious crimes") in Iraq and Syria merit the fullest possible assistance of our government, including consideration for admission of victim refugees to the United States. The further logic is that the perpetrators of the atrocious crimes not only in Iraq and Syria but elsewhere in the world should be subject to investigation and prosecution under Title 18 if federal jurisdiction reaches them. The crime of genocide and war crimes already can be prosecuted, under certain conditions, against not only Americans but

also aliens. (The War Crimes Act of 1996, as amended, does not cover aliens who commit war crimes outside the United States and where there are no American victims. Thus, such individuals also could find sanctuary in the United States.)

However, much more work is required to modernize the federal criminal code to ensure that perpetrators of *crimes against humanity* do not find sanctuary from prosecution in the United States. Currently, perpetrators of crimes against humanity and war crimes under certain circumstances theoretically can live freely in the United States provided they are admitted on immigrant or non-immigrant visas, either under false representation to immigration authorities or because our law does not yet criminalize their particular atrocity crime and does not even ask relevant questions in immigration procedures. H.R. 5961 would go a long way to address this void in our federal code.

Section 4(c) of the bill requires the Attorney General, in consultation with the Secretary of State, to conduct a review of existing criminal statutes concerning atrocity crimes to determine the extent of federal jurisdiction over perpetrators with at least one of several connections to the United States, to determine what statutes currently provide for extraterritorial jurisdiction of crimes against humanity or war crimes, and to assess how the absence of criminal statutes impede the prosecution of such crimes, including if the perpetrator is captured by U.S. military forces outside the United States and foreign prosecution is unavailable. The Attorney General's review will discover that federal jurisdiction over crimes against humanity and war crimes (under certain circumstances) remains non-existent or very limited.

But H.R. 5961, if enacted, will undertake reviews that confirm the reality of limited federal jurisdiction and lead, I hope, to additional legislation to cover egregious voids and gaps in the federal criminal code. It is a raw fact, for example, that the United States is currently a sanctuary for alien perpetrators of crimes against humanity or certain war crimes who are fleeing the reach of the law overseas but who might be subject, at most, to deportation for immigration fraud in the United States. Even then, such deportation might not be to a foreign court for purposes of prosecution but rather simply to live, prosper, and pose a continuing risk elsewhere and perhaps to the national security of the United States and its interests abroad. I attach to this testimony two lists of cases under federal law that focus on immigration fraud, typically with the penalty of deportation, even though the immigrant was allegedly involved in atrocity crimes or other serious human rights abuses.

While their number is unknown, there probably are individuals who committed atrocity crimes overseas and have yet to be discovered currently residing in the United States. If they are tracked down, the result should be something more than the possibility of mere deportation. With new statutes criminalizing such conduct, the United States, under the rule of double criminality, would be more easily able to extradite such aliens to foreign jurisdictions that have similar laws and could prosecute them in their own courts. Our mutual legal assistance treaties also would be more potent instruments of international cooperation. In any event, the United States should deter their arrival in the first place with tough criminal penalties for alien perpetrators of crimes against

humanity or certain war crimes who are plotting to arrive in the United States to reside or otherwise take advantage of immigration privileges without fear of prosecution.

H.R. 5961 requires answers as to the state of current federal law; it mandates the Attorney General to determine additional statutory authorities necessary to prosecute a United States person or a foreign person within the territory of the United States for atrocity crimes. Title 18 of the U.S. Code desperately requires such review by the Attorney General, an endeavor that I am confident will recommend a statute to fill the void to cover, at a minimum, crimes against humanity. The critical first step in achieving that end is H.R. 5961.

I recommend, however, that the statute include a defined term of “atrocity crimes” that describes the collective body of genocide, crimes against humanity, and war crimes. This would ease repeated reference to that set of crimes in the statutory language and make the terminology more accessible to the media and the general public.

Finally, there is a focused effort within the Iraq and Syria Genocide Relief and Accountability Act to provide necessary support to track individuals suspected of committing atrocity crimes in Iraq since January 2014 or Syria since March 2011 and to preserve the chain of evidence for prosecution of these individuals in domestic courts, hybrid courts, and internationalized domestic courts. Such judicial endeavors may not materialize for years, but it is imperative now to support current and future efforts to track suspects and gather evidence competently and professionally as it is discovered on the battlefield and elsewhere. The bill also

would strengthen the government's efforts to identify and assist members of religious or ethnic groups under threat of atrocity crimes in Iraq or Syria. In this regard, I commend the work of my fellow panelist Chris Engels and that of his colleagues at the Commission for International Justice and Accountability, and urge the U.S. Government to join with them to ensure accountability for atrocity crimes.

These would be major preventive steps, first by supporting criminal investigations to bring war criminals to justice, thus undermining their influence and participation in atrocity crimes, and second by mitigating the risks of forced migration. While we should recognize that the United States and other governments have significantly shared in and continue to undertake the massive challenge of refugee relief, the United States Government would, under the guidance of H.R. 5961, take extraordinary steps to respond to both the refugee *and* accountability crises presented by the recent situations in Iraq and Syria.

Thank you for this opportunity to testify before the Commission on Security and Cooperation in Europe.