

## TESTIMONY OF CHRISTOPHER NUGENT

### **Before the Commission on Security and Cooperation in Europe**

Briefing on *The Forgotten: Iraqi Allies Failed by the U.S.*

June 11, 2008

Chairmen Hastings and Cardin and honorable members of this Commission, my name is Christopher Nugent. It is a distinct privilege and honor for me to testify before you today at this unprecedented briefing concerning our courageous Iraqi allies who have risked their lives on the front lines in order to support the American mission to bring freedom, democracy and peace in Iraq. I am a full-time *pro bono* Senior Counsel who works exclusively on domestic and international immigration law and policy issues and individual client cases with the international law firm of Holland & Knight LLP. I have two decades of experience in immigration and refugee law. I have the privilege of supervising Holland & Knight LLP's *pro bono* participation in *The List: Project to Resettle Iraqi Allies ("The List Project")* where to date over 50 Holland & Knight attorneys, paralegals, and volunteer law clerks have handled 198 cases (representing 684 Iraqi allies and their family members) leading to 31 arrivals in the United States (a total of 92 individuals).

*The List Project* represents an unprecedented *pro bono* partnership between Kirk Johnson, Holland & Knight and the law firms of Proskauer Rose and Mayer Brown to represent our brave, indigent Iraqi clients who are either trapped in harm's way in Iraq or dispersed and desperate throughout the Middle East and the rest of the world. Indeed, we have Iraqi clients in locations as far away as India and Malaysia pending refugee resettlement. Our participation in *The List Project* dovetails with our ongoing *pro bono* work with the Pen American Center's Freedom to Write Program representing Iraqi journalists, poets and authors under threat. I will focus my testimony on one of the central challenges we face as a nation in fulfilling our international humanitarian obligations to our Iraqi allies: the critical need for refugees' access to competent counsel to represent them through the refugee resettlement process and the immeasurable benefits counsel provides the government.

In our work with *List Project* clients, our lawyers and paralegals have been trained and work closely with officials at the Office of the United Nations High Commissioner for Refugees (UNHCR), the Department of State Bureau of Population, Refugees and Migration (PRM) and the Department of Homeland Security (DHS). Our goal in this unprecedented collaboration has been to bring about a paradigm shift in the way public institutions, NGOs, and attorneys work together to address the urgent needs borne of humanitarian crises. We have witnessed and commend the dedication and professionalism of these public servants who share our commitment to ensuring that the United States fulfills its moral obligation to resettle brave Iraqi allies and their families. Therefore, I want to make clear that any obstacles we have experienced or observed in the refugee status determination process and resettlement system are not attributable to any one individual, but rather, to broader challenges for what is the largest mass refugee resettlement system in the world. Furthermore, I must emphasize that I bring these obstacles to the Committee's attention in an effort to think creatively to promote a more robust, refugee-centered process capable of aligning the humanitarian aspirations of the United States with the urgent humanitarian needs of our Iraqi allies.

I will now briefly outline my observations and their origins and offer a few recommendations for areas of improvement. In brief, while formally in compliance with our international treaty obligations, our current system of identifying and resettling refugees has some systemic structural and procedural inefficiencies that render fair and full compliance for individual refugees on the ground more challenging. The United States currently approaches refugee resettlement like a cruise ship, whereas other nations, such as the Scandinavians, treat the process like a lifeboat. That is to say, our refugee admission and resettlement process is not designed to respond with alacrity to the emergencies that it was created to address.

Some of the greatest hardships our clients have reported were due to unresponsiveness by UNHCR and DHS, particularly in the face of emergency situations; or when protracted delays in interviews and processing have themselves contributed to these individual emergencies. To be sure, these experiences represent the exception, rather than the rule. But the cost in human lives and suffering due to institutional breakdowns in such aberrational instances speaks to the pressing need to ensure that our system is better equipped to respond to these challenges.

The most troubling example of such an emergency—one that weighs heavily on my heart—is that case of an Iraqi family that was forced out of Iraq under imminent threat of death. Our client's wife was pregnant, and she developed serious health complications while they awaited refugee processing. I could sense the growing agony and despair in his emails as he faced the impossible decision between remaining in a country where his wife and unborn child had no access to urgently needed healthcare, or returning to Iraq under fear that they would all be killed:

*"i have very bad news regrding my wife medical issue , her condition is very bad now and she may have early delivery and we might lose the baby , i dont know , now she has very complcated medical treatment and her right kideny has incresed in the size and very dangerouse on the surounding organs such as urial system and other surrounding organs. i dont know but it seems realy bad [sic]."*

Six weeks later, he sent me the following devastating email from Iraq:

*"THIS IS TO INFORM YOU ALL THAT TODAY IS THE SADDEST AND MOST WORST DAY IN MY LIFE, WE LOST OUR NEW BORN SON AND MY WIFE IN VERY DANGEROUS SITUATION AND PLEASE PLEASE SAVE THE REST OF MY FAMILY, I CANT LIVE ANY MORE, I HAVE BARRIED MY SON WHOM SUPPOSED BARRY ME, CONSIDER IT MY LAST BREATH. "*

Another of our *pro bono* attorneys witnessed similar issues when addressing the predicament of an Iraqi couple who fled the country when their work for Coalition Forces and human rights prompted direct death threats on their lives by insurgents:

*"[The wife] became pregnant and sadly, because the refugee process took so long, and they had no guarantee of hospital care in [third country], they had to return to Iraq for the birth of their child under threat of death."*

Their journey was made, and their baby born, under the specter of torture, kidnapping or assassination at the hands of sectarian militia. They remain in Iraq now in hiding.

Unfortunately, we found access to no viable, institutionalized process to expedite these cases.

Lengthy post-refugee status determination interviews delays constitute another urgent challenge that must be addressed to ensure the safety and security of our Iraqi allies. Another *pro bono* attorney shares the haunting case in which such a delay—and the consequent inability of the destitute family to work and generate income during this period—jeopardized both the safety and the unity of a refugee family:

*"His emails got progressively more desperate. He is a [contractor] whose son was kidnapped and held hostage for a week. After paying a ransom, [he] and his wife and four kids fled [Iraq]. He is now back in Iraq; his family is in [a third country]. He had no choice but to return, as he has been waiting since August of 2006 and ran out of funds to support his family. He only had one UNHCR interview. It appears that they have lost his file."*

Unfortunately, this family's situation is not unique. We receive frequent reports from Iraqi allies whose cases have been pending for anywhere from six to eleven months. While our attorneys always advocate diplomatically on their behalf, current interpretations of our treaty and statutory obligations narrowly circumscribe our ability to effectively represent our clients' interests. One lawyer, struggling to assure her clients that there may be some new report:

*"They email me at least once a week. I have tried to think of ways to respond that are honest, yet still give them hope. I am hopeful that my most recent email to DHS will provide some insight into what the hold-up is, and quite possibly shake their cases free from the apparent quagmire they seem to be in. But I am realistic and know that I may get no response."*

These vignettes are a representative sample of the challenges our advocates have contended with in struggling to bring safety and security to these Iraqi allies. What results from the lack of institutional responsive could appear to some observers as virtual social Darwinism, in which the strong and resourceful benefit from refugee protection and resettlement, and the weakest are left behind to fend for themselves.

In contrast to the statutory guarantee of access to counsel for asylum-seekers who apply for asylum within the United States,<sup>1</sup> current U.S. law and policy fails to guarantee legal access to refugees abroad during their formal refugee interviews and related matters, including motions for reconsideration. Unfortunately, this failure is consistent with international instruments governing the treatment of refugees.<sup>2</sup> As a practical matter, UNHCR has interpreted this silence

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<sup>1</sup> Immigration and Nationality Act § 208(4), 8 USC § 1158(4).

<sup>2</sup> Article 33, United Nations Convention Relating to the Status of Refugees (July 28, 1951, 19 UST 6529, TIAS No. 6577), to which the U.S. is bound by its accession to the United Nations Protocol Relating to the Status of Refugees (Jan. 31, 1967, 19 UST 6223, TIAS No. 6577). Specifically, Article 33.1 provides that no contracting state shall "expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where the refugee's life

as allowing States that are party to the 1967 Protocol to craft their own processes for access to counsel.<sup>3</sup> As you might imagine, these procedures vary widely from State to State.<sup>4</sup>

Even for countries that have very solid overall records of commitment to refugee protection, this absence of guaranteed access to counsel has resulted in notorious episode such as the protracted incommunicado detention at Guantanamo Bay, Cuba, of Haitian refugees interdicted at sea who were suspected of being HIV positive.<sup>5</sup> A 1992 memo from Legacy INS General Counsel instructed INS to execute a specialized screening process separate from that which is provided in the Refugee Act of 1980 implementing U.S. responsibilities under the 1967 Protocol.<sup>6</sup> Additionally, INS was directed to prevent asylum-seekers interdicted outside U.S. territorial waters from meeting with attorneys.<sup>7</sup> The United States Supreme Court rejected a legal challenge to this new policy.<sup>8</sup> The government adopts an expansive reading of the Court's holding such that U.S. treaty obligations do not apply extraterritorially, and in effect, asylum-seekers abroad do not enjoy constitutional or due process rights independent of those affirmatively provided in statute or regulation.<sup>9</sup>

However, the legal action at issue in the Haitian case consisted of the interdiction of refugees at sea—that is, affirmative enforcement of the nation's sea borders. Thus, while the former case involved active immigration enforcement and detention of Haitians that implicated the U.N. Protocol, the U.S. commitment to identify and resettle vulnerable refugee allies is being carried out consistent with the Protocol.

The current lack of guaranteed access to counsel obviously makes it difficult for lawyers to advocate efficiently and effectively on behalf of these refugees—many of whom are injured and

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or freedom would be threatened on account of the refugee's race, religion, nationality, membership in a particular social group, or political opinion." See also Sale v. Haitian Ctrs. Council, 509 U.S. 155 (1993).

<sup>3</sup> *UNHCR Handbook on Procedures and Criteria for Determining the Status of Refugees under 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, UNHCR 1979, HCR/IP/4/Eng/Rev.1 (1992)

<sup>4</sup> *Id.* at 31, ¶ 191.

<sup>5</sup> Memorandum from INS General Counsel (Feb. 29, 1992) (on file with Lowenstein Clinic, Yale Law School) (*cited in* Victoria Clawson, Elizabeth Detweiler & Laura Ho, *Litigating as Law Students: An Inside Look at Haitian Centers Council*, 103 Yale L.J. 2327, 2353 (1994).

<sup>6</sup> Refugee Act of 1980, PL 96-212, 94 Stat. 102 (1980).

<sup>7</sup> See Haitian Ctrs. Council v. McNary, 969 F.2d 1326, 1333 (2d Cir. 1992) ("The memorandum also states that this interview should 'be identical in form, and substance or nearly so as possible, to those conducted by asylum officers to determine whether asylum should be granted to an applicant already in the United States.' However, while asylum applicants in the United States may have attorneys present during their asylum interviews, the 'screened in' Haitians subject to a second interview are not permitted access to an attorney during their interview at Guantanamo Bay." See also, Victoria Clawson, Elizabeth Detweiler & Laura Ho, *Litigating as Law Students: An Inside Look at Haitian Centers Council*, 103 Yale L.J. 2327 (1994); and Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 Yale L.J. 2397 (1994).

<sup>8</sup> Sale v. Haitian Ctrs. Council, 509 U.S. 155 (1993) *Id.* at 183 ("[B]ut a treaty cannot impose unanticipated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent. Because the text of Article 33 cannot reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory, it does not prohibit such actions.").

<sup>9</sup> 1 INS & DOJ Legal Opinions § 93-82 "Immigration Consequences of Undocumented Aliens' Arrival in United States Territorial Waters" (Oct. 13, 1993). ("Some aliens seeking to enter the United States must first be accorded the procedural rights provided by the INA, including an evidentiary hearing, before any determination to exclude them from this country can be made. Other aliens may, however, be prevented from entering the United States by Executive Actions that do not implicate INA procedures.") (*citing Sale, supra*).

have serious mental health conditions including Post-Traumatic Stress Disorder, and who know little English and even less about the adjudicatory processes they experience. Our experiences demonstrate that the assistance of counsel can be extremely useful to both the refugee and the interviewing body. We strongly believe that a rigorous screening process is necessary to ensure that refugee assistance goes only to those who deserve it. As such, the refugee interview can often be a lengthy and confusing process of numerous interviews with different bodies. In that regard, assistance of counsel stands to increase efficiency by saving agencies the time and expense of screening out those applicants who are clearly ineligible for relief. Furthermore, the benefits of counseling by a trained advocate with whom the refugee has developed a relationship based on trust and respect facilitates the refugee's confidence, cooperation and candor in his or her interviews with adjudicatory agencies.

Without doubt, representation greatly improves the likelihood that Iraqis will be able to tell their whole stories completely and effectively, allowing them to escape impending death and resettle as refugees in the U.S. Thus, representation helps to mitigate against the possibility of denying meritorious refugees who for a variety of reasons were simply unable to communicate clearly with their interviewer through a translator.

Consider, for example, the experience of one of our attorneys who spent hours helping prepare an Iraqi ally for his interview:

*" The refugee applicant with whom I worked seemed to benefit greatly from the chronology of his events and conference call where we did a mock interview. Preparation seems to be most beneficial. The applicant knew what to expect and was ready for the type of questions that were likely to be asked. The applicant seemed more confident compared to the hundreds of refugee applicants who unfortunately do not have the benefit of being counseled as to what to expect in the interviews."*

While proactive preparation is helpful, attorney assistance is necessary to ensure efficiency throughout the entire process. From initial screening of refugees, to helping them prepare to fully document and recount their stories, to communicating with officials and troubleshooting problems while applications are pending, to requesting agency reconsideration when a seemingly meritorious application is denied, the myriad roles and responsibilities of are vital to the refugee process. By helping the refugees gather and organize this evidence and ensuring that they provide institutions provided with complete an accurate accounts, attorneys in fact help ease the burden on officials responsible for adjudications. And they ensure that valuable resources are expended expeditiously on the responsibilities for which officials are best-suited: making refugee status determinations and resettling refugees.

In our estimation, there is no need for an adversarial process as part of the government and UNHCR's mission to identify, protect, and resettle refugees. Rather, minimally adequate access to legal counsel and the assistance of trained, objective attorneys can play a crucial role in the protection of refugees. The current landmark mobilization of institutional resources and personnel to aid our Iraqi allies in their time of need represents the best of America's commitments to international humanitarian law and relief. Access to counsel is imperative to fulfill our moral responsibility to our brave Iraqi refugee allies and ensuring institutional

efficiency and effectiveness in their identification, adjudications, and resettlement to the United States. I thank you for your consideration and look forward to your questions.

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