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GENOCIDE AND THE RULE OF LAW

HEARING

BEFORE THE

SUBCOMMITTEE ON HUMAN RIGHTS AND THE LAW

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

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GENOCIDE AND THE RULE OF LAW

MONDAY, FEBRUARY 5, 2007

UNITED STATES SENATE,
SUBCOMMITTEE ON HUMAN RIGHTS AND THE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Subcommittee met, pursuant to notice, at 3:02 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Richard J. Durbin, Chairman of the Subcommittee, presiding.

Present: Senators Durbin, Cardin, Whitehouse, Cornyn, and Coburn.

OPENING STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Chairman DURBIN. The Subcommittee on Human Rights and the Law will come to order. Welcome to our Subcommittee's first meeting. The topic today is genocide and the rule of law. This is the inaugural hearing of this newly created Subcommittee. We are honored to have a distinguished panel of witnesses for our first hearing. After a few remarks, I would like to recognize my Ranking Member, Senator Coburn of Oklahoma, for an opening statement. Then we will turn to the witnesses.

A word about the new Subcommittee. First, my thanks to Senator Patrick Leahy, Chairman of the Senate Judiciary Committee, for establishing this Subcommittee and allowing me to serve as Chairman. Senator Leahy has a long record of championing human rights for many years, and this Subcommittee is further indication of his commitment.

Without objection, I would like to enter into the record at this point a statement by Senator Leahy. Without objection, so ordered.

This is the first time in the history of the Senate that there has been a Subcommittee focused on human rights. The timing is right. At this moment in history, it is vitally important to our national interest to promote greater respect for human rights around the world.

When our leaders speak of our inherent desire for freedom and our communal need for democracy, they are acknowledging the fundamentals of human rights, and those who ignore and violate these fundamentals do more than challenge some idealistic goal. Repressive regimes that violate human rights create fertile breeding grounds for suffering, terrorism, war, and instability. In our time, the world is a much smaller place, and the social ills caused by human rights abuses know no borders. We will never be truly secure as long as fundamental human rights are not respected.

Our own Declaration of Independence says, and I quote, "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable rights..." Too many times in our history we have fallen short of this ideal, but this commitment to human rights was and is the promise of America.

I hope this Subcommittee will give the Senate an opportunity to work together to maintain America's leadership in protecting and promoting fundamental human rights.

America also stands for another revolutionary idea: the rule of law. As John Adams said, "We are a government of laws, not of men." We should keep in mind that human rights are little more than empty promises if they are not enforceable in law. That is why this is the Human Rights and the Law Subcommittee and that is why we are part of the Judiciary Committee.

When Chairman Leahy asked me to chair this Subcommittee, I knew that our first hearing had to be on the subject of genocide and the rule of law. Raphael Lemkin, a Holocaust survivor and the architect of the Genocide Convention, placed his faith in the ability of the law to prevent genocide. He implored the international community to adopt laws against genocide, saying, "Only man has law...You must build the law."

To focus our discussion, I would like to ask those in the audience and my fellow members of the Subcommittee to allow a brief video on genocide that we created for this hearing. I will tell those in the audience in advance that there are some graphic scenes, but this is a graphic topic.

[Videotape played:]

[Senator Proxmire speaking: "The supreme value that I'm sure Members of Congress and almost all Americans recognize is human life. Is there any greater crime than destroying a human life? There is. There's a more monstrous crime: the planned, premeditated destruction of millions who have done nothing wrong but belong to a particular religion or an ethnic group or a racial group.

"What am I talking about? I'm talking about genocide. I'm talking about the most monstrous crime in the history of humankind, when Hitler and the Nazis slaughtered 6 million Jews, destroyed European Jewry.

"This is our treaty. This country drafted the treaty. President Truman signed the treaty in 1948. Think of that—40 years ago. Every major country in the world has ratified it and drafted the necessary implementing legislation to make it national law, except the United States of America. President Kennedy asked for it. President Johnson asked for it. President Nixon asked for it, President Carter, President Ford. And, of course, President Reagan called on the Senate to act, and President Reagan, to his credit, succeeded in persuading the Congress to ratify the treaty."]

Chairman DURBIN. Thank you.

The legal prohibition against genocide is obviously an unfulfilled promise. We see this most clearly today in Darfur in western Sudan. In this region of 6 million people, hundreds of thousands have been killed, and over 2 million have been driven from their homes. For them, the commitment of "Never again" rings hollow.

We must ask ourselves why. Is this a failure of law or of will, or both? What are the legal obligations of states to prevent genocide before it has begun? Do debates about the legal definition of genocide serve as an excuse for governments not to act? What is our responsibility to protect victims of atrocities that do not meet the legal definition of genocide? And we must explore the legal options for preventing genocide and, in the worst-case scenario, stopping genocides like the one in Darfur.

During today's hearing, we will explore using the law to impose criminal and civil sanctions on individuals who are guilty of genocide. We will discuss the status of the International Criminal Court's Darfur investigation and whether the Federal Government is doing everything it can to facilitate that investigation. We will also examine the possibility of civil and criminal liability under U.S. law for people who commit genocide anywhere in the world.

Divestment is another legal tool that has been put to work. We used it effectively, I believe, in South Africa to help end apartheid. And today I would like to announce that I plan to introduce legislation to authorize State and local governments to divest from Sudan.

Senator Brownback, my colleague on this Committee, as well as Senator Obama, my colleague in Illinois, and many members have played leading roles in this divestment movement, including Senator Cornyn and Senator Hutchison. I look forward to working with them.

I just want to close by saying that a little over a year ago, Senator Sam Brownback and I visited Kigali in Rwanda. We stayed in the Hotel Mille Collines, better known by Americans as "Hotel Rwanda." As I walked down the corridor to my room, I could not help but think of that movie, which Don Cheadle starred in, and the hundreds of frightened Rwandans who had huddled there during the genocide, fearing the worst.

Early one morning, I walked down the hill to a Catholic Church, Saint Famille. I was jogging, so I was not really in the right clothing to go into a church. But I stuck my head in the door of this red brick church and looked, and it was very plain. And people had started gathering at about 6 o'clock.

I went back up to the hotel and mentioned to one of the people at the Embassy that I had stopped at this church, Saint Famille. He said, "Do you know the story of that church?" And I said, "No, I don't." He said, "We believe 1,000 people were massacred in that church. They came there seeking sanctuary. They were betrayed and they were killed on the floor of that church."

It really brought home very quickly that what we saw in "Hotel Rwanda" was not some abstract theory. It was the reality of genocide.

The last word I want to say is about my predecessor in the Senate, who was quoted very briefly in the video presentation. Senator Paul Simon, along with Senator Jim Jeffords, in a bipartisan effort pleaded with the Clinton administration to do more about the genocide in Rwanda. President Clinton, as we saw, later said that his inaction was the worst foreign policy mistake of his 8 years.

I salute the Bush administration for calling the situation in Darfur the genocide that it is. But now that we have acknowledged

for more than 4 years that this horror is happening on our watch, we must summon the courage to act to stop this terrible genocide.

Senator Coburn?

STATEMENT OF HON. TOM COBURN, A U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator COBURN. Thank you very much, Senator Durbin, for having this hearing. I am struck at what we face, and I recall being at the University of Oklahoma a little less than a year ago and college students asking, "Why? Why? Why does it continue?" and the very helpless feeling that we have and that it continues today. In spite of the fact that we desire it not to, in spite of the fact we work through the United Nations, in spite of the fact that the Government of Sudan rejects what we do through the United Nations, it continues today.

I want to read a poem that is very well known to many who are associated with this movement, but I think it is an important part of the record because it displays with telling accuracy what genocide is all about.

"They fell that year/They vanished from the earth/Never knowing the cause/Or what laws they'd offended/The women fell as well/And the babies they tended/Left to die, left to cry/All condemned by their birth./They fell like rain/Across the thirsty land/In their hearts they were slain/In their God still believing/All their pity and pain/In that season of grieving/All in vain, all in vain/Just for one helping hand./For no one heard their prayer/In a world bent on pleasure/From other people's cares/They simply closed their eyes/They craved a lot of sound/And jazz and ragtime measure/The trumpet screamed 'til dawn/To drown the children's cries/They fell like leaves/Its people, in its prime/Simple man, kindly man/And not one knew his crime/They became in an hour/Like a small desert flower/Soon covered by the silent wind and sands of time./They fell that year before a cruel foe/They had little to give but their lives and their passion/And their longing to live in their way, in their fashion/So their harvest could thrive and their children could grow./They fell like flies/Their eyes still full of sun/Like a dove in its flight/In the path of a rifle/That falls down where it might/As if death were a trifle/And to bring to an end/A life barely begun./And I am of that race/Who died in unknown places/Who perished in their pride/Whose blood rivers ran/In agony and flight/With courage on their faces/They fell into the night/That waits for every man./They fell like tears/And never knew what for/In that summer of strife/Of massacre and war/Their only crime was life/Their only guilt was being/The children of Armenia/Nothing less, nothing more."

That applies to every situation that we face, and I am one of the harsh critics of the United Nations in this Senate because of the tremendous amount of money that is wasted, the inactions that are not taken—the absence of action that is taken, and the thought that we as a Nation give $5.7 billion a year to the United Nations and $1 billion of it is wasted a year just in our peacekeeping, sometimes for rape, sometimes for other things.

It is shame on us, the U.S. Congress, for not holding the United Nations accountable, for not moving the action with a force. We know what is going on. It is left to us to do something about it.

Thank you, Mr. Chairman.

Chairman DURBIN. Thank you, Senator Coburn.

We are going to turn to our witnesses for their opening statements. Normally, we limit opening statements to 5 minutes, but today is a special case, and we have limited the number of witnesses accordingly. This is an issue of great importance, and two of our witnesses have made great personal sacrifices to be here with us. So we are going to give each witness 10 minutes for their oral testimony. Their complete written statements will be made part of the record.

I would like to ask the witnesses to please stand and raise your right hands to be sworn. Do you swear that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Ms. MANDELKER. I do.

Mr. DALLAIRE. I do.

Mr. CHEADLE. I do.

Ms. ORENTLICHER. I do.

Chairman DURBIN. Thank you. Let the record show that the witnesses have responded in the affirmative.

Our first witness, Sigal Mandelker, is here to represent the Justice Department. Thank you. I know this was short notice, and we appreciate very much that you came here today.

Since July 2006, she has served as Deputy Assistant Attorney General in the Criminal Division. She oversees the Office of Special Investigations and the Domestic Security Section, the two Justice Department offices with primary responsibility for prosecuting human rights violators.

Since 2002, Ms. Mandelker has held a number of senior positions in the administration, including counselor to Department of Homeland Security Secretary Michael Chertoff, counsel to the Deputy Attorney General, and Special Assistant to then Assistant Attorney General of the Criminal Division Michael Chertoff. She clerked for Supreme Court Justice Clarence Thomas and Judge Edith Jones. She received her bachelor's degree from the University of Michigan and her law degree from the University of Pennsylvania.

I also want to recognize that she has a very deep, personal connection to the subject of today's hearing because both of her parents were Holocaust survivors.

Thank you so much for being here today, and the floor is yours.

STATEMENT OF SIGAL P. MANDELKER, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Ms. MANDELKER. Thank you, Chairman Durbin, Ranking Member Coburn, and distinguished members of the Subcommittee. Thank you for holding this important hearing today, and I am honored to appear before you on your inaugural hearing. As the Deputy Assistant Attorney General in the Criminal Division of the Justice Department who oversees the Office of Special Investigations and the Domestic Security Section, I am pleased to discuss the De-

partment of Justice's ongoing efforts against the perpetrators of genocide and other human rights violators.

Bringing these perpetrators to justice is a mission of the very highest importance. As Ambassador Alejandro Wolff, the Acting U.S. Permanent Representative to the United Nations, said just 11 days ago when introducing a landmark U.S.-drafted General Assembly resolution to condemn Holocaust denial, "all people and all states have a vital stake in a world free of genocide."

On a personal note, I am the granddaughter of three grandparents who did not survive Hitler's horrific genocide of 6 million Jews. My parents' earliest memories in reality were living in ghettos, hiding underground in the forest, hiding in haystacks, and being hidden by individuals who risked their own lives in order to save the lives of my parents. My mother was orphaned by the Holocaust, and my father lost his mother at the age of 5. This is an issue about which I feel deeply, both personally and professionally.

The Department of Justice continues to utilize all tools available against these human rights violators, including prosecution, extradition and removal, and by providing assistance to countries and tribunals who prosecute these horrific crimes.

First, the Department of Justice makes use of criminal and civil charges to ensure that the perpetrators of genocide or other egregious human rights violators do not find a safe haven in the United States. Indeed, for the past 27 years, the Office of Special Investigations has identified, investigated, and brought civil denaturalization and removal actions against World War II Nazi perpetrators. OSI has successfully pursued over 100 of these cases. In fact, just this last month, a U.S. immigration judge ordered the removal of Josias Kumpf, of Racine, Wisconsin, who, by his own admission, during a mass killing operation in occupied Poland in 1943 stood guard at a pit containing dead Jewish civilians and others he described as "halfway alive" and "still convuls[ing]," with orders to shoot to kill anyone who attempted to escape. OSI also continues to work with prosecutors overseas to facilitate the criminal prosecution of Nazi criminals.

In addition, U.S. Attorney's Offices around the country, OSI, and the Domestic Security Section criminally prosecute individuals who allegedly participated in human rights violations, including genocide, for offenses such as visa fraud, unlawful procurement of naturalization, and false statements.

For example, a number of Bosnian Serbs, including individuals who served in units implicated in the Srebrenica massacres, have been arrested by Immigration and Customs Enforcement and charged with immigration-related crime for concealing their prior service in the Bosnian Serb military. Two of those who have since been removed by ICE to Bosnia were indicted this past December by Bosnian authorities on charges of murder and other serious offenses.

Third, we extradite individuals wanted for human rights violations. For example, in March of 2000, following the conclusion of hard-fought extradition litigation, the United States turned over Elizaphan Ntakirutimana to the International Criminal Tribunal for Rwanda. This individual, a pastor at the time of the Rwandan genocide, was accused of devising and executing a lethal scheme in

which Tutsi civilians were encouraged to seek refuge in a local religious complex, much like the complex that you mentioned, to which he then directed a mob of armed attackers. With his participation, the attackers thereupon slaughtered and injured those inside. In 2003, Ntakirutimana, a one-time Texas resident, was convicted by the Tribunal of aiding and abetting genocide, and he was sentenced to 10 years' imprisonment. Indeed, a Department of Justice prosecutor also played a crucial role in bringing those charges.

Finally, the United States continues to provide substantial assistance to foreign governments and to various international tribunals that are investigating and prosecuting human rights cases abroad, including the International Criminal Tribunal for Rwanda and the Former Yugoslavia. Indeed, the United States has been the largest contributor to both of these tribunals.

For example, the Department has loaned a number of experiences law enforcement professionals to the ICTY, including the current head of the Domestic Security Section. We have also operated training programs and provided capacity-building assistance in the investigation and prosecution of war crimes, including to the various countries and jurisdictions of the former Yugoslavia.

Mr. Chairman, thank you again for holding this important hearing today. We are very grateful for the tools that Congress has provided in these enormously important cases, and I welcome any questions you may have.

[The prepared statement of Ms. Mandelker appears as a submission for the record.]

Chairman DURBIN. Thank you so much for being with us.

Our next witness is a hero. Canadian Senator Romeo Dallaire tried to stop a genocide in Rwanda, and he saved countless lives. That he did not succeed further in this effort was not his fault. It was ours.

In 1994, 5 weeks after the killings began in Rwanda, our colleagues Paul Simon and Jim Jeffords called General Dallaire, head of the UN Peacekeeping Force in the Rwandan capital of Kigali, and asked what he needed. A desperate Dallaire told them that if he had 5,000 soldiers, he could end the massacre. The Senators hand-delivered a note to the White House requesting that the United States approach the Security Council to authorize deployment of the troops. The Senators received no reply. The killings continued.

If more people had listened to General Dallaire, maybe things could have ended differently in Rwanda. I hope and pray that more will listen to him now—now that another genocide is underway.

Senator Dallaire had a distinguished career in the Canadian military. I asked him earlier whether I should call him "General" or "Senator," and we decided "Senator" would be appropriate in this setting. He achieved the rank of Lieutenant-General and the post of Assistant Deputy Minister of National Defense. He has published a book about his Rwandan experience, "Shake Hands with the Devil", which has received numerous awards. Among many positions, he is Special Advisor on War-Affected Children to the Canadian International Development Agency, and a member of the UN Advisory Committee on Genocide Prevention. He has received

honorary doctorates from numerous Canadian and American universities.

It is this Subcommittee's distinct honor to have you here today, Senator Dallaire. Please proceed with your opening statement.

STATEMENT OF LIEUTENANT-GENERAL ROMEO A. DALLAIRE, SENATOR, PARLIAMENT OF CANADA, OTTAWA, ONTARIO

Senator DALLAIRE. Thank you very much, Mr. Chairman and Senators. First, a word, if I may, of congratulations on this marvelous initiative and congratulations from the Canadian Senate Committee on Human Rights. We applaud your work and we wish you well in your future deliberations, particularly in starting with the subject of genocide.

I only have a short period of time, and so I am going to do what my Marine Corps friends taught me in Quantico, just south of here: I am going to power talk my way through this and hopefully get enough information across. And to do so, I would like to start with bit of history—a bit farther back than CNN history, which sometimes is, one wonders, last week—but back to 1994 and bring us into today, into Darfur and into the future.

I rapidly wish to indicate that in 1994, at one particular time, a small group of Rwandan extremists—and extremism is the instrument of this era—people who do not play by any of the rules—sat around a table and tried to figure out how they would maintain power. How they would maintain power. And the solution they came up with was we will simply exterminate 1,200,000 people of the other ethnicity—Tutsis. And even though we warned and attempted to get the international community involved, and even mandates changed, ultimately they succeeded in killing in 100 days 700,000 of that 1.2 million, plus about 100,000 moderate Hutus.

When they did that, we watched. Now, one readily would come to the conclusion that the international community either did not want to see or did not have the instruments to solve this. And it is interesting that since then we have rapidly turned towards the UN being present there, and being present because the international community wanted it there through the Security Council, that they not having taken action and me in the field not having taken action, that we are held responsible for that genocide. And I do not negate that my mission failed and that we did not help the Rwandans achieve peace and, on the contrary, ended up in a civil war and genocide.

However, I do not believe that the UN was the ultimate culprit or instrument by which we did not prevent it. I believe it is the sovereign states that make up the UN that prevented the UN from doing it because they simply did not give it the tools, did not give it the political will, and ultimately did not give it the resources, be it military or otherwise—to prevent it, let alone stop it.

And so this brings us to genocide, and genocide seems to have over the years turned into a very judicial sort of instrument, a sort of after-the-fact tool, and not necessarily an instrument of anticipation nor of proactiveness to prevent genocide. And when we see the work of the International Criminal Court and the Tribunals, at which I have been a witness three times, and we see them trying to attrit impunity around the world, one wonders how many Tribu-

nals or how many genocides we will need to achieve that aim of eliminating impunity. Because if we count on the term "genocide" to be the clarion call for us to act, let alone prevent but certainly to stop the crisis, we have been woefully ineffective. And, in fact, we have avoided the clarion call by trying to debate it, discuss it, and use all kinds of instruments, including sovereignty, as an excuse for not intervening when it was blatantly obvious that we had, in fact, a genocide—blatantly against the ultimate call for action.

Now, President Bush in calling the Darfur operation and situation a genocide, that was an enormous initiative. And, in fact, one can see him avoiding the very difficult situation that President Clinton found himself in, in 1994. However, after calling it a genocide, what has happened? What has this great power done, in fact, in stopping it, let alone trying to prevent its escalation? How many other countries has it been able to bring online to, in fact, stop this genocide? And how is it possible that, in fact, now we have a government in Sudan that, having refused to allow the UN to go in, having refused even the reinforcement of the African Union, that it is permitted to continue to function and to conduct its business internationally, economically, and so on? When it is now fully recognized by these actions as a genocidal government, refusing to allow the UN to conduct operations to protect massive numbers of its population against human rights abuses, or even soliciting aid or assistance from the UN to assist it in stopping the massive abuse of human rights of its own people? Not permitting that to happen has blatantly established the government of Sudan as a government that has set itself against attempts to stop abuse of human rights of its people and, as such, on balance has met all the criteria of genocidal government.

So what is this massive abuse of human rights and the stopping thereof? In September of 2005, the General Assembly agreed to one of the few reforms that Kofi Annan was able to bring in at that time, one called "Responsibility to Protect"—exactly what we have just described. Responsibility to Protect is an instrument by which sovereignty is no more an absolute, by which, when there is massive abuse of human rights in a country or when a government is not able to stop it, we have not the right, but we the international community have, the responsibility to go in and protect those people.

And so what teeth does this new doctrine have in the UN? What teeth does it have in the international community to stop a genocide? Economic? Military? Legal? Yes, they are all available for us to entertain. And what about preventing it? What sort of proactive instruments can we see that we could use, the international community through the UN, or even separately from that, to actually stop genocide?

The mere fact that human beings can sit around a table and conceive an idea of eliminating, eradicating, destroying millions of people to achieve their aim...How is it possible that that can still be a functioning sort of concept and that we let it happen—and, in fact, watch it happen on the various media and watch it happen not over a day or two, but over weeks and months?

On the 17th of May 1994, the Security Council said that what was going on in Rwanda was a genocide, and by then nearly

300,000 had been slaughtered and over a million internally displaced and refugeed. At that point my plan called for the deployment of about 5,000 troops. I had just finished commanding a brigade group of 5,200 troops. I knew exactly what they could do and what we had to achieve in stopping the slaughter—not stopping the war, but stopping the slaughter behind the lines. And that would be the reason to stop the war.

I called for the deployment of those 5,000 troops within about 10 days in order to stop the expansion of that throughout the rest of the country. Only leading powers and middle powers, like Canada, like Germany, like Japan, big powers like the United States and France and the U.K. and Russia and China, have the capability to deploy those qualified troops in the time frame necessary to achieve that aim. Two months later, the first troops arrived, and they were from Ethiopia, and they had no capabilities whatsoever in stopping it. And by then the genocide was over, and another 500,000 had been slaughtered and 3 million internally displaced. We saw it. We called it that. We watched it. And we did nothing. We watched O.J. Simpson's bloody glove and Tonya Harding knee-capping, but we did not want to act on the genocide that was in front of us.

And so, ladies and gentlemen, what of the future? There are untapped sources of preventing and stopping genocide. I believe we can use not only Chapter VII of the UN in which we would deploy with overwhelming force to prevent or stop genocide and its perpetrators but we could also demonstrate our resolve by mere planning. In the case of Darfur, contingency planning for going in could, in fact, influence the situation. We could go in with Chapter VIII, which means we reinforce a regional power, like the African Union, and its attempts to stop the atrocities. We could even go back to the General Assembly with "Uniting for Peace," an instrument that has been used in the past, where we go right back to every individual country and say, "You have a role in the decision to stop these operations."

We can, in fact, move in and start using other players who have not come to the fore with the strength they have to help the big powers in preventing, let alone stopping, these catastrophes, middle powers like Germany and Japan, Italy, Canada, regional middle powers that can and have resources that have not been called upon enough to support the UN and the international community.

I think, ladies and gentlemen, that we also have economic instruments, like, divestment. It is inconceivable, as an example, that we will intervene militarily, possibly to save human lives, if we can apply R2P, but we will not intervene in the economic matters of a country. How is it possible that Sudan still invest massive amounts of money in its military and next to nothing in its economic and social structures, which is the source of this genocide, and that we let it happen? We have not stopped their bank accounts. We might send in troops, but we will not stop their bank accounts. There is no logic in that. Cash seems to be more powerful than might and human beings.

Ultimately, ladies and gentlemen, we are now faced with a genocide. We are in the middle of it. It needs either massive deployments of troops, or it needs an international diplomatic effort led

by powerful nations and middle powers to stop it. And it is high time that we call a spade and a spade. And China and Russia cannot play on both sides of the game of human rights. They are turning into, certainly, in my opinion, scavengers of Africa as they attempt to maneuver their resource base at the expense of human rights and massive abuses of human rights on that continent.

Thank you very much.

[The prepared statement of Mr. Dallaire appears as a submission for the record.]

Chairman DURBIN. Thank you, Senator Dallaire.

Our next witness is more than a critically acclaimed film, television, and stage star. Don Cheadle has starred in many movies including"Crash," "Traffic," "Ocean's Eleven." He has received many awards, was nominated for an Academy Award as Best Actor for his performance in "Hotel Rwanda," and earned Golden Globe, Critics' Choice, NAACP Image, and Screen Actors Guild Award nominations for that same role. Many Americans first learned about the genocide in Rwanda from "Hotel Rwanda," in which Mr. Cheadle portrayed real-life Rwandan hero Paul Rusesabagina.

Mr. Cheadle has been more than just a competent and skillful actor in bringing that role to the attention of people around the world. He has been a leader in the fight against genocide in Darfur, giving speeches, writing articles, traveling to refugee camps in Sudan and Chad to raise awareness. He has been active in the campaign that resulted in California passing a divestment law. With human rights activist John Prendergast, Mr. Cheadle is co-author of a new book, "Not on Our Watch," which is due out later this year, a citizen's guide for responding to the genocide in Darfur. He is also producing a documentary about the Sudan. A native of Kansas City, he received his bachelor's degree in Fine Arts from Cal Arts in Valencia, California.

Mr. Cheadle, thanks for being with us today. We look forward to your testimony.

STATEMENT OF DON CHEADLE, ACTOR AND ACTIVIST, LOS ANGELES, CALIFORNIA

Mr. CHEADLE. Thank you. Good afternoon, and thank you for inviting me here today. Allow me to begin by saying that I am not only honored but somewhat awestruck to be appearing before you today to testify about the ongoing crisis in Darfur. I was invited here this afternoon by Senator Durbin to recount for you my personal experiences in Sudan and Chad so as to put a "human face" on what has been transpiring in that region for the past 3 to 4 years. There is more I could say in the way of a preamble, giving you my background and how I came to be involved with Darfur; but as time where this matter is concerned is rapidly running out for most and has already expired for far too many, I will get right to it.

After accepting this invitation, looking at the task before me, I started scrolling through my mental Rolodex to recall stories of Darfur, finding each one more tragic and gruesome than the last, yet trying to select the one that was the most shocking, the saddest, rife with the kind of terrifying imagery that would galvanize the room, causing everyone here to knit their brows and wring

their hands and shake their heads. But then two things occurred to me: one, all of the stories fit that description; and, two, all of us already know this.

Even if your knowledge of the situation in Darfur is only anecdotal, given your familiarity with similar tragedies which have unfolded in Armenia, Cambodia, Kosovo, Rwanda, you know the stories all have an eerily familiar ring. Hundreds, thousands, hundreds of thousands, singled out for their ethnicity or their religious or political affiliations, are systematically targeted for extermination.

Instead of the Interahamwe in Rwanda, it is the marauding Janjaweed in Darfur who prey on unarmed civilians. The government in this case uses Antonov bombers for the first wave of attacks, followed by foot soldiers sweeping through for the second wave, then finally the marauders ride in on camelback and horseback to loot, burn, and mop up the stragglers. Invariably, there are numerous accounts of unspeakable brutality to the victims prior to their deaths, with the survivors more often than not being made to witness these acts, as well as, if they are female, being gang raped, another common tactic of the perpetrators—leaving the victims terrified, demoralized, and ashamed. And where Darfur is concerned, if you are a woman living in the camps, you have the added horror of potentially being raped again when you leave the compound seeking much needed firewood for cooking to sustain your family's meager existence, or when the camps are raided, as is happening more often now.

The sickness and depression in the camps is palpable, as more refugees roll in daily, bringing with them what little they can carry, what family managed to survive, and a spirit bruised, battered, and broken. Now, I could plug in the names Fatima or Hawa or Adom to personalize these events, but every story told to me in the camps followed along similar lines, the only difference being the individual recounting it at the time. And every day since, up to and including this one, these stories continue to churn out of Darfur's human grinder at a rapid pace, with no end in sight.

And there you have it: a "human face," an accounting. And what of it?

In the 100 days of Rwanda's ethnic cleansing, with nearly 1 million souls brutally murdered, the most efficient extermination to date, most claimed to have known nothing about it, even years after its occurrence—a claim easy to believe given the dearth of news coverage those tragic events received. The news coming out of Africa in 1994 seemed to be all about Nelson Mandela's leadership and the end of apartheid. In fact, many of the South African actors I worked with during the filming of "Hotel Rwanda" admitted that they had no idea genocide was taking place, figuratively just "up the road." And surely it was not until the film's release that most people in this country had even heard of the place. Unless you were going on vacation to see the mountain gorillas, Rwanda was not exactly considered the greatest of getaways, no public opinion intended. But Rwanda differs greatly from Darfur in many ways. Perhaps the one most worth noting for our purposes is that this conflict in western Sudan has far exceeded 100 days in length. Darfur has been on a slow boil for 4 years now. Four years.

And over those 4 years, network news has reported about the crisis, articles have been written, rallies protests, and marches organized, concerts dedicated, benefits held, divestment bills signed, lectures made. Our President has labeled the crisis a "genocide." Yet here we are, 4 years in and counting. The question is: What will be done about it?

Now, to be clear, I ask what will be done—not what can be done, for that question has been asked ad nauseam and contains within it connotations of powerlessness and surrender. What will be done is a very different question. Rather than succumbing to the monster of despair, "What will be done?" presupposes that there are indeed answers, solutions, actions to be taken that yet remain dormant. This is the appropriate question for Darfur and for the Committee members convened here today.

Over the last year, I have heard a great many answers to these questions offered and have been privileged to participate in several efforts toward gaining peace in Darfur. I traveled to the region with a congressional delegation followed by "Nightline's" cameras to chronicle the journey and broadcast the stories to a wide audience, in an effort to raise awareness about the plight of the Darfurians. I was enlisted in the ranks of UCLA students to push their college and the entire UC Regents to divest their portfolios' funds from businesses working in the Sudan, a policy that was later adopted by the entire State of California and signed into law by Governor Schwarzenegger last year. Similar legislation is now pending in many States across the U.S., and in a personal gesture of solidarity, Chairman Durbin and Senator Brownback have likewise divested their family holdings from companies profiting in Darfur—a very important action that I hope everyone will follow.

In December, I was fortunate enough to travel with a small delegation to China and Egypt—both very important countries to Sudan—in an attempt to persuade their leaders to exert their considerable influence in the region, publicly condemning the continuing bloodshed while strengthening their back-door diplomacy.

In May, there will be a book on the stands I co- authored with the International Crisis Group's John Prendergast in an attempt to demystify the conflict and give insight into not only our activist roots and personal journeys, but also hopefully to provide a sort of primer for those who wish to become more actively involved in seeking solutions to this.

Valiant efforts? Perhaps. Effective? The jury is still out. Enough? Not even close. Three to five hundred thousand dead and dying, plus 2.5 million displaced souls equals a massive humanitarian crisis deserving of massive humanitarian attention. There is a small army of activists collecting, armed with unbridled enthusiasm and prepared to throw themselves headlong into the fight. But our well-intentioned efforts will wither on the vine if we are not guided and supported by the likes of you potential architects of change, bringing all of your collective pressures to bear on the powers that be. There are many actionable tactics that remain untried in this current iteration of violence that have been proven to be highly effective in the past, and we need to implement them now.

We need multiple players engaged in consistent and continual negotiations with the leaders in Khartoum as well as the rebel fac-

tions to get them back to the table to broker an agreement that is durable. Only with a committed team of diplomats working tirelessly to understand each party's demands will we be able to see a shift toward a solution. And to that end, the President's Special Envoy to Sudan, Andrew Natsios, along with Salim Ahmed Salim of the AU and the UN's Jan Eliasson must be fully supported in their work, financially as well, and we should take the lead on that.

We need high-ranking members in this administration to weigh in heavily in this process so as to be taken seriously by the GOS to achieve a favorable outcome.

We need to support the ICC in their efforts to prosecute the perpetrators of these crimes against humanity by sharing information and declassified intelligence vital to their investigations so that when these charges are made, they stick. In the 4 years that this conflict has been raging out of control, not a single member of the Khartoum government has been punished. The UN Security Council, the EU, and the current administration have threatened to punish those who commit these atrocities, but have as yet to follow through on these threats.

The latest incident was the U.S. threat to move to an unspecified "Plan B" if the Khartoum regime would not accept an internationally agreed upon UN role in the peacekeeping force. However, President Bashir and some of the most influential members of his regime have reiterated in no uncertain terms that UN troops are not welcome in Darfur. And what has happened as a result? Nothing. There was no visible reaction from Washington as the January deadline came and went.

This only emboldens Khartoum to push forward with its military objectives. We, of course, should be wary of moving troops, however hybrid, into a sovereign nation without their consent, but when does a so-called sovereign nation forfeit its sovereignty? Does killing your own citizenry en masse vitiate that position of sovereignty, or is there something even more egregious required? And what could that be? Do the small tributaries of information trickled to us by the GOS about terrorists trump the taking of innocent men, women, and children's lives? Should these morsels give a nation the right to engage in inhumanity?

If not, we need to outline specific punitive measures—travel bans, asset freezes, indictments—punishments that can be negotiated down or even taken off the table entirely if the killing ends. But unless the Khartoum regime believes there are real consequences to these actions, the status quo will be maintained and countless more will suffer and die.

In the 1990's, Sudan expelled Osama bin Laden from the country and dismantled his training camps after considerable pressure from the West, most significantly from the U.S. Similar pressure could again be exerted to bring an end to this current crisis.

We need to support the current efforts by China to keep the pressure on Sudan, as clearly they are a major player there. China's hosting of the Olympic Games in 2008 will cast them in a very bright light indeed. We need to capitalize on this opportunity to leverage China's desire to be recognized as having changed their questionable ways with regards to human rights issues and their

wish to be deserving of the slogan of unity they are promoting for the Games of "One world, one dream." As long as they are in essence underwriting the genocide by providing the GOS with the very arms they are turning against their own citizens, China's leadership may be more deserving of the slogan "One, world, one nightmare"—an association they should most certainly wish to avoid. We should reach for purchase there. I hope that Mr. Natsios' recent visit to Beijing, followed by President Hu's to the Sudan, may bear fruit but these should by no means be the only attempts. I am aware that there are important leaders in our country and others who have been involved in tricky diplomacy as well, albeit in a quiet way. Maybe it is time for these men and women to come to the fore and take advantage of the support of many ordinary citizens around the globe who wish to see these horrors in Darfur come to an end.

Any of these tactics should be deployed immediately if we are to see real change in Darfur.

We need to provide vital equipment and training necessary for the peacekeeping force in Darfur, not least of which should be to bolster communications capabilities for the AU. Push the UN to adopt a more forceful mandate and rules of engagement so that the peacekeeping force has the authority to do more than simply report on the atrocities they are witnessing, and they can provide real protection.

We can fund troops and humanitarian workers from other willing Muslim countries. South Africa, the Middle East, South Asia can all play significant roles here. Egypt, similarly, has expressed a desire to be a part of this, and we should capitalize on that.

But if, after all of these things, after all the committee meetings and the brainstorming sessions and the discussions and plans about how and when to act, we still find ourselves unwilling to embark on these solutions, then we must cease and desist with all the tough talk. Please, no more mention of no-fly zones and possible NATO intervention forces. Let's refrain from using the word "genocide" that demands our Government to respond as put forth by the United Nations Convention on the Prevention and Punishment of the Crime of Genocide, an agreement of which we are a signatory. Please let's forego the lamenting of the lost souls in this latest conflict and just write them off. Let's by all means please banish forever from our lexicon the phrase "Never again." This empty rhetoric is an insult to those in jeopardy, and it puts the world on notice that where mass atrocities are concerned, we are all bark and no bite.

But perhaps we should look at this a different way. Maybe what is required for our more strenuous involvement is for the folks in Darfur, in the Sudan, to step it up. Maybe 500,000 dead is simply not enough to warrant action. Maybe a million is more like the target number. I am serious about this. That word does feature very significantly in our collective consciousness. Perhaps when we say "one million Darfurians dead" an alarm will go off and the public outcry will be so deafening that we will be forced to take action. At the rate things are moving, it will only take 4 more years to reach this threshold—2 years into the term of our next President. And will this crisis be but one of many items on his or her "to do"

list? Or will there have been significant action such as to have made this issue one of careful maintenance rather than abject consternation? We obviously do not have the answer to that, but in this Committee's inaugural year, I can think of no better issue to wrestle with as concerned citizens everywhere stand by to see who will get the ten count—us or genocide.

So I ask again: What will we do?

[The prepared statement of Mr. Cheadle appears as a submission for the record.]

Chairman DURBIN. Thank you, Mr. Cheadle.

Our final witness today is Diane Orentlicher, Professor of law at Washington College of Law, American University. She is co-director of the law school's Center for Human Rights and Humanitarian Law, and the founding director of its War Crimes Research Office, which she directed from 1995 to 2004. She was described by the Washington Diplomat as "one of the world's leading authorities on...war crimes tribunals." Professor Orentlicher has published and lectured extensively on legal issues relating to genocide, crimes against humanity, war crimes, and international criminal tribunals. She received her B.A. from Yale, and her J.D. from Columbia Law School, where she was an editor of the Columbia Law Review.

Professor Orentlicher, thank you for joining us today, and please proceed with your testimony.

STATEMENT OF DIANE F. ORENTLICHER, PROFESSOR OF INTERNATIONAL LAW, AMERICAN UNIVERSITY, WASHINGTON, D.C.

Ms. ORENTLICHER. Mr. Chairman, Ranking Member Coburn, and distinguished members of this Subcommittee, with other witnesses I want to thank you for the opportunity to appear at this historic session, the first hearing of a Senate body established to consider how our law can best advance the deepest interests of humanity. With its special focus on genocide and the rule of law, this hearing could not be more timely, coming at a time when our legal duty to stop atrocious crimes is urgently relevant in Darfur.

I am fortunate to have as a foundation for my own remarks the eloquent and powerful testimony of the two witnesses immediately preceding me. By focusing on effective strategies for ending atrocious crimes still underway in Darfur, they have evoked the central point of the 1948 Genocide Convention: When states confront the threat or reality of genocide, they must mobilize to prevent it or to halt its deadly march.

My own remarks will place these witnesses' recommendations in a broader legal setting. After briefly recalling the core obligations that our country assumed when it became a party to the Genocide Convention, I will address the question of how well U.S. law fulfills our legal commitments under that treaty.

First, let me say that I cannot help thinking that Raphael Lemkin, the Polish scholar who campaigned relentlessly for a treaty on genocide, would have been deeply gratified by your decision to devote this Subcommittee's first hearing to genocide and the rule of law. As Senator Durbin recalled in his opening remarks, Lemkin believed it was essential to confront genocide through law—not just a moral code of conscience, although Lemkin was a man of sur-

passing conscience, but through an enforceable law of humanity. No matter how many times history gave Lemkin reasons to lose faith in humanity, he passionately believed in the power of law to compel us to do better the next time we learned that the very survival of a human group was in grave peril.

In 1948, the UN General Assembly adopted the treaty for which Lemkin had campaigned so tirelessly, the Convention on the Prevention and Punishment of the Crime of Genocide. Its core duties are twofold: The parties "confirm that genocide is a crime under international law" which they undertake both to prevent and to punish. The two duties are, of course, related. By ensuring that those who breach the basic code of humanity are brought to justice, the treaty's drafters sought to alter the depraved calculus of ethnic annihilation. For those who commit genocide count on our acquiescence, committing their crimes beyond any thought of shame or account.

In my remarks this afternoon, I will speak very briefly of the duty to prevent genocide, which has already been the focus, quite rightly, of other witnesses' testimony, and I will say a bit more about the duty to punish genocide.

First of all, the duty to prevent genocide begins at home but transcends national borders. That is, the framework of the Genocide Convention is that it counts on states to take the necessary steps to prevent genocide in their own society, but it also recognizes that the risk of genocide anywhere engages the responsibilities of states everywhere. Simply put, the Genocide Convention charges states to take whatever action is needed to prevent genocide or to bring its murderous violence to a swift and certain end.

Mindful of this responsibility, government officials have at times, as others have mentioned, hesitated to respond to urgent cries for protection on the asserted ground that it was not clear whether the situation at hand constituted genocide. And so I want to emphasize a point that should speak for itself: If governments wait until it is legally clear that genocide has occurred, they have waited too long to prevent it. Besides, any situation that seriously raises the specter of genocide is undoubtedly one that requires urgent attention and effective action under a body of law that is not the subject of this hearing.

As other witnesses have mentioned, a number of States and local governments in this country have not hesitated to act in response to atrocities in the Darfur region of Sudan. By enacting divestment laws targeting Sudan, they are doing their part to mount meaningful pressure on the Sudanese Government to bring the suffering in Darfur to an end.

In your opening remarks, Mr. Chairman, you mentioned your plan to introduce legislation in support of these efforts. That type of legislation would be precisely the kind of legal action to end genocide that Raphael Lemkin hoped states would take when confronted with the specter of genocide in their time. And that type of congressional legislation may be necessary to ensure the survival of state divestment laws against legal challenge.

When the Supreme Court invalidated a Massachusetts divestment law targeting Burma in a 2000 decision, it did so on the grounds that, when Congress enacted Federal sanctions targeting

Burma, it "manifestly intended to limit economic pressure against the Burmese Government to a specific range," which the Massachusetts law exceeded.

U.S. courts could conceivably attribute a similar intention to Congress in relation to sanctions that it has imposed against Sudan unless Congress makes clear that it welcomes State and local divestment initiatives.

Turning from prevention to punishment, the question that I would like to take up in my remaining time is whether U.S. law adequately fulfills our obligations of punishment under the Genocide Convention. I will suggest four ways in which this Subcommittee could consider strengthening the legal foundation for our national commitment to ensure that those responsible for crimes of ethnic annihilation are brought to justice.

In my written testimony, I describe how the principal law implementing the Genocide Convention, the Proxmire Act, largely fulfills the letter of our treaty obligation to ensure that persons who commit crimes of genocide in U.S. territory can be punished here. The Proxmire Act also enables U.S. courts to prosecute U.S. nationals who participate in genocide abroad. That approach is not explicitly required by the Genocide Convention but advances its overarching aim of ensuring that genocide is punished.

Looking beyond our own courts, the U.S. Government has played a leading role, as Ms. Mandelker indicated, in supporting various international courts that have jurisdiction over genocide as well as other serious crimes. It has also provided very impressive support to national courts to strengthen their capacity to bring to justice those who committed atrocious crimes in their own territory.

Finally, recent legislation, which was also referred to in Ms. Mandelker's testimony, directs the Attorney General, when deciding on legal action against aliens who are excludable based on their suspected participation in genocide, to consider options for prosecution.

But broader trends in international law and practice have in some ways outstripped the comparatively modest approach embodied in current U.S. law and reflected in the text of the Genocide Convention. Most important, if that treaty were enacted today, it would surely include a provision directing States to assert jurisdiction not only when genocide is committed in their own territory, but also when a suspected perpetrator is present in their territory unless they extradite or transfer the perpetrator for prosecution elsewhere. International treaties on torture and enforced disappearance—these are treaties of more recent vintage than the Genocide Convention—include provisions along the lines I have just mentioned. And as a party to the Torture Convention, the United States has enacted legislation that enables U.S. courts to prosecute persons who have committed torture abroad when they are present in our territory unless they are prosecuted elsewhere. The United States recently acted in December to arrest someone under this legislation.

Many other countries, including our leading allies, have laws that enable them to do the same thing for the crime of genocide, and they have enforced those laws in recent years to provide some measure of justice for victims of genocide in Rwanda and the Bal-

kans who were unable to obtain justice at home or before an international court.

But the United States is unable to provide a similar backstop against impunity for genocide. Thus when U.S. authorities discovered that a prominent suspect in the 1994 genocide, Enos Kagaba, was in Minnesota, they undertook assertive action to ensure that he would face justice for his crimes, but they could not prosecute Kagaba for genocide here. And so in April 2005, Kagaba was deported to Rwanda, whose government announced it would prosecute Kagaba on genocide charges. But while the Rwandan Government has, indeed, been committed to prosecutions arising out of the 1994 genocide, its court system has been understandably overwhelmed by staggering numbers of cases. Moreover, the International Criminal Tribunal for Rwanda has so far been unwilling to transfer any of its cases to Rwanda, determining that its legal system does not yet satisfy international standards of fair process.

Although U.S. action against Kagaba demonstrated our national commitment to deny sanctuary to perpetrators of genocide, the case also highlights gaps in our legal framework that limit our ability to ensure that those who commit genocide face justice, fairly administered. And so in closing, I would like to suggest for your consideration three types of legislative action that would close this gap.

First, I urge the Subcommittee to consider amending the Proxmire Act to enable the United States to prosecute crimes of genocide not only when committed in the United States or by a U.S. national, but also when the victim is a U.S. national and, wherever the crime occurs, if the perpetrator is present in the United States, subject to the important caveat that the person will not be prosecuted fairly and vigorously before another court. That is an important caveat because, of course, the United States should not provide a forum of first recourse for genocide committed abroad. It should, however, do its part to close the impunity gap.

Second, and as an important companion to my first suggestion, I hope this Subcommittee will consider further strengthening an important congressional directive to the U.S. Attorney General set forth in our Immigration and Naturalization Act pursuant to legislation passed a few years ago. This legislation directs the Attorney General, when determining the appropriate legal action to take against a genocide suspect who is deportable on that ground, to consider "the availability of criminal prosecution" under U.S. law or the "availability of extradition" to a foreign jurisdiction that is prepared to prosecute the suspect. While this language evokes our national commitment to secure justice in the aftermath of genocide, it does not explicitly convey a preference for justice over deportation. I hope this Subcommittee will consider amending this law to convey that type of preference.

Third, I hope this Subcommittee will consider amending the Proxmire Act to make it clear that U.S. courts can prosecute individuals who bear criminal responsibility for genocide under the well-established doctrine of superior responsibility.

Finally, I urge this Subcommittee to consider amending the Torture Victim Protection Act of 1991, or TVPA, to enable plaintiffs to bring civil actions against persons, including, where appropriate,

legal persons, who are responsible for genocide. As now drafted, the TVPA establishes a cause of action against persons who subject others to torture or extra-judicial executions, but not against defendants suspected of genocide. I believe the reason for this is that at the time the law was enacted in 1991, its proponents could not easily imagine that in the final decade of the 20th century, survivors of genocide would have fresh cause to seek legal redress. Now we know better, and I urge this Subcommittee to consider legislation that would remove this anomaly in our law.

These actions, I believe, would help redeem one promise of the Genocide Convention: to ensure justice for those who survived unspeakable crimes and to honor the suffering of those who did not.

Thank you, Mr. Chairman.

[The prepared statement of Ms. Orentlicher appears as a submission for the record.]

Chairman DURBIN. Thank you for your testimony.

We are going to enter into the record statements from 14 different organizations. In the interest of time, I will make them part of the record. We will not read them at this moment, but they represent, I think, some of the most widely respected human rights organizations in our country. Without objection, they will be entered into the record.

I am going to allow 7 minutes in the first round of questions from each member here. I am going to try in my 7 minutes to ask about two different issues or raise two different issues.

Ms. Mandelker, let's start with the point made by Professor Orentlicher. Now, as I understand it, there is a difference in terms of the authority of the United States to bring prosecutions under the Genocide Convention and under the Torture Convention. And that is, I think, demonstrated by the fact that Chucky Taylor, who was a leader in Liberia and was living in the United States, is being prosecuted by the United States for engaging in torture, even though the acts that he was involved in did not occur in the United States or, to my knowledge, involve U.S. citizens

On the other side, when it comes to the issue of genocide, it appears there is a much different standard of authority. As an example, a man by the name of Salah Abdallah Gosh, head of the security of the Sudanese Government, who has reportedly played a key role in their genocidal campaign, came to Washington 2 years ago to meet with senior administration officials. It appears to me that we did not have the authority, even if we had concluded that he had been complicit in genocide in Darfur, to arrest and try him under the Genocide Convention. Is that distinction the same as you understand it?

Ms. MANDELKER. Yes, Senator.

Chairman DURBIN. Make sure you turn your microphone on, please.

Ms. MANDELKER. Yes, Mr. Chairman. The jurisdictional bases under which we can prosecute genocide as opposed to torture are different. Under the genocide statute, we can only prosecute U.S. nationals, or if the genocide, in fact, occurs in the United States. The torture statute is a little different. It includes U.S. nationals and those found in the United States. So that is correct.

Chairman DURBIN. And that is a point made by Professor Orentlicher, that if given that additional authority, it would be a disincentive, would it not, for those engaged in this kind of conduct, knowing that the United States could, in fact, arrest and prosecute them for actions not involving U.S. citizens but actions that are considered crimes of genocide?

Ms. MANDELKER. Certainly, Senator, I cannot comment on such a proposal. The administration does not have a formal position on this issue. But we would be prepared to review any such legislation that you might propose.

I would note, however, that expanding the law to establish jurisdiction for genocide in all cases occurring anywhere in the world would raise other serious legal and policy concerns.

Chairman DURBIN. How does that differ from torture?

Ms. MANDELKER. Well, Senator, the genocide statute—and, again, I am not commenting on any particular proposal, but the genocide statute was enacted after the ratification of the convention, which was different from the Convention on Torture, and the torture statute, of course, was enacted after the ratification of that convention.

Chairman DURBIN. Professor Orentlicher, would you like to comment on that distinction?

Ms. ORENTLICHER. Thank you. Well, I think it is important to recognize that the Genocide Convention was adopted very early in the history of the United Nations. It was the first human rights treaty adopted, and it was a huge leap for the UN to pass an international criminal treaty of any kind. And so its approach was radical at the time, but now seems quite modest compared to more recent trends in international law. It has been common in recent treaties dealing with human rights violations that amount to crimes to establish a framework for universal jurisdiction.

I want to emphasize that universal jurisdiction is always a last recourse. I think one of the most important things the U.S. Government is doing right now is providing support to local countries that are recovering from epic violence to strengthen their own legal capacity.

I have just returned from a trip to Serbia and Bosnia, where U.S. efforts to support local courts in those two countries are really quite impressive. So universal jurisdiction is always a jurisdiction of final recourse.

And the last thing I would like to say, if I may, is that experience in recent years has shown that the power of one national court to exercise universal jurisdiction has often provided a very healthy catalyst to countries where the crimes occurred to exercise jurisdiction themselves.

Chairman DURBIN. I would like to ask a question of both Senator Dallaire and Mr. Cheadle, and then I will give you the time between you, a minute perhaps apiece, to answer. I am sorry it is not longer.

Senator Dallaire, we spoke earlier today about the type of force that might be sent into Darfur. Your experience in Rwanda I think gives you special expertise in this area. There are some who say, "Oh, the United States, we cannot be sending troops all around the world." And others says, "You are exactly right, and you should not

be sending troops on the ground into Darfur." And I would like your comments on that particular issue.

Mr. Cheadle, you have been involved in this divestment movement, and as I said, I am going to introduce a bill to allow State and local governments to engage in divestment policies. And I would like for you to tell me what your experience has been in the State of California after Senator Dallaire.

Senator DALLAIRE. Two years ago, in Boston, I presented a concept of operations where, to go into Darfur, we would need about 44,000 troops to do the job. I mean, the place is as big as France. We would need about three divisions worth, plus some in Chad because of the refugee camps that are situated there and, of course, the problems on the border.

The technology required to be able to cover that ground with so many troops can only come from those countries that possess the necessary technology, that is, the developed countries—not only the big powers but the middle powers. They could provide that in night vision systems and so on. But one of the big deficiencies of any of the forces going into the region is, of course, strategic lift and strategic sustainability of forces, which the developed countries can certainly provide.

But if we are talking about purely troops on the ground, no, we do not need U.S. troops. In fact, it would not be a smart move to, in fact, use U.S. troops in a situation where the religious dimension reflects a potential friction that could come out of a force going there.

The African Union's African standby force—which is a five-brigade capability—is still at least 5, maybe 10 years away from being able to respond internally—it can be reinforced, however, with other African forces and forces from other regions of the world without necessarily coming to the Christian developed countries and certainly not to the major powers. Middle powers can provide capabilities—advisory and technology—while other countries could provide the troops if the political will were there for those troops to go in. This would either be as a force of protection to help reestablish those people, those 2.5 million, in other places or ultimately a force of intervention against the Sudanese Government under Responsibility to Protect.

In that scenario, 44,000 might not meet the requirement, but then, again, do we have the force structures in the world to do it? And I believe yes, without coming to the developed world. It is a matter of simply needing the political will to encourage others to want to provide them.

Chairman DURBIN. Mr. Cheadle, on divestment?

Mr. CHEADLE. Well, in this and in many issues related to this, I have sort of been enlisted since my appearance in the film "Hotel Rwanda." And in this particular issue, Adam Sterling, who was working with the Darfur Action Committee out of Los Angeles and STAND, Students Taking Action Now for Darfur, at UCLA, had been lobbying for his school, UCLA, but also the entire UC Regents to consider divesting their funds from portfolios that were benefiting from doing business in Darfur. And we had a rally at the school, and we were able to see that happen.

Closely on the heels of that, legislation was drafted. Adam was one of the people who drafted it as well. There is another committee member out there whose name I am forgetting—Paul Horowitz, excuse me—Paul Koretz, rather. Paul Koretz. And they drafted legislation that Governor Schwarzenegger signed into law last year which divested—which Calpers and calstrs, two of the major pension funds in California, divested their funds from businesses operating in the Sudan.

Since then, there has been a lot of legislation around the country and many bills in a lot of different States to try and achieve this same end. And in the California bill, I know that there had been some resistance to it, obviously fiduciary responsibilities that they felt were not being met by these divestment bills. And I believe there is a provision in the bill that allows a certain amount of time—I do not know if it is 6 months to a year—for companies to find other means, other companies to invest their funds in. And it has been shown that many of these funds, the profit that they are making is very nominal, and they are able pretty easily to find other places to invest their money, that it does not really take a big hit to these funds.

So this is what we are trying to encourage other States to look at, and I just would like to offer my support to what you are proposing to do in any way that I can.

Chairman DURBIN. Thank you, and I am going to recognize my colleagues and give them a little leeway here because I went beyond the 7 minutes.

Senator Coburn?

Senator COBURN. Thank you, Senator, and I thank each of you for your testimony.

You know, I kind of want to get something going between Senator Dallaire and Don Cheadle here for a minute. Your question is: What will we do? And we just heard Senator Dallaire say what is needed.

Now, somewhere between what your questions ask and what you are saying, there is an answer. Except where is it? That is the question. It is the inaction, the absolute inaction of the United Nations. It is feckless when it comes to this response at the present time.

So the question I have is: What do we do? You know, what is the answer to work through the bureaucracy? What is the answer to play off the different international powers—Russia and China—in terms of how they do not want to see something coming even though they do not want to claim it? Or we have a United Nations Human Rights committee that has a majority of the members of that are not stellar players when it comes to human rights.

What is the answer? Is the answer outside of the United Nations? Is it a coalition of the willing? What is the answer? Let's answer Mr. Cheadle's question. What will we do? It is not what can we do. What will we do? You know what to do, correct?

Senator DALLAIRE. Just give me the troops.

Senator COBURN. All right. So how do we get the troops?

Senator DALLAIRE. Well, in fact, Senator, it is rather interesting that the United Nations has all the planning done for the current phases of operations in order to reinforce the African Union, but

the only thing that is missing is the political will of the sovereign states that make it up to want to put the troops there. And they do not want to put the troops there, to be very blunt, as the question is put forward, because there is no self-interest in there.

I mean, who cares about Darfurians? They are sub-Saharas black Africans. They are the lowest priority of humanity. They are no different than the Rwandans. They are not worth the investment. We put 67,000 troops in Yugoslavia, and I could not get keep 450 in Rwanda. We are putting them all over the place, including Afghanistan, and we do not put them there.

I think that the essence of it is: Do we believe that those humans count? And are the politicians of the sovereign states willing to create a coalition of the willing outside of the UN or, in fact, give the Security Council the mandate that it should be articulating to, in fact, deploy those forces, because you can find them.

Senator COBURN. I will ask you this question, and then I will ask Mr. Cheadle to respond as well. Is there any doubt in your mind that this country is willing to support that effort?

Senator DALLAIRE. Yes.

Senator COBURN. There is doubt in your mind that we are—

Senator DALLAIRE. Yes. Your President how long ago has said that it is a genocide, and what have we seen since? We have seen a lot of cash going—

Senator COBURN. No, no. I am talking about the specifics of approving that plan at the United Nations.

Senator DALLAIRE. No one. This country does not even want to do the contingency planning. The big powers, the Brits, the French—the Russians and Chinese are not even on the same wavelength of wanting to do any possible intervention, let alone the political negotiations that we think they should be doing to move the Sudanese Government.

Senator COBURN. So it is your testimony that you think that we are part of the obstructing force at the UN for this to go forward.

Senator DALLAIRE. Any nation that has a capability of committing itself to protecting under the Responsibility to Protect has demonstrated an unwillingness to go ahead.

Senator COBURN. Big difference. I asked you a very specific question. We are part of that contingent of communities that is obstructing the ability for this to move forward.

Senator DALLAIRE. Yes, and so—

Senator COBURN. In spite of what we have done at the UN Security Council.

Senator DALLAIRE. And so is my country as a leading middle power.

Senator COBURN. Okay. And so what will we do about that?

Senator DALLAIRE. That remains—your political decision of committing the resources, either the political resources, the economic resources, whatever means, divestment and so on, and the military resources—

Senator COBURN. But divestment is not going to change anything except for the next 2 or 3 years. I am talking about something in the next 2 or 3 months. Divestment is great, but that is a long-term strategy. I am talking about the short-term strategy. What do we do? How do we develop the coalition of the willing?

Mr. CHEADLE. Well, Rwanda, it is ironic that the Rwandis are standing by with two to three battalions of soldiers waiting to go in. They need, obviously, the command and control to come through the UN. They need the support, they need the capabilities to get there. They cannot get there.

But all of these things need to be shorn up. All of these gaps need to be shorn up. And it has to come through, if not the President, the Secretary. It has to come from a high enough position that it has power, that it has teeth, and that it has strength. So far it is—this is a very well meaning Committee and we are here trying to do our best, and I have been trying to do my best as an individual, as is Romeo Dallaire. But we need the powers that are in control to put their pressure to these other governments that are the partners in this, to put this through, or nothing will happen.

Senator DALLAIRE. Senator, may I reinforce that point by the following: that the countries—

Senator COBURN. Let me make an exception here for a minute.

Senator DALLAIRE. Sorry.

Senator COBURN. I want permission to request the State Department to answer this question for our Committee as well—in other words, their position on this, because we have heard one side of it. And it is a little bit different than what I have heard, I will tell you quite frankly. You are looking at it from the inside, which is a greater perspective than I have, Senator, and I will grant you that. But I think for the record, to be fair, we ought to have that because that will help us have some action.

Go ahead, Senator Dallaire.

Senator DALLAIRE. Only to reinforce my point on the political decisions. Another obstacle to, in fact, using force under Responsibility to Protect—after having exhausted all the other means, including really giving the Sudanese Government a run for its money, which has not really happened so far—is the fear of casualties. The fear of casualties in a country that does not count, in an area that does not count. Sovereign states are having a terrible time since, in fact, Mogadishu to survive any such operations when, one, there is no self-interest and, second, it is a place where it has no impact really on your security. Do we want to take casualties? And most of the developed countries have refused that.

Senator COBURN. Yes, because they may be next. That is why. Yes, because they may be next.

A question: If you had three or four countries, a coalition of the willing, and went before the UN and they said no, in your mind is it still correct for them to go if they can accomplish the task? I am talking about the very clear moral issue of stopping genocide, regardless of what a UN body may say?

Senator DALLAIRE. I am not one to go outside of the UN with single-nation-led coalitions because in my estimation it means that the international community does not want to have the solution.

However, I am certainly for a coalition of the willing to create a capability, both political and military, to introduce the possibility of conducting interventions there.

Senator COBURN. I think you answered the question by the description of the UN. The UN does not want to address this issue.

Senator DALLAIRE. But, sir, the UN is us.

Senator COBURN. That is right. That is right. And the UN has waste and has corruption to the tune of about 25 percent of its budget every year. It absolutely is non- transparent in what it gives to the world, how it spends its money, where it does in terms of the connection. It is abysmal in terms of us knowing what it is doing. It is not us because we do not get to see what "us" is doing. The UN has to change and it has to become transparent so we can see how it is spending its money and what it is doing with that money in terms of its peacekeeping operations. And 25 percent, one out of every $4, that is spent on peacekeeping is defrauded—is defrauded. That money, that $1 billion, could be solving the problems in Darfur today.

Thank you.

Chairman DURBIN. Senator Cardin?

Senator CARDIN. Well, Mr. Chairman, let me thank all of our witnesses today. This has been certainly an important hearing and a story that needs to be told.

We have an immediate problem in Darfur to bring an end to the genocide. That is the immediate problem that we need to deal with. And we have a game plan, and that game plan is the introduction of additional troops, and we have to get that done. It requires the leadership of the United States. It requires us working with every available means, including the United Nations. And I think we need to be prepared to use economic sanctions, particularly oil revenue sanctions, to make sure that, in fact, is carried out. I am not sure whether we are committed to that type of hard plan to end the genocide in the Darfur region of Sudan.

But I think the broader question is—I mean, the immediate issue is to stop the killings, stop the genocide. The broader issue is to take off the table ethnic cleansing as a means of accomplishing political ends. That has happened too many times during my lifetime, and it looks like there is no end in sight to other countries using similar tactics, that ethnic cleansing is permitted.

And I think it is somewhat the failure of leadership. I remember when I was in the State legislature—we were talking over lunch—we talked about bringing an end to the apartheid government of South Africa and we were suggesting economic sanctions, so many people said, "Oh, don't do that. You are only going to hurt the South Africans by doing that." So everybody seems to want to take their particular tool of the table.

I guess my question to you is that if you had to pick one tool—we have talked about military intervention in regards to Darfur. We have talked about economic sanctions, and the Chairman's bill is one that I support to bring about more effective economic sanctions against countries that are involved in ethnic cleansing. We talked about the war—we have not talked as much about the war crimes tribunals, but we always thought that bringing international justice, crimes against humanity, using international tribunals would make it clear that you cannot get away with genocide, that it does involve the international community, it is not a matter of your government sovereignty, that this is an issue on which every civilized country has a means of intervention. So we could expand the use of special tribunals to try to hold countries accountable.

We have international organizations, the United Nations. I know Senator Coburn does not exactly have confidence. I think that the United Nations represents all of us, and it is a tool that needs to be used. I have been working with the OSCE, which is 56 countries in Europe, Central Asia, and North America. I think that has been effective in putting a spotlight on human rights generally, because when you start seeing a lack of commitment to human rights, it is a slope that leads ultimately in some cases to genocide. And you need to have a stronger international presence to say these are important issues, ones that we care about. We do care about people's rights to live in their country and to have their rights respected.

So it is frustrating to all of us because we have been through this too many times. But what tools are the most effective? Should we put our attentions to the war crimes tribunals? Should we put our attentions to the international organizations, to strengthen the international organizations? Would it be easier to use military intervention in countries, letting them know that it is not their sovereignty, that we are all involved in it?

I know it is easy to say all of the above, but if you had to pick one that would be the most important for us to strengthen, which one would you pick?

Mr. CHEADLE. Well, I spoke—before I came here, I met with Condoleezza Rice, and we were speaking about this very thing. And she said that we ought to take their "yes" as the "yes." Bashir has said that he will accept a hybrid force. There are certain caveats that he had. But we should take the "yes" as a "yes," prepare the troops, get the control and command in place, get the communications in place, get everything set up so then we can say we have it now and now we can go.

And then if he still says no, then we have a real obstruction, as opposed to what we have now, which is a bunch of negotiations around small points. We have to say we are ready to go, this is set up. And then if he is not obstructionist, then there is—then the question of sovereignty does come onto the table. Then we are asking: Are you still allowed to say no when the world is saying yes? And I think that is what she believes is the most important thing, and I think it is not a bad idea.

Senator CARDIN. Senator?

Senator DALLAIRE. We are like a wet noodle in this exercise because we have got no teeth or we do not want to show any teeth. We have got all kinds of initiatives and debates and discussions on the political front. We have got all the data we need to prove that it is a genocide and it is a genocidal government. We have got all the NGO community saying that they cannot even help the people that are there right now and that it is slowly continuing, the genocide that started a few years ago. And the question is: With all that data there, why is it still possible that we are talking as if we are talking to an equal when we talk to the Sudanese Government? How is it conceivable that a government that has so blatantly gone against fundamental human rights, massive abuses thereof, that we still treat them as an equal sovereign state with all its capabilities in decisionmaking?

We endorsed the Responsibility to Protect doctrine within the UN—one of the reforms that Senator Coburn is certainly calling

for—but it is only one of the 101 that Kofi Annan tried to introduce, Well, which State stopped most of them? This one. Only three made it through. And many of those reforms would bring a lot of changes and maybe achieve what you are trying to achieve, what I hope to achieve: a more effective UN. But ultimately, someone has to say, "We are going to prepare contingency plans for the possible deployment of forces that would intervene in Sudan. If you do not accept the UN-proposed mandate and deployment capabilities to reinforcing the African Union, then we will take action." But not one country has offered even to start planning on a contingency basis. Not one. The UN does not have that capability. You need the big powers. You need the French, who could do it, you know, with others supporting them. Middle powers could join in and create a coalition to build that contingency plan. Not one even wants to start the contingency planning, and so there is no stick.

Senator CARDIN. It is a matter of political will because, as I think we have all said, the sovereignty issue really does not play here.

Senator DALLAIRE. Well, that, is exactly the problem Responsibility to Protect, came out of the Rwandan genocide, during which we blatantly said that we should go in but did not want to. We just do not want to follow up on a concept that we all agreed to implement if necessary. It is happening, and we are backing out. And it is not because the soldiers are not there. Hey, we have got millions of soldiers. It is not because they are committed else where that they are not available. It is because the political will is not there to make them available.

Senator CARDIN. All right. I respect Senator Coburn's points, and I know we share a lot of frustration about reform at the United Nations, and I agree with that. But I think when you are talking about the introduction of troops, it is going to be the major powers that are going to be making those judgments, more so than delegating it to the United Nations. They reflect basically what the major powers are committed to doing, and we do not have that support at this point, according to what you are saying.

Senator DALLAIRE. But the major powers are the Permanent Five. There is a gang out there that is really not pulling its weight, and those are the middle powers. Why aren't we influencing the Germans to get in there, rather than just throwing cash at it? Why aren't we trying to influence the Japanese to change their Constitution to allow that to bring capabilities rather than just cash to address the problem and so on? Why aren't the Canadians being pushed far more strongly to commit themselves to human rights and responsibilities? We spearheaded R2P in 2001, and a situation that fits its criteria now exists, and yet we are still not putting the assets there.

I do not think the big powers should keep stumbling over each other to try to meet all these requirements. I think there are a lot of other nations who are sitting on the fence that the big powers should be pushing to get involved.

Senator CARDIN. Well, I agree, but I do not think the major powers are committed yet to doing this; therefore, they are not trying to convince the other powers—

Senator DALLAIRE. You are absolutely right.

Senator CARDIN.—because they are not there yet.

Thank you, Mr. Chairman, for your patience. I appreciate it very much.

Chairman DURBIN. Senator Whitehouse?

Senator WHITEHOUSE. Thank you, Mr. Chairman. Let me start by telling you how pleased I am that you have called this Committee into being and have focused its first efforts on the genocidal bloodletting in Darfur. It is a great accomplishment, and I am proud to be here with you. And to the witnesses, thank you so much for your help and your testimony.

It strikes me that genocide is a pattern through human history—just in this century, the genocide of the Armenians, the Holocaust, the Killing Fields of Cambodia, Bosnia and Kosovo, Rwanda, now Darfur—and we have never really as a world community developed the capability for addressing it. And it seems that we may now have the wherewithal to do that, the opportunity to do that, the human desire to do that. This may be one of those moments whose time has come.

And in that context, let me ask you this—and forgive me, because the question begins rhetorically, but what nation more than any other has the resources to provide military power, medical aid, emergency relief, and logistical support? What nation more than any other has the technological capability to go around the world and quickly build communications, a command and control system? What nation more than any other has the capability to deploy such assets worldwide, rapidly, and in quantity? And what nation more than any other has the authority to drive and organize international cooperation? And if that nation found the energy and the will to match those capabilities so that it had an institutional capability with itself and worldwide to respond to tragedies of this nature—not only genocidal but caused by natural disaster as well—what do you believe the effect would be on the good will, on the moral authority, and on the international standing of that nation? General?

Senator DALLAIRE. My response, sir, is the following: Why do you always want to set yourselves up? Why the leading world power that has all those capabilities, why in seeking solutions should you necessarily have to commit, yourselves, all those capabilities when, although diffused, they exist in the rest of the international community?

Let me throw a real weird one at you. Why can't the Chinese provide all that? They have got it. It may not be as modern, but they have got it. And they are in there, and they are keen on that oil. And they know what our problems are in the context of human rights, with what is going on in Darfur. Why don't they go in? Why don't we support them in going in there to provid that capability if they are so chummy with the Sudanese?

What is fundamental is that the Darfurians, 2.5 million people, are dying out there with absolutely nothing, and we are all sort of working through a number of permutations without really wanting to hit somebody between the eyeballs and saying, "Listen, you go in and do it because you are the one who is stopping us from actually trying to help this situation."

And so your question leads us, of course—a leading question, I suppose—to the United States. But why do you want to do that

when there are so many others that also believe in human rights, have capabilities, but are sitting there waiting for you to set yourself up again?

Senator WHITEHOUSE. Because it looks like somebody has to break the logjam here.

Senator DALLAIRE. Then create the initiative to bring all those other beavers together and get them to do it with your moral support and political will behind it.

Senator WHITEHOUSE. That is part of the capability that I mentioned—the capability and the authority to drive and organize international cooperation.

Mr. Cheadle?

Mr. CHEADLE. I absolutely agree. I do not think that necessarily the United States should be the face of the force that goes in. I do not believe that we have to commit troops on the ground. I believe there are so many steps that can be taken prior to that eventuality, if that even is something that occurs. As General Dallaire said, I think we can play a role as leaders and as support of other countries who have very great interest in that region—China being one of them. When we went to Egypt, they spoke of they do not want a disaster on their border. As that region becomes more and more unstable, that is the last thing they want is another unstable country on their border.

But I think we need consistent and continual commitment to a process. This is not going to be one gesture that is going to solve this. We have to apply diplomacy that takes continual attention, and that can come from many different ways. But the leaders have to want that, and the leaders of not just this Nation but the other nations, as General Dallaire has said, have to see this as an important issue. Basically, they have to believe that it is important to save human beings' lives who have no—who give them no political cachet. And at this point, we have not seen that shift.

Senator DALLAIRE. There is about to be a meeting of the G–8, and there is the G–20. They are sending representatives to that table. Why not squeeze them? And some of them have capabilities that have not been committed to this that should be called to task.

Senator WHITEHOUSE. I think we agree.

Thank you, Mr. Chairman.

Chairman DURBIN. Thank you.

I would like to ask unanimous consent that the statement by Senator Cornyn, who unfortunately had to leave, be made a part of the record. Without objection, it will be.

We will have a second round, and let's do 3 minutes so we each have a brief question to ask.

The one thing that I find interesting—there are lots of things interesting, obviously, but the one thing that is curious and interesting as you watch foreign policy and developments in the world is how often it comes down to oil. Oil. It turns out that oil brings in 85 percent of Sudan's foreign revenue, $7.6 billion a year. It turns out there are three major oil companies in Sudan. They are owned by China, India, and Malaysia.

The question I would like to ask—and maybe Ms. Mandelker or Professor Orentlicher, someone else if they would like to join in—is: What are the legal means that we can use to put pressure on

the Sudanese when it comes to their oil revenues? It strikes me that if we find a way to touch those revenues, we are going to get the attention of the Sudanese very quickly.

Ms. MANDELKER. Senator, of course, I am from the Criminal Division at the Department, so I am not prepared to comment on your question. But it is clearly an important one and one that we will carefully consider.

Chairman DURBIN. Dr. Orentlicher, do you have any thoughts on that?

Ms. ORENTLICHER. Well, legally, of course, it is possible to devise sanctions aimed at an oil embargo, and that would certainly carry a lot of punch. But, you know, the question whether it is politically feasible is one that is more in your province than mine.

May I comment on one other issues that was alluded to earlier?

Chairman DURBIN. Of course.

Ms. ORENTLICHER. In terms of the panoply of levers that are available, you know, to say the obvious, we need to not pick just one, and it is clear from our experience in other areas like Bosnia that it took a concerted range of actions to bring an end to the violence that lasted 3–1/2 years there.

One tool, and the one that I have been most involved in, involved international criminal sanctions. I mention this because that is likely to come onto the radar with respect to Darfur soon in a way that it is not now the case. The prosecutor of the International Criminal Court has indicated that he is likely to come down with indictments relating to Darfur later this month. At some point there may be a dilemma presented to policymakers about whether the indictments in some way impede a peace process or not.

And so I would like to put that issue in a broader context. When there is genuinely reason to believe that outstanding investigations impede international security, there is a mechanism for the Security Council to suspend that process. But I want to sound a cautionary note. When faced with challenges of the magnitude of those we face in Darfur, it has proved in other situations tempting to surrender a process of justice in the often delusional hope that it will bring an end to the carnage. We—

Chairman DURBIN. So to be specific, if you think the International Criminal Court is going to come down in February with some indictments or prosecutions against some of the leaders in Sudan, do you think the UN might consider bargaining away those actions?

Ms. ORENTLICHER. The issue may arise at some point. It arose when Slobodan Milosevic was indicted by the Yugoslavia War Crimes Tribunal, and it has been discussed in the context of investigations in Uganda by the International Criminal Court when peace negotiations were underway.

So the big picture I want to emphasize is that our experience in the past with this issue has been that it is tempting to say at that moment where the dilemma presents itself, this is a thorn in the side of peace negotiators, we have to get rid of it.

And I want to say nobody I know who is involved in justice for genocide would want to stand in the way of action that would actually bring the carnage to a halt, but experience has shown that when diplomats raise this concern and argue for amnesty, it is

often an alibi for not taking more assertive action to bring carnage to a halt. And it has proven possible so far to have peace with justice. In fact, it has often been the case that indictments have facilitated an end to a conflict rather than provide an impediment to peace.

Chairman DURBIN. Thank you.

The last point I would like to make on the oil issue is I am not going to stop with this inquiry. I want to find out what tools we have available by way of sanctions, by way of actions involving Sudanese oil.

General Dallaire?

Senator DALLAIRE. The statistics you quoted with respect to the funds coming available to the Sudanese Government through the oil, 70 percent of that is going to into military hardware. So the first question I would ask is: When you look at the security of that country, why are we not putting something like an arms embargo on Sudan? If they are pouring all that money into weapons that are being used to actually perpetrate and continue this massive human rights abuse, why aren't we doing something about that?

Chairman DURBIN. I would not be surprised, General, to find that some of the countries with the oil interests in Sudan are also supplying the arms.

Senator DALLAIRE. There we go. So who is running the show?

Chairman DURBIN. Senator Coburn?

Senator COBURN. Thank you.

Senator, it is a pleasure to have you here, one. No. 2, I am going to read back to you a little bit of what is in your book because I think we agree about the UN. You are much less frustrated with it than I am, or you are in much better control of your emotions over your frustration. I do not know which it is.

"Though I, too, can criticized the effectiveness of the UN, the only solution to unacceptable apathy and selective inattention is a revitalized and reformed international institution charged with maintaining the world's peace and security, supported by the international community and guided by the founding principle of its charter and universal doctrines on human rights. The UN must undergo a renaissance if it is to be involved in conflict resolution. This is not limited to the Secretariat, its administration bureaucrats, but must encompass the member nations who need to rethink their roles and recommit to a renewal of purpose. Otherwise, the hope that we will ever truly enter an age of humanity will die as the UN continues to decline into irrelevance."

I believe it is climbing into irrelevance constantly right now, and I agree with your words. I would add one thing to it. They need to be transparent about what they do so that the world outside of the governments can judge what they are doing.

I want to go back just one moment and try to—because I think the problem is the UN. And the UN is the member states, I will grant you that. I believe we need an international body, and I believe we need to have leadership in that international body. But we cannot sit here and ask Mr. Cheadle's question, "What will we do?," and the answer between that we will not play in the UN. I mean, that is basically what we are saying.

And so why won't we play in the UN? Because the UN is no longer an effective voice to prevent something like this because everybody is gaming the UN. And if you look at the 77 countries that are consuming the dollars or playing the games with positions and inside ballpark in New York City, you will recognize that nothing positive is going to come out until that whole system is changed and revitalized and comes into the sunshine of public opinion so we can see what is going on.

So I comment, and only on your writings, because I actually agree with them, and there is tremendous wisdom. Darfur is happening today because the UN is feckless, because it is not the world body it claims to be, because it is not acting in the way it should be acting. And that truly is a reflection of the member states. But how did it get that way?

Senator DALLAIRE. How it got that way? You have just given me the great opening. How it got that way is that sovereign states let it move down that road.

Senator COBURN. That is right.

Senator DALLAIRE. And it is interesting that the 101 reforms that Kofi Annan tried to bring through would have gone a long way toward greater transparency and impartiality, also, which is absolutely crucial in this exercise. We stopped that, but hopefully we will, and this country will, take a lead in trying to round those things up and bring them back in.

However, we are in a new era, and I wrote that with the backdrop of the research I am doing on conflict resolution. We entered a whole new era at the end of the Cold War. This is no longer the same situation. The rules have changed. In a sense, the threat plays with no rules at all. It is extremism, and it will kill its own to achieve its aims.

But in the same light, we are using old tools. We are using old diplomatic tools, old military tools, old economic, humanitarian tools of the Cold War era, and we are trying to adapt them to fit this era. And what we are discovering is they do not work. We are crisis managing, we are on-job training, we are doing lessons learned.

Let me give you a very short example. I spent 35 years in NATO, and we had a lexicon. In the military, we use action verbs, right? Attack, defend, withdraw, bypass, and so on. Everybody knew what they meant. The Russians knew what they meant. All of a sudden we enter this era, and my mandate is "to establish an atmosphere of security." What does "establish" mean? I mean, I did not invent it. It came from the political, diplomatic side. Establish? Does it mean I defend the country against a third party when I am demobilizing both armies? Does it mean I watch it? And what is an atmosphere of security? A police state? A sort of no-weapons area?

And so we are using terminologies, we are using tools that are outmoded, and what we need is a whole new conceptual base to conflict resolution. We need new ideas, new concepts to solve these problems. And what we are seeing throughout the structures is people adapting old stuff and finding it does not work.

Senator COBURN. Thank you, Mr. Chairman.

Chairman DURBIN. Senator Whitehouse, do you have any questions?

Senator WHITEHOUSE. Thank you, Mr. Chairman.

Let me come at my question another way. You posited a very cold-eyed calculation by the world: that the Darfurians have no political value to anyone, that they have no economic value to anyone, that they are expendable and, hence, there is no effort.

Even from a hard, cold-eyed calculation, is there not a calculation to be made that a country that can show leadership regularly in responding to these kinds of tragedies can gain from that an element of international standing, an element of international good will, an element of international moral authority that may not have immediate value in that particular area but, nevertheless, is an asset of the countries to deploy in all of its different foreign, military, and other international engagements?

Senator DALLAIRE. Sir, that is like apple pie. Of course it would. I think, however, the deficiency in that is that that same country should be demonstrating innovative approaches in how to do that and not use some of the old semi-imperial, dominant types of methodologies that were used in the past that simply will not meet the very complex, ambiguous scenarios in which we find ourselves today—in which, not to minimize it, religion is a major player.

And so we are into a whole different set of circumstances that need that same moral authority and demonstration of will, but that also needs a whole new set of tools to do it right. We cannot simply try to adapt the old methods of the past. You know, a new mantra.

And so as I indicated, the UN—you do not need another UN. You need a renaissance in the UN. And I think the major players have got to initiate that from within also.

Mr. CHEADLE. And I believe, if I can piggyback on that, on the question.

Senator WHITEHOUSE. Please.

Mr. CHEADLE. I believe sometimes in a way that role of leadership can be supportive, and that may be a place where we can play a real part in this, is that we support other players who have interests in that area. This is Muslim- against-Muslim violence that is happening in this country, and we should work with those who are moderate and those who wish to see that violence end in their own self-interest and be a supportive player in that way, not necessarily try to stand out in a leadership role as the great United States fixing your problem, but tell us where we can apply our help, where we can apply our technology, where we can apply our assets, where we can help with control and command and support it from that position.

And I do absolutely agree with you that it would go a long way in sort of resurrecting what we hope to be as a nation, a leader of morals and an example of that.

Senator WHITEHOUSE. Yes. Thank you, Mr. Chairman. I know that the Marshall Plan, for instance, did not put a lot of troops on the ground in Europe in order to accomplish its goals, but it certainly was a high point in American leadership. Thank you very much.

Chairman DURBIN. Thank you, Senator.

I want to thank the following individuals and organizations who did submit statements for the record, and I want to read this list because it is a very impressive list: Save Darfur Coalition, Geno-

cide Intervention Network, Armenian National Committee of America, Armenian Assembly of America, the Jewish Council for Public Affairs, Freedom House, Amnesty International, Human Rights Watch, Human Rights First, Admiral John Hutson, the Jewish Community Relations Council of Chicago, the Alliance for Justice, Open Society Institute, and the Center for American Progress.

The hearing record will be open for a week for anyone who wishes to submit additional materials. Written questions for the witnesses must also be submitted by the close of business 1 week from today if there are follow-up questions. And we will ask the witnesses to respond in a prompt way.

I thank everyone for the sacrifice you made to be here today for this inaugural hearing, and I will leave here remembering many things, but I will certainly remember the admonition and challenge of Mr. Cheadle: What will we do?

Thank you all very much. This Subcommittee is adjourned.

[Whereupon, at 4:58 p.m., the Subcommittee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Dear Senator Coburn,

I appreciate you following up and forgive me for the lateness of my response. I have been traveling lately and pursuing my *other* profession; acting. I will answer your questions in the order they were received.

(a) **Do you think that Hollywood would respond differently if the United States intervened militarily in Sudan?**

While I am clearly ensconced in the business of making movies I could no more say I speak for "Hollywood" than you would presume to speak for "Washington". There seems to be a prevailing opinion among those not in my business that all of us movie folk share a similar free spirited, leftist-leaning ideology - which is simply not the case. We are as varied and diverse in our thoughts about the best ways in which to address the challenges that face us as a nation and as individuals as are you and your colleagues, to be sure. That being said (written) I cannot be sure how Hollywood would respond to military intervention in Sudan save to say that the response would most certainly not be in lock step. However, of my peers who have knowledge of the myriad nuances that taking *any* action with regards to Darfur would give rise to, very few of them believe that yet another United States military intervention into an Arab led nation would be a good idea.

(b) **What is the difference?**

I am not an expert but from what I read in the papers and see on the news/internet, the differences between invading Iraq and overthrowing their government versus going into Sudan to stem this current tide of violence are multitudinous. As you stated in your letter, *some* of the reasons for removing Saddam Hussein were humanitarian. I believe it is precisely this inexact measurement of possible motives for waging pre-emptive war that have many - hardly just vocal actors – speaking out and finding fault with the current administrations actions. I have yet to hear anyone in fact endorse the idea of moving against the government of Sudan in a similar fashion even given the mounting humanitarian costs of inaction. Though Sudan has not been a major factor with regards to the "terror threat" against our country since their ousting of Osama Bin Laden in the 1980s, as President Ahmadinejad's recent visit should clearly demonstrate, Sudan's potential for posing such a threat should not be taken lightly. Any and all action to address this problem needs to have the support and advisement of numerous nations to find a durable solution. The last thing America needs is to come off as a semi-imperialistic country taking unilateral military action thinly veiled as humanitarian, to broaden its own agenda, which is exactly how it would be spun. We should more strenuously engage the United Nations (as similarly done when Secretary Rice needed to push through red tape regarding Lebanon) to expedite plans that the UN currently has on its books to address the crisis in Darfur. The UN's projected yearlong process could be seriously truncated if intense pressure is applied by one of its strongest members and we should look to be that member.

I believe the answer to your question 2(a) can be found within the body of both my response to question 1(b), as well as within the body of my original testimony before your committee. But to expand on questions (b) and (c) (**Is there any action that we could take that would be too strong for the American public to support, in your opinion? (c) And even so, do you think we should take such strong actions anyway?),** I believe that attacking an Arab led government at this time for *whatever* reason save for a direct threat to our nation would be the death knell for United States diplomacy, foreign policy and any support our leaders may hope to gain from the American public. There is much to be done in the way of mounting pressure against the GOS that doesn't involve us committing American troops on the ground in Darfur and that is what we should be focused on. President Paul Kagame of Rwanda has pledged his support in the way of three battalions of soldiers ready to go into the region to restore order. We should find ways to bolster this effort financially and logistically. Solutions like these are much more feasible and palatable in my opinion.

And as far as China is concerned, I do not believe that without a great amount of pressure from the US that we will see much movement from China with regards to solving the crisis in Darfur. The most recent report from the UN regarding the deteriorating conditions in Northern Darfur was in fact summarily rejected by both China and Russia as being "exaggerated". Though the Chinese were cordial to our delegation on our visit we were in no way laboring under the false expectation that two actors and two athletes were going to affect the relationship between two countries whose financial fates are at this moment inextricably tied through oil revenues. We all know that our government's interactions with China can be tenuous at best when the question of human rights arises with our countries own trade agendas looming over all dealings between us. I cannot presume to know what it would take for China to move away from its oil interests or its stance that things in Darfur are less than grave. I *do* believe however that we have yet to exhaust all options toward addressing the latter, least of which could be a consistent and public message from our leaders that where Darfur is concerned, the US has lead the way in support and raising awareness, and China has been woefully absent. As a regular citizen I am not privy to the intricacies of our top-level dealings with the government of China and quite honestly don't really *know* what our policy toward them is but I cannot imagine China being called to the carpet and shown as obstructionists by us to be an enviable position for them. Would it change anything? I do not know. But none of us can answer that question unless and until it is tried.

HEARING: "GENOCIDE AND THE LAW"

Follow-up Questions of Senator Tom Coburn, M.D.

1. In your book you wrote that "Canada and other peacekeeping nations have become accustomed to acting *if, and only if, international public opinion will support them*—a dangerous path that leads to a moral relativism in which a country risks losing sight of the difference between good and evil, *a concept that some players on the international stage view as outmoded.*" [emphasis added]

   Indeed, it is frustrating that it takes too long for the UN to act, and often when they do, as in the case of your mission in Rwanda, the troops on the ground are not allowed to adapt to changes in circumstances that can happen in an instant. In Sudan, the UN is waiting for the Sudanese government — the very government that is committing the atrocities — to consent to a UN mission. You acknowledged that international law is often inadequate in your written testimony's conclusion.

   Nonetheless, in your written testimony, after discussing NATO's Kosovo intervention in 1999, you wrote that you do not advocate "illegal, actions as a first course." You also expressed in your book, written testimony, and oral testimony that both (1) UN inaction and (2) state action without the participation of the UN undermines the UN's relevance in the world.

   This creates a major quandary.

   (a) If the United Nations Security Council and/or General Assembly refuse to grant approval, or delay approval, for a mission to stop genocide or other crimes against humanity, should a country act unilaterally to stop the carnage?

   (b) Why or why not?
   I'd like to preface this answer with the observation that, if middle powers had more capability to offer the Security Council, the P5 would be less reticent to act and the question would be moot.

   Only the major powers – and, really, only the United States – can actually contemplate unilateral action. This puts the United States in a difficult position, precisely because it *can* act alone. Its intentions will always be questioned, and in a case like Darfur, where religion and ethnicity (Arab Muslims) are clear factors, unilateral action by the US will do more harm than good. Therefore, the wish to help that is clearly present in US politics would best be expressed through greater financial and technical support for multilateral and collaborative activities, and diplomatic pressure for others to do the same.

   History has demonstrated that action is always best undertaken by a group of nations, rather than by a single nation acting unilaterally; not only is it more difficult to question the motivations of a group of nations, but by virtue of its multilateralism, the intervention will be much more effective on the ground. Even better, though, would the creation of an entity like the United Nations Emergency Peace Service (UNEPS), which has received

endorsement from such respected figures as Juan Mendez (former UN Special Adviser, Genocide Prevention) and Sadako Ogata (former High Commissioner for Refugees). As I understand it, a resolution addressing the need for UNEPS was introduced in the US House of Representatives in early March; I will be following its progress with great interest.

(c) What if a country, in the same predicament, wants to act to prevent genocide or other crimes against humanity? [Preventative missions may be harder to justify because they do not have the same evidence to back them as presently occurring atrocities].
"Prevention" itself is a difficult word to define. The question is, are we talking about preventing something before it even starts, or are we talking about preventing something from getting worse. Assuming that we are talking about acting preventively in the former sense, we would not likely need to be talking about a military mission. Genocide and massive human rights abuses have a number of warning signs, and when these signs being to appear, there are a number of political, diplomatic, and economic pressures that can be brought to bear on the government of a nation of concern. However, these must be credible threats and incentives – something which the international community has been rather short on.

Sometimes, the very fact that a government knows it is being watched can cause it to temper its actions; this is the role that is envisioned as being provided by the UN Special Adviser for the Prevention of Genocide. However, if we operationalized R2P, it could be the primary genocide prevention tool, rather than a tool that is used only after genocide has started. The public is less reluctant to see interventions when the security situation has not yet degenerated into open fighting, at which point there is more risk for our troops. The problem is that governments don't tend to think long term; they tend to think mandate to mandate. Most government leaders are well-versed in managing crises, but not in resolving or preventing them.

2. You have stated that for an increased budget of $100 million for UNAMIR, which would have covered such things as better intelligence and a strong peacekeeping force, the Rwanda genocide could have been prevented. You also discussed in your book how if the United States had supported UNAMIR 1 and 2, the cost would have been slightly over $60 mil1ion. Instead, the US paid $300 million to support the refugee camps in Goma, Zaire. So, effectively, instead of stopping the genocide, the U.S helped support refugee camps that were breeding grounds for more violence.

(a) While Sudan has a different history than Rwanda, do you think that anything short of a robust Chapter VII intervention is going to actually work?
In the long term, a political solution is necessary; in the present situation, however, a robust Chapter VII mission is necessary. While AMIS already has a (limited) Chapter VII mandate, but no capability to carry it out. The recent Sudanese government's recent consent for a heavy support package is promising, but it can also be withdrawn – and without the strong support of developed countries, it will not even materialize.

(b) Please describe in detail the type of mission you would recommend.

3. In the hearing I quoted the following passage from your book:

   Though I too can criticize the effectiveness of the UN, the only solution to unacceptable apathy and selective attention is a revitalized and reformed international institution charged with maintaining the world's peace and security, supported by the international community and guided by the founding principles of its Charter and the Universal Declaration of Human Rights. The UN must undergo a renaissance if it is to be involved in conflict resolution. This is not limited to the Secretariat, its administration and bureaucrats, but must encompass the member nations, who need to rethink their roles and recommit to a renewal of purpose. Otherwise the hope that we will ever truly enter an age of humanity will die as the UN continues to decline into irrelevance.

   I agree with this completely. I believe that every member of the UN bears the responsibility to protect victims of crimes against humanity in other nations, especially when the leaders in a country are the perpetrators of evil.

   I also believe that there would be greater support among Americans for UN missions if there were greater accountability at the UN. Currently, the UN refuses to publicly release audits, program reviews, and financial statements.

   Do you agree that greater transparency at the UN would create a better UN, and lead to more support for its missions?
   To begin, I must stress that the importance of the UN as a forum for all the world's nations to interact as equals cannot be underestimated, nor can its role in norm-setting over the last 60 years. My observation that the UN is declining into irrelevance is not intended to detract from its fundamental importance; it is its very importance that makes reform crucial.

   With respect to your question on transparency, I feel it is certainly part of the solution – but only a part. First, as long as nation states use the UN primarily to protect their political interests, no amount of transparency will improve the public's perception of it. Second, what is it that we mean by transparency? Certainly, it can refer to greater public access to audits and financial statements, but what about the political side - the transparency problems posed by the exclusive tendencies of regional groupings? The Secretariat is held back too much from the Security Council and the General Assembly; the upper leadership of the Secretariat – as respected and independent individuals of high moral standing – should be allowed greater involvement in these discussions.

4. **Based on the information that is coming out about the United States' "Plan B" for Darfur, please provide any initial opinions you have of the plan and its chance for stopping the genocide.**
   There is little information about "Plan B," so I am not in a position to offer specific comments. However, I have often stated that the very act of contingency planning for deployment – if this is what "Plan B" would entail – could go a long way in influencing the Government of Sudan's decision-making. Involving other powers, such as the French, the Arab League and the Chinese in such planning would strengthen its credibility, as threats of unilateral action are not likely to be well received by any nation. That being said, it is unfortunate that the

January deadline that was set for "Plan B" passed so quietly. The international community's credibility is constantly undermined by toothless threats and empty promises.

5. It is becoming clear that Jintao Hu has no intention of tying economic support for Sudan to human rights improvements.

   (a) **Do you think that other world powers, such as the United States, Great Britain, and Canada, should place pressure on Hu to better use his influence in Sudan?**
   Absolutely. Since this hearing was held, China appears to have moderated its non-interventionist stance slightly and has brought its influence to bear on Sudan, to positive effect.

   (b) **If so, what form do you believe such pressure should take?**
   A French politician recently proposed that France should boycott the Olympics if China continues to protect the Sudanese government, which is a proposal that bears further attention. The Olympics are a powerful symbol of world peace, with the five interlocking rings representing the unity of the world's continents. Thousands of our fellow human beings are being slaughtered. If we can do nothing more than stand by doing absolutely nothing about it, if we cannot muster up the courage to stand together against those who would massively abuse human rights, the very spirit of the Olympics is tainted, no matter where they are held.

Questions for Sen. Romeo A. Dallaire from Sen. Cornyn:

According to several recent news reports, the Darfur conflict is no longer limited to that war-ravaged region within the Sudan. For example, the refugees who fled into camps in eastern Chad and into the Central African Republic may have been followed outside Sudanese territorial boundaries by the genocidal Janjaweed militias.

a. **Can you confirm these reports of Janjaweed militias operating outside of Sudan and terrorizing refugees from Darfur?**
   My sources are the same as yours: the news media, contacts in the field in Darfur, and the United Nations. However, it is widely accepted that Janjaweed militias cross the border all the time as members of nomadic tribes. Chad revolutionaries are doing the same thing, only crossing in the other direction.

b. **Does evidence exist that members of the Sudanese armed forces have themselves crossed over into Chad or the Central African Republic for purposes of terrorizing refugees?**
   Incontrovertible proof is difficult to come by in areas like Darfur, but it is widely accepted that the Sudanese army and gendarmerie are recruiting Janjaweed into the forces and are killing Darfurians outright.

c. **If these Janjaweed militias are, in fact, entering Chad or the Central African Republic to terrorize the refugee camps in that nation, do we know if they were carrying out orders given by the Sudanese government? Please explain.**

The Janjaweed were previously free-lance militias, but it would appear that many are now being integrated into the Sudanese army.

d. **Finally, if the Janjaweed militias have, in fact, entered Chad or the Central African Republic under orders from—or with the support of—the Sudanese government, what additional authorities, if any, are provided under international law to compel action against those committing this genocide? Please explain.**
I am not an international law expert and, as such, as detailed answer to this question would probably best be provided by someone like Dr. Orentlicher, who also testified in February. That being said, I can offer an interpretation based on the law contained in UN Charter: if Janjaweed militias have entered Chad or the Central African Republic under orders from, or with the support of, the Sudanese government, and have attacked people residing their, this could be deemed to be an armed attack and would give rise to the right of self-defence by Chad and the Central African Republic. However, no other nation can come to their aid without a specific request by the states under attack.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 18, 2007

The Honorable Richard J. Durbin
Chairman
Subcommittee on Human Rights and the Law
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find enclosed responses to questions arising from the appearance of Deputy Assistant Attorney General Sigal Mandelker before the Subcommittee on February 5, 2007, concerning genocide and the rule of law. We hope that information is of assistance to the Committee. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Richard A. Hertling
Principal Deputy Assistant Attorney General

Enclosures

cc: The Honorable Tom Coburn
Ranking Minority Member

Subcommittee on Human Rights and the Law
Committee on the Judiciary
United States Senate

Hearing on
"Genocide and the Rule of Law"

February 5, 2007

Questions Submitted by
Senator Richard J. Durbin
Chairman

Sigal Mandelker, Deputy Assistant Attorney General, Criminal Division, Department of Justice

1. **In your written testimony, you stated, "our nation has taken a leading role in establishing and supporting such notable institutions as the Nuremberg and Tokyo Tribunals after World War II and, more recently, the International Criminal Tribunals for Rwanda and the former Yugoslavia, the Special Court for Sierra Leone, and the Iraqi High Tribunal."**

   Please provide a detailed description of efforts by the Department of Justice and other federal agencies to assist the International Criminal Tribunal for Rwanda.

The United States government was instrumental in the establishment of the International Criminal Tribunal for Rwanda (ICTR) in 1994 and has been a leading supporter of the Tribunal since then. In fact, I understand from the State Department that the United States remains the single largest contributor to the ICTR budget, and our assessed contributions typically cover roughly one quarter of the Tribunal's budget. In 2006 alone, the United States provided over $32 million for the ICTR. The United States supports the ICTR politically and diplomatically, including by pressing other States to cooperate with the Tribunal through apprehension and transfer of indictees.

The Departments of Justice (DOJ), State (DOS), and Homeland Security (DHS), Immigration and Customs Enforcement (ICE), provide assistance, within their respective purviews, to the ICTR, in the context of specific criminal investigations and prosecutions by locating and extraditing fugitives, sharing information, locating and providing witnesses, arranging witness interviews and providing other assistance needed to investigate and prosecute those indicted by the ICTR with crimes within the ICTR's jurisdiction.

The DOJ Criminal Division's Office of International Affairs (OIA) takes the lead in DOJ on providing legal assistance and on international extraditions and certain other legal assistance. Through OIA, DOJ has also provided the ICTR with investigative support and other assistance in response to requests made by the Tribunal over the course of its existence. Additionally,

experienced prosecutors from DOJ have worked at the ICTR, with DOJ encouragement, under approved leaves of absences.

In March 2000, the United States extradited Elizaphan Ntakirutimana to the ICTR in response to that Tribunal's request. Ntakirutimana was charged with genocide, complicity in genocide, and crimes against humanity (including murder, extermination and inhumane acts) for his role in the 1994 Rwandan genocide. He was living in Laredo, Texas, at the time that the ICTR requested his surrender. Ntakirutimana fought to remain in the United States. The Department engaged in a protracted four-year legal battle, resulting in a decision by the Fifth Circuit Court of Appeals that allowed the U.S. government to surrender Ntakirutimana to the custody of the ICTR. Ntakirutimana's extradition was effectuated pursuant to United States legislation and an agreement between the United States and the ICTR for the surrender of persons responsible for genocide and other crimes falling under the purview of the ICTR. In 2003, Ntakirutimana was convicted by the ICTR of aiding and abetting genocide, and he was sentenced to ten years' imprisonment.

Regarding the second part of the question on efforts of other federal agencies, as we have previously advised Committee staff, we sought and included input from other agencies but we respectfully recommend that the Subcommittee contact the Department of State and other relevant agencies, should it require additional information.

2. **Please provide a detailed description of efforts by the Department of Justice and other federal agencies to assist the International Criminal Tribunal for the former Yugoslavia.**

The U.S. government was also instrumental in the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 and has supported the Tribunal since its inception. I understand from the State Department that the United States is the single largest contributor to the tribunal's budget, and our assessed contributions typically cover a quarter of the Tribunal's budget. In 2006 alone, the United States provided more than $36 million for the ICTY. The U.S. government supports the ICTY politically and diplomatically as well, consistently pressing States in which suspects are believed to be hiding to cooperate with the Tribunal through apprehension and transfer of fugitive indictees.

The Departments of Justice, State, and Homeland Security, Immigration and Customs Enforcement, within their respective purviews, have provided investigative support and other legal assistance to the ICTY in the context of specific criminal investigations and prosecutions by locating witnesses, sharing information and obtaining evidence, arranging witness interviews, providing forensic analysis, and providing other assistance needed in the investigation and prosecution of crimes within the ICTY's jurisdiction. The U.S Government has also made a number of current and former federal officials available to testify before the ICTY, on behalf of both the Office of the Prosecutor (OTP) and defense teams. Additionally, a number of experienced prosecutors and law enforcement personnel from DOJ have worked at the ICTY, including under details and approved leaves of absences.

Further, with foreign assistance funds from the Department of State, as part of assisting other countries in carrying out their own prosecutions, the Criminal Division's Overseas Prosecutorial Development, Assistance and Training section (OPDAT) and the International Criminal Investigative Training Assistance Program (ICITAP) have the lead for DOJ in providing institutional and capacity support to those countries for war crimes prosecutions as well as for criminal justice sector reform and development, primarily to Serbia and Bosnia & Herzegovina, and to a lesser extent to Croatia, Montenegro, Macedonia and Kosovo. Such assistance has facilitated the transfer of several war crimes cases from the ICTY to the domestic judiciaries in Croatia, Bosnia & Herzegovina and Serbia.

In the context of supporting domestic war crimes trials throughout the Balkans, DOJ has, *inter alia,* assisted in drafting war crimes legislation in Serbia (including provisions for victim-witness support); trained members of the Croatian judiciary who are tasked with investigating war crimes; monitored war crimes trials in Bosnia & Herzegovina; provided advice and guidance to enhance cooperation between the United Nations Mission in Kosovo (UNMIK) and war crimes prosecutors elsewhere in the region; and provided equipment that facilitated international cooperation in war crimes cases. For example, DOJ has sponsored domestic war crimes training seminars in Macedonia and elsewhere, organized and funded study tours to the ICTY at The Hague for prosecutors and judges from Serbia and Bosnia & Herzegovina, and provided equipment for the War Crimes Chamber of the Belgrade District Court. Prosecutors and other personnel of the National Security Division's Counterterrorism Section, the U.S. Attorney's Office for the District of Columbia, and the Criminal Division's Office of Special Investigations have participated in the war crimes training programs for prosecutors and investigative authorities in Croatia.

Working primarily through OPDAT, DOJ has also encouraged cooperation between countries in the region in war crimes cases. For example, the Department facilitated the first-ever meeting between war crimes prosecutors from Serbia and Bosnia & Herzegovina. In addition, OPDAT has provided advice in the negotiation and implementation of the first agreement between countries in the region to cooperate in war crimes cases. The agreement provides a framework for cooperation while respecting each country's right to maintain jurisdiction. OPDAT also co-sponsored a regional war crimes conference in Montenegro in October 2006, which for the first time included judges and prosecutors from all relevant countries and jurisdictions in the region.

Regarding the second part of the question on efforts of other federal agencies, as we have previously advised Committee staff, we sought and included input from other agencies, but we respectfully recommend that the Subcommittee contact the Department of State and other relevant agencies, should it require additional information.

3. **Please provide a detailed description of efforts by the Department of Justice and other federal agencies to assist the Special Court for Sierra Leone.**

The U.S. government played a pivotal role in the establishment of the Special Court for Sierra Leone (SC-SL) in 2002. I understand from the State Department that the United States remains the single largest contributor to the Special Court, having provided $35 million in

voluntary contributions to date. This sum represents roughly one-third of the Special Court's total funding. Additionally, the United States has been a key political supporter of the SC-SL, notably in pressing for the arrest and transfer of former Liberian president and SC-SL indictee Charles Taylor to the Special Court. This support included efforts to persuade the government of Nigeria – in which Taylor had been granted exile – to facilitate his transfer. We understand from the State Department that the United States also played a leading role in securing passage of a United Nations Security Council resolution allowing UN peacekeepers in Liberia to apprehend Taylor and transfer him to the custody of the SC-SL should he be found in Liberia. He is currently in SC-SL custody in The Hague, where his trial is scheduled to begin in June.

While the bulk of U.S. government efforts in bolstering the work of the SC-SL has been focused on the political, financial, and diplomatic fronts, the Departments of Justice, State and Homeland Security, through ICE, within their respective purviews, have also provided the Special Court with investigative support.

Regarding the second part of the question on efforts of other federal agencies, as we have previously advised Committee staff, we sought and included input from other agencies, but we respectfully recommend that the Subcommittee contact the Department of State and other relevant agencies, should it require additional information.

4. **Please provide a detailed description of efforts by the Department of Justice and other federal agencies to assist the Iraqi High Tribunal.**

In May 2004, pursuant to National Security Presidential Directive (NSPD)-37, President Bush established the Regime Crimes Liaison Office (RCLO) to assist the Government of Iraq to investigate crimes by Saddam Hussein and key members of his regime, and to help establish the Iraq High Tribunal (IHT) (formerly the Iraqi Special Tribunal) to prosecute those crimes.

As an initial matter, it is worth noting that while the United States provides critical assistance to the IHT, is an Iraqi-managed process. The IHT, created in December 2003, is a domestic court of limited jurisdiction to investigate and prosecute members of the former regime for war crimes, genocide, crimes against humanity, and certain other Iraqi crimes. The IHT generally follows Iraqi civil law procedures. It includes an Investigative Chamber of 24 judges, three Trial Chambers each of which has five judges, and an Appellate Chamber of nine judges.

The RCLO works closely with the Department of State to recruit international assistance to the IHT. The United Kingdom (training and international judicial advisor), Australia (training in court administration and public affairs), and Kuwait (investigative assistance) have all provided significant aid.

The United States has provided significant financial and technical support to the IHT through the establishment of the RCLO. To date, the United States has allocated over $160 million to support the IHT through the RCLO. RCLO personnel number close to 100 full-time personnel, including six Assistant United States Attorneys (AUSAs), Department of Defense (DOD) judge advocates and other military personnel, an agent from the Drug Enforcement Administration (DEA), Deputies with the United States Marshal Service (USMS), administrative

personnel, and contractors, under the leadership of the Regime Crimes Liaison, a DOJ employee. The RCLO also employs several dozen Iraqis in the Secure Evidence Unit in Baghdad and linguists who work as translators. At various times, the RCLO has also employed as many as 20 personnel from DOD's Army Corps of Engineers and specialized contractors in the field. These included anthropologists, archaeologists, pathologists, and other forensic scientists who worked on the exhumations of mass graves and the preservation of evidence. The RCLO's forensic analysis functions have concluded and personnel levels are gradually being reduced, as the IHT gains experience.

The RCLO's major accomplishments include assisting in the establishment of the IHT, the drafting of its Rules of Evidence and Procedure; providing comprehensive international training of its judges and lawyers; supporting the IHT's first trial (al-Dujayl), which resulted in convictions and, in some cases, death sentences for Saddam Hussein and members of his regime; assisting in investigations of other major cases, including exhumations of mass graves in al-Hatra, Northern Iraq, and Muthanna in the south; establishing a Secure Evidence Unit in Baghdad and an online database of millions of documents in Arabic and English; supplying technical assistance in support of the completion of the renovated IHT Courthouse in the International Zone in Baghdad, including a fully wired courtroom, staff facilities, and holding cells; and supporting security and force protection planning and implementation, including creation of a Safe House for witnesses and court officials. While the United States is providing critical assistance to the IHT, this is an Iraqi court with Iraqi judges.

The IHT has commenced its second trial, known as the Anfal case. This case relates to a campaign in the late 1980s that resulted in the killing and displacement of over 100,000 Kurds in northern Iraq. Saddam Hussein was among the defendants charged in Anfal. Ali Hasan Al-Majid, better known to the public as "Chemical Ali," is also charged in this case, along with five other former regime members. The RCLO is presently assisting in the Anfal trial by arranging security for witnesses and trial participants. The actual trial is anticipated to conclude later this year.

The RCLO continues to assist in other ongoing investigations being conducted by the IHT, including the 1991 uprising campaign; the 1990-91 invasion and occupation of Kuwait; the former regime's systematic perversion of the Iraqi judicial system; and the draining of Iraq's southern marshes. The RCLO has also continued to assist the IHT in the investigation of a number of other cases, including chemical weapons attacks on Halabja, the 1983 Barzani case involving the execution of approximately 8,000 men and boys; the 1980's expulsion and mistreatment of Faylee Kurds; and the Wasting National Wealth case involving the Oil-for-Food Investigation.

Regarding the second part of the question on efforts of other federal agencies, as we have previously advised Committee staff, we sought and included input from other agencies, but we respectfully recommend that the Subcommittee contact the Department of State and other relevant agencies, should it require additional information.

5. **Please provide a detailed description of efforts by the Department of Justice and other federal agencies to assist the International Criminal Court's Darfur investigation.**

The ICC Prosecutor has not requested any assistance from the Department of Justice or from the U.S. Government in connection with the investigation. Of course, any response to a request for assistance to the ICC would need to be consistent with U.S. law, including the American Service Members' Protection Act.

6. **In your written testimony, you stated:**

> **In 2004, the U.S. State Department commissioned an Atrocities Documentation Team which on only a few weeks notice assembled a team of experienced law enforcement investigators and legal experts, including Department of Justice personnel. The team interviewed over 1,100 Darfurian refugees who had taken shelter in refugee camps in neighboring Chad. Based on the information elicited in those interviews, then-Secretary of State Powell was able to conclude and state publicly that genocide was occurring in Darfur.**

Has the federal government shared any information you gathered regarding atrocities in Darfur with ICC investigators?

As noted above, the ICC Prosecutor has not requested any assistance from the Department of Justice in connection with the investigation, nor to my knowledge has the ICC Prosecutor requested any such assistance from other federal agencies. The report issued by the Department of State's Atrocities Documentation Team, entitled "Documenting Atrocities in Darfur," is posted on the Department of State's website and is publicly available.

February 27, 2007

Senator Richard J. Durbin
Chairman, Subcommittee on Human Rights and the Law
Senate Judiciary Committee
309 Hart Senate Office Building
Washington, DC 20510

Dear Senator Durbin:

I am writing to provide responses to the follow-up questions submitted by Senators Tom Coburn, M.D., Ranking Member, and John Cornyn, respectively. I welcome the opportunity to do so, within the areas in which I believe that my expertise can be helpful.[1]

Responses to questions submitted by Senator Coburn, Ranking Member

Question 1(a): The principal situation in which it is desirable for U.S. courts to be able to exercise jurisdiction over non-U.S. nationals who are suspected of criminal responsibility for genocide is when such an individual is found in the United States. In such a situation the United States would in effect contribute to the suspected perpetrator's impunity if we deported him without acting to ensure that he is prosecuted elsewhere. Exercising universal jurisdiction would be a final recourse only if it became clear that no other country or international court was in a better position to ensure prosecution.

In truly exceptional circumstances, however, it may be in the United States' interests to seek the extradition of a suspected perpetrator of genocide. An opportunity that the United States government sought to act upon exemplifies this situation—and also indicates how extraordinary such an occasion would be. Ten years ago the notorious Khmer Rouge leader Pol Pot unexpectedly became available for trial outside of Cambodia, and the U.S. government was keenly interested in ensuring his prosecution. But U.S. law did not provide a basis for trying Pol Pot and the United States was unable to persuade any other country to seek his extradition, even for purposes of securing custody of Pol Pot pending the establishment of an international court to which he could be transferred. At least one country approached by the United States, Canada, declined the U.S. government's request in part because its law on universal jurisdiction did not enable Canada to seek a suspect's extradition; Canada could only institute proceedings against suspects who were already in its territory.[2] The window of opportunity soon

[1] I have not followed the situations at issue in Senator Coburn's Question 4 or Senator Cornyn's Question 3 sufficiently closely to provide a considered opinion to those questions.
[2] See Anthony DePalma, "Canadians Surprised by Proposal to Extradite Pol Pot," New York Times, June 24, 1997. In addition, Canada did not have an extradition treaty with Cambodia. See id.

closed, and Pol Pot's death one year later forever deprived Cambodians of the justice of seeing him face trial.

Questions 1(b) and (c): If the Genocide Convention Implementation Act were amended to allow U.S. courts to exercise universal jurisdiction over individuals who participate in genocide, it would not give rise to the type of wide-ranging investigations that occurred under Belgium's previous law. Under Belgium's criminal procedure, private parties can initiate criminal prosecutions in a way that is not possible in the United States. Under the controversial Belgian law that has since been repealed, private parties who did not have substantial links with Belgium could institute criminal proceedings against persons in virtually any country. Thus the key preconditions that led to Belgium becoming, for a time, the world capital of universal jurisdiction simply do not exist here.

Nor have we seen any evidence of politicized prosecutions under U.S. legislation establishing universal jurisdiction over torture. Indeed, although the Torture Convention Implementation law entered into force in November 1994, the United States did not bring an indictment under that law until December 2006, when U.S. authorities indicted Roy Belfast (also known as Chuckie Taylor). So far, Belfast is the only individual indicted under the U.S. torture law. The record suggests that non-enforcement has been a far greater issue than overzealous or politically-motivated prosecutions. It is, moreover, infinitely more challenging to mount a prosecution for genocide than for torture. Finally, I am aware of no evidence indicating that the Torture Convention Implementation law has spurred prosecutors or civil complainants to pursue criminal investigations of U.S. nationals abroad or even to enact laws establishing universal jurisdiction over torture.

Question 2: It is always best for human rights violations that constitute crimes to be prosecuted in the country that bears principal responsibility for the violations. The challenge we confront is that countries in which atrocities occur on a massive scale typically face formidable obstacles in providing justice, even if their governments are politically willing to meet their responsibility to do so. Often the circumstances that give rise to atrocious crimes also take an enduring toll on national courts, and rebuilding their capacity is the work of a generation.

In these circumstances, one of the more important contributions the United States can make is, indeed, assisting a country like Rwanda to rebuild its judicial system. The United States has made impressive contributions of this kind in Serbia, which has begun to prosecute war crimes committed during the 1990s in a way that had not been possible until recently, as well as in several other countries that were formerly Yugoslav republics. Unfortunately, the Rwandan legal system has not yet shown similar progress. Just last month Human Rights Watch issued a report concerning reprisal murders of genocide survivors and others involved in Rwanda's gacaca process, a traditional form of dispute resolution adopted to ease the burden on Rwanda's judiciary. This sobering pattern reflects enduring risks associated with genocide trials in Rwanda. Finally, given the staggering number of genocide cases pending in Rwandan courts, we do not face even a theoretical prospect of taking this function away from Rwanda.

Turning from Rwanda to other contexts, recent experience has shown that the credible prospect of prosecuting atrocious crimes abroad, far from taking responsibility away from countries where the crimes occurred, has instead often spurred those countries to undertake prosecutions that they would not otherwise have mounted. In these situations, the possibility of third-country prosecutions has widened the space for democratic progress in countries where atrocities occurred.

Question 3(a)-(c): First, I would like to clarify that I do not believe that the Genocide Convention requires States parties to call upon the United Nations to act in all circumstances in which the treaty may be relevant. Rather, it requires States to prevent and punish genocide, and the former requirement may at times entail collective action through appropriate U.N. organs. At other times or alongside collective action through the United Nations, States can undertake preventive action by, for example, bringing effective diplomatic pressure to bear on a country that is at risk of genocide or enacting divestment laws targeting the country responsible for ethnic violence that may lead to genocide.[3]

The gist of States' obligation to prevent genocide as it applies to other countries is that they must take effective action to prevent genocide from occurring or from continuing.[4] What measures constitute effective action depends upon the particular circumstances of each potential or actual genocide. Effective measures to prevent or halt genocide may include exerting diplomatic pressure; imposing economic sanctions; providing humanitarian assistance with the host State's consent; and intervening militarily without such consent. It is only the last type of action that raises the question of whether Security Council approval is a necessary precondition to lawful intervention.

In my opinion the drafters of the Genocide Convention did not intend to amend the UN Charter, which outlaws the use of force except in self-defense and when authorized by the UN Security Council. When military force is necessary to stop genocide, the Security Council would, in my opinion, fail to meet its responsibilities under the UN Charter if it failed to provide the requisite authorization. In this kind of situation, I believe that a State would be justified in intervening to stop genocide without Security Council

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[3] This approach was affirmed in a judgment of the International Court of Justice (ICJ) published yesterday. The Court stated that the duty to prevent genocide "has its own scope, which extends beyond the particular case envisaged in Article VIII [of the Genocide Convention], namely reference to the competent organs of the United Nations, for them to take such action as they deem appropriate. Even if and when these organs have been called upon, this does not mean that the States parties to the Convention are relieved of the obligation to take such action as they can to prevent genocide from occurring, while respecting the United Nations Charter and any decisions that may have been taken by its competent organs." Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment (Merits), ¶ 427 (Feb. 26, 2007).

[4] In the judgment that it issued yesterday, the ICJ found that "a State may be found to have violated its obligation to prevent [genocide] even though it had no certainty, at the time when it should have acted, but failed to do so, that genocide was about to be committed or was under way; for it to incur responsibility on this basis it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed." Id., ¶ 432. While a State is not required to succeed in its efforts to prevent genocide, parties to the Genocide Convention must "employ all means reasonably available to them, so as to prevent genocide so far as possible." Id., ¶ 430.

authorization provided it made a serious effort to secure such authorization and it is clear that timely approval cannot be secured. People should not be condemned to die because the UN Security Council has failed to shoulder its solemn responsibilities.

But a decision to bypass the Security Council should not be taken lightly, for it carries heavy costs even when, as in the 1999 NATO intervention in Kosovo, it may be justified. In general, the discipline of having to persuade the Security Council to approve an intervention helps ensure that States do not use force in ways that present a real threat to international peace and/or regional stability and that encourage lawless force by other States. The risks associated with unilateral action can be reduced if intervention is approved through a multilateral institution such as NATO and the goals of the intervention are clearly confined to appropriate humanitarian objectives. This assures that the intervention is undertaken for disinterested and appropriate reasons and confers some measure of legitimacy on the action. The latter may be crucial to an intervening State's ability to enlist partners in the intervention itself and in the follow-on operations that a military intervention usually requires.

Responses to Questions Submitted by Senator Cornyn

Question 1(a)-(b): I agree with Human Rights Watch's conclusion that the Anfal campaign constituted a genocide. The organization's meticulously documented analysis demonstrated both that acts of genocide were perpetrated against Iraqi Kurds and that these acts—in particular, mass murders of Iraqi Kurds—were undertaken with the intent to destroy a substantial part of Iraq's Kurdish minority, which constitute an "ethnic group".

Question 1(c): Both the Anfal campaign and the crimes now being committed in Darfur entail atrocities so grave as to amount to international crimes. With the Darfur carnage still in high gear, the international community has a duty not merely to punish the perpetrators—as it has appropriately acted to do in referring the Darfur situation to the International Criminal Court (ICC)—but also to take far more urgent and effective action to halt the violence than it has taken. In addition to other measures aimed at ending the carnage, the international community must ensure that suspects indicted today by the ICC Prosecutor are apprehended without delay.

Question 2(a): The Genocide Convention imposes two interrelated but distinct obligations: to prevent and to punish genocide.

The Genocide Convention places primary responsibility on every State party to ensure that genocide does not occur in its own territory by, for example, outlawing this crime and ensuring that it is punishable by appropriate penalties. If genocide occurs, the State in whose territory this crime took place likewise has primary responsibility to ensure that the perpetrators are punished.

But the convention recognizes that the duty to prevent and punish genocide transcends national borders. Drafted in the wake of Hitler's campaign of extermination, the

convention reflects the drafters' acute awareness that the duty to prevent genocide would be meaningless if it were left to each State to enforce that obligation solely within its own borders. Thus the treaty recognizes that collective action may sometimes be required to prevent or repress genocide but does not specify a particular course of action that must be taken whenever the treaty's obligations are triggered (Article VIII). While this approach is appropriate in the sense that what is needed to prevent genocide depends upon the particular facts of a situation, the treaty's failure to specify particular measures to stop genocide once it is under way is not intended to provide an alibi for inaction.

Turning to the duty to punish genocide, I believe that the range of obligations that a State has under international law can be summarized as a duty to ensure punishment of those who are suspected of criminal responsibility for genocide, whether as a direct perpetrator or through well-established forms of criminal participation. The Genocide Convention imposes specific duties in this regard on the State where genocide occurs and on States that have accepted the jurisdiction of an international court with jurisdiction over genocide but does not exclude the exercise of jurisdiction over genocide suspects under other lawful grounds of jurisdiction.[5] Ensuring prosecution may mean prosecuting the perpetrator in a State's own courts; extraditing him to another State with appropriate jurisdiction; transferring him to an international criminal court with appropriate jurisdiction; or providing assistance to such a court by, for example, arresting indicted suspects and transferring them to the court or providing evidence to the prosecutor. Merely deporting a suspected perpetrator of genocide does not, in my opinion, satisfy a State's duty to ensure prosecution.

Question 2(b): If the Holocaust taught us anything, it is that each of us has an unshakable responsibility to act when humanity is threatened with deliberate extinction. Although this duty is truly universal, in my view a State's responsibility is commensurate with its power to act effectively.[6] This places a special burden of moral conscience on the United States. Time and again we have seen that the United States must provide the needed leadership to ensure an effective response—to make sure that "Never Again" does not in practice mean "again and again."

Thank you for the opportunity to respond to the follow-up questions submitted by Senators Coburn and Cornyn.

Sincerely yours,

Diane F. Orentlicher
Professor of Law

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[5] See id., ¶ 442.

[6] In the judgment that it issued yesterday, the ICJ observed that one factor determining whether a State party to the Genocide Convention has met its duty of prevention "is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide"—a factor that "varies greatly from one State to another." Id., ¶ 430.

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February 2, 2007

PRESIDENT
NAN ARON
CHAIR
JAMES D. WEILL

The Honorable Richard J. Durbin
Chairman
Subcommittee on Human Rights and the Law
United States Senate
Washington, D.C. 20510

Dear Chairman Durbin,

Alliance for Justice congratulates you on your chairmanship of the new Subcommittee on Human Rights and the Law, and your leadership in creating this important new forum. We are very pleased that the Senate has decided to turn its attention to the fundamental moral issue of human rights around the world.

Your subcommittee's work could not come at a more important time as regimes on nearly every continent fail to respect the most basic human rights. More than sixty years after the horrors of the Holocaust, the threat of genocide, forced relocation, and torture still haunt hundreds of millions around the world.

What you do is important here at home as well. This nation has lost its way as a beacon of justice in the years since 9/11. Facing external threats, we have sacrificed some of our values, and rather than strengthening us, our nation is less secure.

The military commissions legislation enacted last year allowed trials using secret evidence based on hearsay and gained through coercive interrogations. The ancient right of habeas corpus, which ensured prisoners a fair hearing in which to plead their innocence before a judge, was suspended for those designated "enemy combatants" in the war on terror.

The United States today continues to operate secret prisons and transfer prisoners to countries where they are tortured. Most Americans find these practices offensive to their values and frightening. They have been extremely counter-productive, diminishing our credibility and respect in the world and endangering thousands of Americans who live, work and travel overseas.

Today, you begin to shine a light on some of the most important moral issues of our time. Your subcommittee has an historic opportunity to start the process of changing course here in the United States and around the world. Since 1979, Alliance for Justice has been a national organization working to advance the

cause of justice and strengthen advocacy in the public interest. We stand with you in this effort, and extend an offer of assistance.

Thank you for your leadership. What you begin today will impact the lives of people around the world for many years to come.

Sincerely,

Nan Aron
President

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John D. Podesta
President & CEO

February 5, 2007

Senator Richard J. Durbin
Chairman
Subcommittee on Human Rights and the Law
Senate Judiciary Committee
Washington, D.C. 20010

Dear Senator Durbin:

On behalf of the Center for American Progress Action Fund, we thank you and Chairman Leahy for your leadership in establishing the Senate Judiciary Subcommittee on Human Rights and the Law, and we congratulate you on the occasion of its inaugural hearing.

In the wake of the atrocities of the Second World War, America played a leading role in creating an international legal framework for the protection of human rights. For half a century, the standards that emerged from that experience were reaffirmed by successive U.S. administrations, regardless of political party.

This abruptly changed with the advent of the present administration. Over the past six years, its policies have seriously undermined those standards, to the detriment of every nation, including our own.

The 110th Congress has a historic opportunity to begin to reverse the damage, and today's important hearing on "Genocide and the Rule of Law" is an important beginning.

We look forward to working with you to help restore respect for international human rights standards by advancing their enforcement and implementation under U.S. law.

Sincerely,

John D. Podesta
President and CEO

Mark D. Agrast
Senior Fellow

Statement of Amnesty International
Inaugural Hearing of the Newly Formed Human Rights Subcommittee
Of the Senate Judiciary Committee
February 5, 2007

Amnesty International welcomes the establishment of the new Human Rights Subcommittee of the Senate Judiciary Committee. This new committee recognizes the critical importance of international law and human rights in this increasingly interconnected world. This committee, under the guidance of Senators Durbin and Coburn, will be able to look into the nexus between U.S. and international law as it applies to situations of mass human rights violations in the U.S. and around the world.

Amnesty International is pleased that the committee will start by looking at the law of genocide. The situation in Darfur is one of the most pressing human rights crises facing the global community today. With 200-300 thousand dead, villages burned and over 2.5 million displaced, solutions to the crisis are urgently needed. By looking into the laws and past examples of genocide, this hearing will allow the committee to consider genuine solutions. A proactive approach to this crisis in progress is necessary to prevent the familiar refrain of "never again" that often accompanies any discussion of genocide in Rwanda from being applied to Darfur. Amnesty International urges the committee to actively use lessons of the past to take strong measures to curtail the ongoing devastation in Darfur.

Amnesty International looks forward to further hearings on issues such as torture, extraordinary renditions and secret prisons. Over the past six years, the United States has chosen questionable ways to fight terrorism that have led to multiple human rights abuses and international rebuke of "war on terror" policies. Proper investigation and oversight of U.S. obligations under U.S. and international law will help to ensure that as the United States moves forward in developing counterterrorism measures, its policies will adhere to its human rights commitments and uphold the rule of law.

Historically, the United States has played an integral role in creating many of the human rights mechanisms that laid the foundation for modern day human rights norms and laws. Yet, the past few years have seen the United States become one of the leading forces in undermining the treaties it helped create. Amnesty International hopes that the establishment of this new committee be a step in restoring the United States' historic role as a leader on human rights, signaling a renewed commitment to strengthening the international human rights framework and recognizing the importance of international law.

The Armenian Assembly of America
Testimony Regarding
Genocide and The Rule of Law

Submitted by Bryan Ardouny, Executive Director

Human Rights and the Law Subcommittee of the
Senate Judiciary Committee

February 5, 2007

Mr. Chairman, Ranking Member Coburn and members of the Subcommittee, the Armenian Assembly of America is pleased to offer testimony at today's hearing on "Genocide and the Rule of Law."

The Armenian Assembly of America applauds the creation of the first-ever Subcommittee on Human Rights and the Law and commends Chairman Durbin for making this hearing on "Genocide and the Rule of Law" a priority. It is a testament to the importance that the United States places on the respect for fundamental human rights. The work of the Subcommittee in examining past crimes against humanity to draw lessons learned to prevent future atrocities is further testament to this principle. It is clear that the existing international legal framework as well as the U.S. record on genocide prevention is insufficient. We hope this Subcommittee actively generates and introduces new mechanisms to better protect potential victims from future genocides and to improve the U.S. record on genocide prevention. The Armenian Assembly and the entire Armenian-American community stand ready to help in these efforts.

As we reflect on the continuing problem of genocide, certainly the 20th century stands out as one marred by mass killings on a scale never before seen in history. From the Armenian Genocide at the turn of the century, which the world easily forgot but for Adolf Hitler, who infamously invoked it by saying: "Who, after all, speaks today of the annihilation of the Armenians?" as he unleashed the horrors of World War II and the Holocaust – to the crimes of the Khmer Rouge in Cambodia, the atrocities in Rwanda, and now in the 21st century, the decimation of the population of Darfur, the trail of crimes against humanity painfully continues.

The absence of international law to hold the perpetrators of the Armenian Genocide accountable was dishearteningly evident at the end of World War I. But for a brief series of domestic trials in Turkey, which were too soon discontinued, the organizers of the Armenian atrocities avoided responsibility and escaped judgment. This very lack of accountability to one's own nation and to the international community for having committed mass atrocities propelled a true giant in the defense of human rights, Raphael Lemkin, to ask why a murderer may be charged for a single crime, while a mass murderer is excused. It would take one more genocide for mankind to find the sense of outrage that is now embodied in the U.N. Convention on the Prevention and Punishment of the Crime of Genocide, of which the United States is a signatory.

In fact, the Armenian Assembly of America was part of the coalition of organizations headed by the American Bar Association advocating for the U.S. adoption of the U.N. Genocide Convention. From the time of its founding in 1972, the Armenian Assembly supported Senator William Proxmire's unremitting campaign to persuade the Senate to approve implementing legislation enabling the U.S. adoption of the Convention. The Armenian Assembly had the honor then of giving testimony in committee and in writing, as part of the commitment of the Armenian-American community to doing its share in creating greater awareness of the danger of genocide.

The law was silent in 1915 when Armenians by the hundreds of thousands were sent on death marches, subjected to massacres, and starved to death in the parched desert. While the law was silent, leading voices of conscience in the United States and elsewhere around the world were far more vocal. Newspapers across America carried chilling accounts under headlines such as "Armenians Are Sent to Perish in the Desert" and "1,500,000 Armenians Starve" (*New York Times*, August 18, and Sept. 5, 1915, respectively). In turn, America's diplomatic representatives in the Ottoman Empire performed an extraordinary service by recording their eyewitness accounts and sending them to the Department of State and the President. Their horror and indignation prompted U.S. Ambassador Henry Morgenthau, with the approval of the State Department, to appeal to American humanitarians to respond to the crisis in the Middle East. At a time when relief agencies were non-existent, the U.S. Senate called upon the American people to rescue the survivors of the Armenian Genocide. A resolution adopted by the Senate on February 9, 1916, reads in part:

> *Whereas the people of the United States of America have learned with sorrow of this terrible plight of great numbers of human beings [several hundreds of thousands of Armenians in need of food, clothing, and shelter] and have most generously responded to the cry for help whenever such an appeal has reached them: Therefore be it*
>
> *Resolved by the Senate (the House of Representatives concurring), That, in view of the misery, wretchedness, and hardships which these people are suffering, the President of the United States be respectfully asked to designate a day on which the citizens of this country may give expression to their sympathy by contributing to the funds now being raised for the relief of the Armenians in the belligerent countries.*

Further, in 1919 the Senate incorporated the agency called Near East Relief for the express purpose of providing for the care of orphans and widows and to promote the welfare of those rendered destitute by "the cruelties of men."

Against the background of overwhelming evidence that would have been sufficient to prosecute any number of the criminals involved in the Armenian Genocide, today the Armenian-American community instead struggles against the unremitting forces of denial that want to bury the past, distort history, and erase the memory of this crime against humanity. To quote Professor Deborah Lipstadt of Emory University, who personally confronted the problem in court, "Denial of genocide is the final stage of genocide; it is what Elie Wiesel has called 'a double killing.' " It seeks to demonize the victims and rehabilitate the perpetrators.

Descendents of the survivors of the Armenian Genocide in their respective countries of residence have appealed to their governments to stop this denial and to re-affirm the historic record on its occurrence. For them, as for us in the Armenian Assembly of America, the affirmation of history by our lawmaking institutions is the best hope available to respond to the power of denial with the decency of the law and the principles that protect and defend basic human rights.

Denial also subverts the essence of the rule of law. It is a form of violation, a violation of the right to honor the memory of the victims of genocide without facing the abuses and indignity of denial. For this very reason the Armenian-American community with every Congress has urged legislators to re-affirm this history, and most especially the very honorable American record of humanitarian response to the Armenian Genocide. Therefore, we remain deeply concerned that the Department of State, despite the very evidence in its own archives, has consistently opposed Congressional resolutions that properly identify the mass killing of the Armenians as genocide. This policy is not consistent with the American record on human rights and flies in the face of past and current policy to expose those who commit atrocities and to bring them to justice.

Most regrettably, Congress and the Department of State need to be reminded that denial is not a problem of semantics alone. A mere two weeks ago a terrible crime was committed in Turkey that reminded the world how high can be the price of fighting denial.

Turkey is the only country in the world where speaking the truth about the Armenian Genocide is regarded as a prosecutable offense. The infamous Article 301 of the Turkish penal code coercively restricts the freedom of expression and has been invoked in dozens of cases against peaceful law-abiding citizens of Turkey who have taken a public position challenging their government's distortions and denials of historical facts.

The new Turkish penal code, adopted by the Turkish legislature, as part of its accession process to the European Union, and intended to introduce reforms in Turkey, has clearly been shown to be a step backward instead of progress forward.

It is extremely unfortunate that one of the most prominent figures of the Armenian community in Turkey was prosecuted under Article 301. The Turkish courts dismissed all other cases filed under Article 301 with the exception of Hrant Dink, one of the most vocal advocates of human rights and tolerance in Turkey.

For mere mention of the Armenian Genocide he was hauled to court and found guilty in 2005. His very public prosecution in the courts and in the Turkish media made him a target of extremists. Now he is dead, assassinated in front of the office of the newspaper he founded, a newspaper he published in Armenian and Turkish to foster understanding and dialogue among those two communities.

In a country of 71 million people, the representative of the Armenian minority (approximately 60,000) in Turkey, which numbers less that a tenth of one percent of the population, the remnant of a people once counted at over 2 million, happens to be the individual meted punishment and public condemnation for speaking about events in history that occurred more than 90 years ago.

Clearly, the law in Turkey violates the very spirit of what the law is supposed to be, the instrument by which society protects its citizens, the guarantee by which

fundamental freedoms are protected, the institution that looks after the safety and security of everyone of its constituents.

Here the rule of law has been turned upside down by Article 301, abused by prosecutors and judges to impose an authoritarian conformity adhering to extreme and intolerant forms of nationalism, and applied in a manner that targeted the bravest champion of democratic freedoms to the point of exposing him and delivering him as the victim of a ruthless assassin.

Article 301 of the Turkish penal code has become a painful reminder of the abuses of the law that allowed genocide to be committed in 1915, much as it became the propellant that added the name of so distinguished a journalist, a figure honored everywhere for his courage and decency, to the list of victims of hate, racism, chauvinism, and extremism.

Many in Turkey condemned the murder of Hrant Dink. A reported 100,000 marched at his funeral, an outpouring of grief over the demise of one man and a statement of public concern for the ominous dangers threatening democracy and free speech in Turkey. Yet just weeks after this act of solidarity, a different set of pictures has emerged from Turkey, of police officers lining up to be photographed with the assailant (a Turkish flag held between his hands), of crowds in stadiums holding banners and chanting slogans with messages opposed to the peaceful rally that carried Hrant Dink to his gravesite.

Hrant Dink did not break the law, as we understand the law. He believed in the freedom of speech, and he wanted to speak freely. He believed in the freedom of the press, and he wanted to publish freely. He believed in the freedom of expression, and he wanted Turks and Armenians to communicate without rancor. He needed the protection of the law, but did not receive it. Hrant Dink did not violate the law. Rather, the law failed Hrant Dink.

The rule of law means more than enforcement. It means respecting the spirit of the law as the law was meant to be. By the murder of a single person, or the slaughter of one and a half million, genocide and the denial of genocide offends the spirit of the law and calls for justice, whether from two weeks ago, two years ago, or 92 years ago.

The Armenian Assembly of America calls upon Congress to consider and introduce measures that strengthen international legal protections against genocide and to do the same regarding the denial of genocide.

The Armenian Assembly of America also calls upon Turkey to pay serious attention to the plea of the Armenian patriarch of Istanbul, His Beatitude Mesrop II Mutafyan, who called for an end of the stigmatization of Armenians by the Turkish educational system and the reform of school curricula.

The application of the law should not be limited to prosecution after the crime has been committed. The laws on public education are where prejudice is averted and

the environment of tolerance first is instilled. The U.N. Genocide Convention did not call for punishment alone. It aspired for the prevention of genocide. Prevention, whether of a single crime, or atrocities on the scale of genocide, starts with education. So does the rule of law.

Armenian National Committee of America
NATIONAL HEADQUARTERS

February 2, 2007

The Honorable Richard Durbin
U.S. Senate Committee on the Judiciary
Subcommittee on Human Rights and the Law
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Durbin:

Please accept our appreciation for the opportunity you have offered our organization to submit testimony (see attached) for the February 5, 2007 hearing of the Senate Judiciary Committee's Subcommittee on Human Rights and the Law on "Genocide and the Rule of Law."

Armenian Americans, in Illinois and around the nation, have tremendous respect for your principled leadership in genocide prevention and, of course, deeply appreciate your efforts toward U.S. recognition of the Armenian Genocide. We are encouraged by the creation of the Human Rights and Law Subcommittee and look forward to supporting the vital work of this panel in the months and years ahead.

Thank you once again for the opportunity to contribute to your important efforts to maintain and strengthen America's leadership in protecting human rights.

Sincerely,

Aram Hamparian
Executive Director

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Statement of Aram Suren Hamparian
Executive Director of the Armenian National Committee of America

Senate Committee on the Judiciary
Subcommittee on Human Rights and the Law
Hearing on "Genocide and the Rule of Law"
February 5, 2007

Chairman Durbin, Ranking Member Coburn, and distinguished members of the Subcommittee, on behalf of the Armenian National Committee of America, I would like to thank you for holding this important hearing and for inviting our organization to offer the insights of the Armenian American community on a truly crucial issue for our nation and the entire international community.

The cycle of genocide

Today, as we witness the genocide unfolding in Darfur, it has become increasingly clear that the failure of the international community, over the course of the past century, to confront and punish genocide has created an environment of impunity in which the brutal cycle of genocide continues.

As Armenian Americans - heirs of a nation that bore witness to the 20th Century's first genocide - we bear a special responsibility to help ensure that the lessons of our experience help prevent similar atrocities from being visited upon any people, anywhere in the world.

We consider it our responsibility to contribute to the life-saving work of the Save Darfur Coalition, Africa Action, the Genocide Intervention Network, and other groups working to bring an end to the horrific suffering in Sudan. Here in the United States, we enthusiastically support the efforts of Facing History and Ourselves, the Genocide Education Project and other educational groups teaching America's school children about the dangers of genocide and the value of tolerance. We are especially encouraged by the powerful reach of the band "System of a Down" - comprised of four Armenian Americans - in educating countless millions about genocides - past and present. The powerful documentary "Screamers," which is currently playing around the nation, documents their work in this area. All these efforts are aimed at breaking the genocidal cycle.

With specific regard to the situation in Darfur, we were gratified that the Administration - in a break from past practice - properly invoked the term genocide, but remain deeply troubled that our government has yet to take the decisive steps required of us under our commitments to the Convention on the Prevention and Punishment of Genocide. We run the risk of turning this landmark treaty into a dead letter if our actions do not live up to our moral and legal obligations.

As members of this panel know, the Armenian Genocide and the Holocaust weighed heavily on the mind of international lawyer Raphael Lemkin, whose family was brutally murdered by the Nazis in their genocidal drive to destroy the Jews of Europe. He coined the term "genocide" and was instrumental in the drafting and adoption of the Convention. In a 1949 interview with CBS, Lemkin explained, "I became interested in genocide because it happened to the Armenians; and after[wards] the Armenians got a very rough deal at the Versailles Conference because their criminals were guilty of genocide and were not punished."

The denial of the Armenian Genocide

Sadly, even in 2007, we are faced with a state-sponsored campaign of denial that the Armenian Genocide ever took place.

This denial takes the form of Turkish laws against even the mention of the Armenian Genocide, the systematic teaching of genocide denial to Turkey's school children, and, in nations around the world, a campaign of threats, intimidation and blackmail against any individual, group, or country that speaks the truth about the Ottoman Turkish government's murder of 1.5 million Armenians between 1915 and 1923.

Our own Ambassador to the Ottoman Empire during the early years of the Genocide, Henry Morgenthau, described the government's crimes as "a campaign of race extermination." The Allied Powers vowed to punish the Turkish authorities for these crimes, using for the first time the term "crimes against humanity," but, as we know too well, they did not fulfill their promise of justice for the Armenian people, setting the stage for nearly a century of Turkish government denials.

We work to end this denial because, as a matter of fundamental morality, our nation should recognize and condemn all genocides - past and present. The United States should, on principle, reject all genocide denial - whether it come from Tehran, Khartoum or Ankara. To do any less is to undermine our country's credibility on the most vital international issue of our time - the creation of a world safe from genocide.

We work to end this denial because it seeks to obscure a proud chapter in American history. Those who deny this crime dishonor President Woodrow Wilson and all those who spoke out against the atrocities committed against the Armenian people. They dishonor the U.S. diplomats who risked their lives to document the suffering of the Armenian nation. They dishonor the Americans - rich and poor - who gave of themselves as part of an unprecedented American relief effort to alleviate the suffering of a brutalized population.

We work to end this denial because we know that the Republic of Armenia cannot be safe as long as Turkey remains an unrepentant perpetrator of genocide against the Armenian people.

We work to end this denial because Turkey's acceptance of a just resolution of the Armenian Genocide would represent significant progress toward a more tolerant Turkish society, and a

meaningful step toward the Republic of Turkey's long sought acceptance into the European family of nations.

And, perhaps most importantly for the work of this panel today, we work to end this denial because it sets a dangerous precedent - a real life example of genocide committed with impunity - that makes future genocides more likely. Prior to launching his "final solution," Adolf Hitler infamously cited this example in a 1939 speech intended to quiet the potential reservations of his generals, asking the chilling question: "Who, after all, speaks today of the annihilation of the Armenians?"

The denial of any genocide, past or present, sets a dangerous precedent for the future, emboldening potential perpetrators with the knowledge that their crimes can be committed without condemnation or consequence.

The murder of Hrant Dink

The most recent victim of this denial is Hrant Dink, a courageous journalist who was assassinated on January 19th of this year in front of his newspaper's offices in Istanbul.

One of the remaining Armenians living in Turkey, Hrant was born and spent his early years in Malatya, a city whose Armenian population was - with only a handful of exceptions - destroyed during the Armenian Genocide. As editor of Agos, a bilingual Armenian-Turkish language newspaper, he faced years of official persecution and regular death threats in response to his writings about the Armenian Genocide. Last year he was given a suspended sentence of six months under Article 301, a new provision of the Turkish Penal Code that punishes discussion of the Armenian Genocide as an "insult to Turkishness." When he criticized this verdict, he was prosecuted once again under a different provision of law that criminalizes attempts to "influence the judiciary." In his last column, he wrote about the torment of living in the shadow of death threats and the vulnerability he faced due to the government's incitement of hatred against him.

Hrant Dink was not alone. Many other writers in Turkey are being silenced through Turkey's criminal code. Nobel Prize-winner Orhan Pamuk has been prosecuted under Article 301 for mentioning the killings of Armenians. The writer Elif Shafak was prosecuted for writing a novel in which her fictional characters discussed the Armenian Genocide.

Hrant Dink's murder is tragic proof that the Turkish government continues to fuel the same type of hatred and intolerance that led to the Armenian Genocide more than ninety years ago. His killing was not an isolated act, as Turkish leaders have said in what can only be described as disingenuous expressions of regret, but rather occurred as the result of the Turkish government's official - and increasingly aggressive - policy of denial. His example underscores the pressing need for the United States to fully recognize the Armenian Genocide - through Executive branch action and the adoption by the Congress of the Armenian Genocide Resolution.

U.S. complicity in Armenian Genocide denial

Sadly, the Turkish government is able to maintain its denial, against all evidence and the tide of international opinion, in large part due to the State Department's refusal to speak with moral clarity about the Armenian Genocide.

Our State Department remained almost entirely unwilling to speak publicly against the Turkish government's longstanding prosecution and persecution of Hrant Dink. In fact, a search of the Department's website finds only one mention of him before his murder. In sharp contrast, the same State Department that has been so reluctant to defend free speech within Turkey has been more than willing to loudly and aggressively seek to prevent our own legislature - the U.S. Congress - from even considering legislation commemorating Armenian Genocide.

In a truly unfortunate escalation of our complicity in Turkey's denials, the State Department, last year, fired Ambassador John Evans - a distinguished diplomat with over thirty years of experience - for properly characterizing the Armenian Genocide. In the proud tradition of Ambassador Henry Morgenthau, who represented our nation in the Ottoman Empire during the early years of the Genocide, Ambassador Evans spoke the truth about this crime against humanity. For this, his career of service to our nation was ended by an Administration apparently more concerned with the sensitivities of a foreign government - one that regularly violates the free speech rights of its own citizens - than with the rights of an American citizen who speaks out honestly about genocide. The Turkish government's Foreign Agent Registration Filings with the Justice Department reveal that its foreign agents contacted several U.S. officials regarding the Ambassador's comments, but, as of today, the State Department has been unwilling to offer any meaningful explanation of the role the Turkish government played in the Ambassador's dismissal.

Most recently, the President - in the face of broad-based Congressional opposition - has again nominated Richard Hoagland to serve as ambassador to Armenia, despite his intensely controversial record of denying the Genocide. As a community, Armenian Americans are deeply grateful for the principled leadership of Senator Robert Menendez, who has, once again, placed a hold on this ill-advised nomination.

In closing, I would like to stress that, although the Armenian Genocide began in 1915, it continues today through the Turkish government's worldwide campaign of denial. We look to the members of this panel, and to all Members of Congress, to help end U.S. complicity in Turkey's denial, and to encourage the Republic of Turkey to abandon its efforts to erase this chapter in its - and the world's - history.

The proper recognition and universal commemoration of the Armenian Genocide will, we are confident, represent a meaningful contribution to our nation's efforts to end the cycle of genocide.

OPENING STATEMENT

HEARING: "GENOCIDE AND THE RULE OF LAW"

SUBCOMMITTEE ON HUMAN RIGHTS AND THE LAW

SENATE JUDICIARY COMMITTEE

SENATOR BENJAMIN L. CARDIN

FEBRUARY 5, 2007

Mr. Chairman, I want to thank you for calling this hearing today. Let me also thank you for your role in creating this new subcommittee of the Judiciary Committee. This subcommittee has jurisdiction over the enforcement and implementation of human rights laws, including judicial and executive branch interpretations of those laws.

Today we will focus on genocide and the rule of law. I am so pleased that we have a distinguished panel of witnesses who have significant expertise on this subject. On the subject of the Rwandan genocide, I welcome actor Don Cheadle from the gripping movie "Hotel Rwanda," and Canadian Senator Romeo Dallaire, who was the head the UN peacekeeping effort in Rwanda during the genocide. I also look forward to hearing the testimony of Diane Orentlicher, an American University law professor who has testified before Congress frequently on international law issues. I look forward to talking about how the lessons of Rwanda can help us address the ongoing genocide in Sudan, which I am also examining as a member of the Africa Subcommittee of the Foreign Relations Committee.

I am very pleased to be a new member of this Committee and to have been named to serve on this subcommittee. I also understand, Mr. Chairman, that this hearing will probe the legal options for preventing genocide, the criminal prosecution process for those who commit genocide, the effective implementation of relevant conventions against genocide, and the legal options for preventing genocide. I strongly support the Chairman's efforts to use tools to stop genocide such as divestment – as we did with South Africa and the apartheid system in the 1980's – and international and domestic prosecution of war criminals.

By way of introduction, Mr. Chairman, I have been very active in working to prevent genocide, war crimes, and crimes against humanity during most of my twenty years of service in the House of Representatives. Most recently I have worked in an organization that has worked for years in the former Yugoslavia to bring a lasting peace and bring war criminals to justice.

In the House, I was privileged to serve as the Ranking Member of the U.S. Commission on Security and Cooperation in Europe (CSCE), commonly known as the

Helsinki Commission. The Helsinki Commission is a unique federal agency that was created by Congress in 1976, after the signing of the Helsinki Accords in 1975 by the United States and the Soviet Union. The Helsinki Accords were a political document that guaranteed certain universal human rights and freedoms to all citizens in North America, Europe, and Eurasia, including Russia and the former Soviet republics.

The Helsinki process is unique in several ways which distinguish the organization from other regional and multilateral groups, such as the EU and NATO. First, the process envisions three baskets of security: military-political, economic and environmental, and human rights. Second, the organization includes the United States, all of Europe, the central Asian republics, the former Soviet republics, and Russia. Finally, the Helsinki process gives all of the Participating States equal status, and decisions are taken by a consensus on a political basis. After the Cold War, the Helsinki process has focused on the difficult transition that many former Communist nations have faced as they transition to a democracy that respects the rule of law.

The United States is one of the 56 Participating States in the Organization for Security and Cooperation in Europe (OSCE), which is the largest security organization in the world. OSCE is best known for sending election monitors to analyze whether elections are "free and fair." I was privileged to be elected recently by my European colleagues to a three-year term as Vice President of the Parliamentary Assembly (PA) of the OSCE. In the last Congress Senator Brownback ably served as our Chairman.

So today I look forward to hearing from our witnesses in particular on how to effectively implement treaties and laws that prohibit and punish acts of genocide. In the Helsinki process we spend much of our time working on the implementation of existing commitments and agreements. In the former Yugoslavia, for example, the OSCE Mission to Serbia provides the Government of Serbia with legal advice and recommendations on judiciary reform issues, including training of new judges and the adoption of new Criminal and Civil Procedure Codes. It also help to draft the Law on War Crimes and set up domestic war crimes tribunals, and encourages Serbia to cooperate with the concurrent activities of the International Criminal Tribunal for the former Yugoslavia (ICTY) at the Hague.

Let me express my gratitude and thanks to Carla Del Ponte of Switzerland, who unfortunately recently decided not to seek reappointment for another term as Chief Prosecutor. Her strong determination over the past eight years to prosecute war criminals have brought comfort and closure to countless victims of horrific crimes and their surviving loved ones. I believe that her work, as well as the work of the new International Criminal Court (ICC), is critical to deterring future war crimes and forms a key component of the international community's response to conflict and post-conflict situations.

Unfortunately, many war criminals still remain at large and have not been brought to justice. I am disappointed that the Serbian Government has failed to fully cooperate with the ICTY, and that Ratko Mladic and Radovan Karadzic are still free. I hope this

committee will work with me in urging the United States to support a successor to Carla Del Ponte with an equal commitment to ensuring that full ICTY cooperation is achieved and that war criminals are brought to justice.

Let me close with another hope for this new subcommittee. We need to do a better job of overseeing *our own* compliance with the Helsinki Accords and applicable international treaties and domestic law. I am hopeful that both the Helsinki Commission and this subcommittee, for example, will hold hearings on American compliance with the Geneva Conventions as it relates to the process used for detaining and treating accused terrorists. The 9/11 Commission recommended that the United States work with it allies to come up with new rules for the detention and treatment of accused terrorists that are often not part of a regular military force of a recognized nation state. Congress and the Administration have failed to address this issue. The Supreme Court has repeatedly held that the trial procedures proposed by the Administration are invalid. Congress also failed to effectively address this issue when it adopted the Military Commissions Act, which in my view may be struck down by the Supreme Court because it does not meet the basic due process guarantees for accused terrorists under both the Geneva Convention and our Constitution. Mr. Chairman, the Administration policy ultimately puts our own troops in harm's way by legitimizing the use of coercive tactics and possibly torture by the U.S. Government. The United States loses much of its credibility to criticize human rights abuses around the world when it condones or fails to criticize our own shortcomings.

We should remember that our treaty obligations are explicitly stated in the Constitution, once a treaty has been ratified by two-thirds of the Senate as required under Article II, Section 2 of the Constitution. Article VI provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; *and all Treaties made, or which shall be made, under the Authority of the United States*, shall be the supreme Law of the Land…" (emphasis supplied). I look forward to working with you, Mr. Chairman, and the members of the subcommittee as we conduct our important constitutional oversight role of our international treaty obligations.

United States Senate
Committee on the Judiciary
Subcommittee on Human Rights and the Law

Hearing on Genocide and the Rule of Law
February 5, 2007

Testimony of Don Cheadle

Good afternoon Mr. Chairman, Ranking Member Coburn, and members of the Subcommittee on Human Rights and the Law. Allow me to begin by saying that I am not only honored but also somewhat awestruck to be appearing before you today to testify about the ongoing crisis in Darfur. I was invited here this afternoon to recount for you my personal experiences in Sudan and Chad so as to put a "human face" on what has been transpiring in that region for the past three to four years. There's more I could say in the way of a preamble – giving you my background and how I came to be involved with Darfur, but as time where this matter is concerned is rapidly running out for most and has already expired for far too many, I'll get right to it.

After accepting this invitation, looking at the task before me, I started scrolling through my mental Rolodex to recall stories of Darfur, finding each one more tragic and gruesome than the last, yet trying to select the one that was the most shocking, the saddest, rife with the kind of terrifying imagery that would galvanize the room, causing *everyone* here to knit their brows, wring their hands and shake their heads.

But then, two things occurred to me, one, *all* the stories fit that description and two, you all already know this. Even if your knowledge of the situation in Darfur is only anecdotal, given your familiarity with similar tragedies, which have unfolded in Armenia, Cambodia, Kosovo and Rwanda, you know the stories all have an eerily familiar ring.

Hundreds, thousands, hundreds of thousands, singled out for their ethnicity or their religious or political affiliations, are systematically targeted for extermination.

Instead of the Interahamwe in Rwanda, it is the marauding Janjaweed in Darfur who prey on unarmed civilians. The government in this case uses Russian-made Antonov bombers for the first wave of attacks on the villages, followed by foot soldiers sweeping through for the second wave, then finally the marauders ride in on camel and horse back to loot, burn and mop up the stragglers. Invariably there are numerous accounts of unspeakable brutality to the victims prior to their deaths, with the survivors more often than not being made to witness these acts, as well as, if they are female, being gang raped, another common tactic of the perpetrators – leaving the victims, terrified, demoralized and ashamed. And where Darfur is concerned, if you are a woman living in the camps you have the added horror of potentially being raped again when you leave the compound seeking much needed firewood for cooking to sustain your family's meager existence or when the camps are raided, as is also happening now. This is a facet of war after all, and at its basest, these are common occurrences.

The sickness and depression in the camps is palpable as more refugees roll in daily, bringing with them what little they can carry, what family managed to survive and a spirit bruised, battered and broken. I could plug in the names Fatima or Hawa or Adom to personalize these events, but every story told to me in the camps followed along similar lines, the only difference being the individual recounting it at the time. And every day since, up to and including this one, these stories continue to churn out of Darfur's human grinder at a rapid pace, with no end in sight.

And there you have it: a "human face," an accounting. And what of it?

In the 100 days of Rwanda's ethnic cleansing, with nearly a million souls brutally murdered, the most efficient extermination to date, most claimed to have known nothing about it even years after its occurrence – a claim easy to believe given the dearth of news coverage those tragic events received. The news coming out of Africa in 1994 seemed to be all about Nelson Mandela's leadership and the end of apartheid. Many of the South African actors I worked with during the filming of Hotel Rwanda admitted, surprisingly, that they had no idea genocide was taking place, figuratively just "up the road" from them. And surely it wasn't until the film's release that most people in this country had even *heard* of the place. Unless you were going on vacation to see the mountain gorillas, Rwanda wasn't exactly considered the greatest of getaways, no pun intended.

But Rwanda differs greatly from Darfur in many ways; perhaps the one most worth noting for our purposes is that this conflict in western Sudan has far exceeded 100 days in length. Darfur has been on a slow boil for four years now. Four years. And over those four years network news has reported about the crisis, articles have been written, rallies, protests and marches organized, concerts dedicated, benefits held, divestment bills signed, lectures made… our president has even labeled the crisis a genocide. Yet here we are, four years in and counting. The question is, what will be done about it?

To be clear, I ask you what *will* be done – not what *can* be done, for *that* question has been asked ad nauseam and contains within it connotations of powerlessness and surrender. What *will* be done is a very different question. Rather than succumbing to the monster of despair, "What *will* be done?" presupposes that there are indeed answers, solutions, actions to be taken that yet remain dormant. *This* is the appropriate question for Darfur and for the committee members convened here today.

Over the last year I have heard a great many answers to this question offered and have been privileged to participate in several efforts toward gaining peace in Darfur. I traveled to the region with a congressional delegation followed by *Nightline's* cameras to chronicle the journey and broadcast the stories to a wide audience in an effort to raise awareness about the plight of the Darfurians.

I was enlisted in the ranks of UCLA students to push for their college and the entire UC Regents to divest their portfolios' funds from businesses working in the Sudan, a policy that was later adopted by the entire state of California and signed into law by Governor Schwarzenegger last year. Similar legislation is now pending in many states across the U.S. and in a personal gesture of solidarity, Chairman Durbin and Senator Brownback have likewise divested their family holdings from companies profiting in Darfur, a very important action that I hope everyone will follow.

In December, I was fortunate enough to travel with a small delegation to China and Egypt - both very important countries to Sudan - in an attempt to persuade their leaders to exert their considerable influence in the region, publicly condemning the continuing bloodshed while strengthening their "back-door diplomacy."

In May, there will be a book on the stands I co-authored with the International Crisis Group's John Prendergast in an attempt to demystify the conflict and give insight to not only our activist roots and personal journeys, but also hopefully to provide a primer for those who wish to become more actively involved in seeking solutions to this and other acts of inhumanity around the world.

Valiant efforts? Perhaps. Effective? The jury's still out. Enough? Not even close. 500,000 dead and dying plus 2.5 million displaced equals a massive humanitarian crisis

deserving of massive, immediate attention. There is a small army of activists collecting, armed with unbridled enthusiasm and prepared to throw themselves headlong into the fight. But our well-intentioned efforts will wither on the vine if not guided and supported by the likes of you potential architects of change, bringing all of your collective pressure to bear on the powers that be. There are many actionable tactics that remain untried in this current iteration of violence that have been proven to be highly effective in the past and they need to be implemented now, without delay.

We need multiple players engaged in consistent and continual negotiations with the leaders in Khartoum as well as the rebel factions to get them back to the table to broker an agreement that is durable. Only with a committed team of diplomats working tirelessly to understand, unravel and interpret each party's demands will we begin to see a shift toward a solution, and to that end the President's Special Envoy to Sudan, Andrew Natsios, along with Salim Ahmed Salim of the AU and the UN's Jan Eliasson must be fully supported in their work, financially as well, and the U.S. should take the lead.

We need high-ranking members in this administration to weigh-in heavily in this process so as to be taken seriously by the GOS to achieve a favorable outcome.

We need to support the ICC in their efforts to prosecute the perpetrators of these crimes against humanity by sharing information and declassified intelligence vital to their investigations so that when charges are made, they stick. In the four years that this conflict has been raging out of control, not a single senior member of the Khartoum government has been punished.

The UN Security Council, the EU, and the current administration are skilled at threatening to punish those who commit atrocities and obstruct peace-building efforts, but have as yet to follow through.

The latest incident was the U.S. threat to move to an unspecified "Plan B" if the Khartoum regime wouldn't accept an internationally agreed upon UN role in a peacekeeping force. However, President Bashir and some of the most influential members of the regime have reiterated in no uncertain terms that UN troops are not welcome in Darfur. And what happened as a result? Nothing. There was no apparent reaction from Washington as its January 1 deadline came and went. This only emboldens Khartoum to press forward with its military objectives, and undermines international efforts to secure a peace deal and get soldiers on the ground that can help protect Darfurian civilians.

We of course should be wary of moving troops, however hybrid, into a sovereign nation without their consent but when does a so-called sovereign nation forfeit its sovereignty? Does killing your own citizenry en masse vitiate that position of sovereignty or is there something even more egregious required for that status to be revoked? Whatever could that be? I shudder to think. Do the small tributaries of information trickled to us by the GOS about terrorists trump the taking of innocent men, women and children's lives? Should these morsels give Khartoum the right to engage in such inhumane activity?

If not, we need to outline specific punitive measures – travel bans, asset freezes, ICC indictments – punishments that can be negotiated down or even taken off the table entirely if the killing ends. But unless the Khartoum regime believes there are real

consequences for their actions, unless there is real resolve to carry these punishments out, the status-quo will be maintained and countless more will suffer and die.

In the 1990's Sudan expelled Osama Bin Laden from the country and dismantled his training camps after considerable pressure from the West, most significantly from the United States. Similar pressure should again be exerted to bring an end to this current crisis.

We need to support the current efforts by China to keep the pressure on Sudan, as they are clearly a major player in this. China's hosting of the Olympic Games in 2008 will cast them in a very bright light indeed. We need to seize upon this opportunity to leverage China's desire to be recognized as having changed their questionable ways with regards to human rights issues and their wish to be deserving of the slogan of unity they are promoting for the games of "One world, one dream." As long as they are in essence underwriting the genocide by providing the GOS with the very arms they are turning against their own citizens, China's leadership may be more deserving of the slogan, "One world, one nightmare" – an association they most certainly wish to avoid. We should reach for purchase there. I hope that Mr. Natsios' recent visit to Beijing followed by President Hu's visit to The Sudan may bear fruit, but these should by no means be the only attempts. There are other players who have been involved in this tricky diplomacy, albeit in a quiet way. Maybe it is time that these men and women come to the fore and take advantage of the support of many ordinary citizens around the globe who wish to see the horrors of Darfur come to an end.

Our nation can provide vital communications and other tactical equipment as well as the training necessary for a peacekeeping force in Darfur to operate effectively.

We should push the UN to adopt a more forceful mandate and rules of engagement so that a peacekeeping force, once assembled and deployed, has the authority to provide real protection for the victims rather than simply report about the atrocities they are witnessing.

We should also fund the troops and humanitarian workers from other willing Muslim countries. South Africa, the Middle East, and South Asia can all play a significant role here. The Egyptians have specifically expressed a willingness to be on board with this.

Any and all of these tactics should be deployed immediately if we are to see any future for the citizens of Darfur.

But if, after all of the committee meetings and brainstorming sessions and discussions and plans about how and when to act, we *still* find ourselves unwilling to embark on real solutions, than we must cease and desist with all the tough talk. Please, no more mention of no-fly zones and possible NATO intervention forces. Refrain from using the word "genocide" that demands our government respond as put forth by the United Nations Convention on the Prevention and Punishment of the Crime of Genocide, an agreement of which we are a signatory. Forgo the lamenting of lost souls in this latest, useless conflict - just write them off, and then let's by all means please, *please* banish forever from our lexicon the phrase, "Never Again." This empty rhetoric is an insult to those in jeopardy and puts the world on notice that where mass atrocities are concerned, America is all bark and no bite.

Perhaps, however, we should look at this a different way. Maybe what is required for our more strenuous involvement is for folks to step it up. Maybe 500,000 dead is

simply not enough to warrant action. Maybe a *million* is more like the target number. I'm serious about this. The "M" word *does* feature very significantly in our collective consciousness. Perhaps when we can say, "one million Darfurians dead" an alarm will go off and the public outcry will be so deafening that our leaders will face taking action or being run out of office on a rail. At the rate things are moving it will only take four more years to reach this threshold – two years into the term of our next president. Will this crisis be but one of many items on his or her "to do" list or will there have been significant action such as to have made this issue one of careful maintenance rather than more abject consternation? We obviously don't have the answer, but in this Committee's inaugural meeting, I can think of no better issue for you to wrestle with as concerned citizens everywhere stand by to see who will get the ten count – you or genocide.

So again, ladies and gentlemen, I pose the question; what *will* you do?

FOR THE HEARING RECORD

Statement of U.S. Sen. John Cornyn of Texas (2/5/07)

Sudan is Africa's largest country. The Nile River starts its northern flow to the Mediterranean at the confluence of the White Nile and Blue Nile rivers, near the Sudanese capital of Khartoum.

But the life-giving majesty of the world's longest river contrasts with the horror and tragedy that have plagued Sudan since it gained independence from Egypt and Great Britain in 1956.

Conflict based on ethnic, racial and religious differences has wracked the country from its inception. War, famine and disease have led to an estimated two million deaths, and created some four million homeless refugees over two decades.

Today, the deadly civil war in Darfur, a western region in Sudan roughly the size of Texas, has become the world's most dire human rights and humanitarian crisis.

Since 2003, at least 300,000 men, women and children have been killed, and some 2.2 million people—approximately one-third of Darfur's population—have been terrorized and driven from their homes.

Villages are burned routinely, and survivors are usually forced into refugee camps where they depend on international assistance to survive. But relief operations delivering food and water to the region are often turned back by violence. This summer alone, 21 supply vehicles were hijacked and 12 humanitarian workers were killed.

We are all too aware of casualties in Iraq and Afghanistan, but many Americans are largely oblivious to this genocide in an African region less than 1,500 miles from Baghdad.

Even while we have attempted to coax African countries and the United Nations into more effective intervention, President George W. Bush has led an aggressive U.S. response to the Darfur atrocities.

In the past three years, the United States has provided more than $1.4 billion in humanitarian assistance to Darfur victims. We have provided more than 85 percent of the food distributed this year, and contributed $300 million to support 34 base camps for peacekeeping forces, along with maintenance, communications, training and airlift support.

~~Diplomatically, we are pushing the UN, Europe, African Union and others to devise an~~ effective solution for peace. In December, after meeting with the President's newly appointed Special Envoy to Sudan, Andrew Natsios, I co-sponsored a Senate Resolution demanding that the Sudanese government either comply with mandates from the

international community, to include allowing a fortified UN peacekeeping force in the region, or face serious consequences.

In the meantime, to supplement governments' work, private efforts, including several based in Texas, have emerged. One group in Midland has received national and international acclaim for its efforts to raise public awareness about suffering in Darfur.

The *New Yorker*, *National Review*, *Christian Science Monitor* and *American Spectator* publications all have spotlighted the work of a Christian human-rights activist organization known as the Midland Ministerial Alliance.

"There is a strong Texas contingent that has really been outspoken on Sudan issues," said Sam Bell of the non-profit Genocide Intervention Network. He said his group's "hall of fame" includes the religious community of Midland, where several churches have established sister congregations in southern Sudan.

At home and in Darfur, the group has staged fundraisers for Sudanese schools, led a vigorous letter-writing campaign here and in Sudan, and hosted Sudanese exiles in Midland.

In Dallas, the congregation of Temple Emanu-El helps spearhead "Operation Dolls for Darfur," which raises awareness about the crisis through the sales of Guatemalan "worry doll" lapel pins, and other grassroots efforts.

Today, most Americans are only vaguely aware of the genocide in Darfur. The horror is occurring in a remote country, and the central government has effectively excluded international news media from covering the crisis.

But any effective campaign to alleviate suffering in Darfur must start with public awareness—both to educate the public and pressure the Sudanese government for a resolution. The individual efforts of our fellow Texans to achieve these goals provide an inspiring example for us all.

-30-

Introduction

In November 2003, then United Nations (UN) Under-Secretary General for Humanitarian Affairs Jan Egeland called Darfur "the worst humanitarian disaster in the world." Three years later, the situation has only worsened, and yet men in suits continue to sit around tables arguing the semantics – then of genocide, and now of what specifically a "hybrid force" should comprise. The people of Darfur have suffered the very worst of what a violent conflict has to offer. Yet targeted brutality, gang rape, abduction, displacement, disease, and starvation are only the tip of the iceberg of what they have endured. Sadly, the words do not exist to properly describe the horrors, or surely action would have been taken by now.

Over a decade has passed since the world ignored Rwanda as all hell broke loose. Rather than sending the reinforcements that could have put an end to the crisis, my force of 2,500 was reduced to just 450 – the effect of direct instructions from callous world leaders. Since that time – and 800,000 deaths later – Rwanda seems to have joined the Holocaust as a convenient catch-phrase; something to be avoided, in theory. The practice – with the possible exception of Kosovo – has left much to be desired.

Certainly, the world cannot be accused of ignoring Darfur, except perhaps when events more directly related to our self-interest have popped up to distract us. There has been no shortage of demonstrations, resolutions, discussions, and conferences on the subject. I myself have, along with many colleagues, risen a number of times in the Canadian Senate to remind Parliamentarians that people are continuing to die. And yet, once again, words have failed. What will finally provide the right motivation to act?

I must admit that I have, on occasion, considered bringing a flak jacket I wore during the Rwandan genocide — a jacket that was blood-soaked from carrying a 12-year-old girl who had been mutilated and repeatedly raped — into the Senate Chamber and throwing it into the middle of the room. Maybe this would finally capture the attention of the political elite in a way that words have failed to do. Maybe it would finally bring home the point that human rights are not only for those who have the money to buy it and sustain it; they are the privilege and right of every human being.

Taking Action: Military Options

What legitimate and effective tools does the international community have to respond to the on-going crisis in Darfur, and others to come? To begin with, in September 2005, world leaders overwhelmingly embraced the concept of the Responsibility to Protect (R2P) in the UN Summit Outcome Document. This principle provides that, if a state proves unable or unwilling to protect its own citizens from genocide, war crimes, ethnic cleansing, and other crimes against humanity, then the international community has the *responsibility* – not the right or the option – to provide that protection.

Glimmers of the idea that state sovereignty is not an unalienable right can also be seen in NATO's 1999 campaign in Kosovo. Faced with vetoes by Russia and China against a Security Council-sanctioned intervention, NATO circumvented the UN and intervened nonetheless. Subsequent arguments about the legality of the intervention miss a crucial point: NATO members intervened because the ethnic cleansing had to stop. International law evolves

from the actions of States that are undertaken because of a belief that there is an obligation to do so. And the finding by the Independent International Commission on Kosovo that the NATO intervention was "illegal but legitimate" would seem to take a step in this direction.

Of course, I do not advocate illegal actions as a first course. Barring an (illegal) intervention by a coalition of the willing, what options are (legally) available to us?

I still believe absolutely that the most legitimate body to authorize humanitarian intervention remains the United Nations Security Council. Like others, the Security Council has not been idle. In more than half a dozen resolutions – some admittedly watered down under threat of veto – the Security Council has demanded the disarmament of the *Janjaweed* (1556), threatened sanctions against individuals found to be impeding the peace process (1556 and 1564), banned military flights over Darfur (1591), authorized war crimes investigations by the International Criminal Court (1593) and supported the deployment of troops to Darfur (1706). Not a single one of these commitments has been enforced.

The Permanent Five (P5) must realize that it is in their best interest to uphold the Security Council's legitimacy and effectiveness; their continued relevance depends on learning to see beyond narrow self-interest. Support by the General Assembly – including the P5 – for the reforms proposed by Kofi Annan would go a long way toward reclaiming a key purpose of the United Nations: "promoting and encouraging *respect for human rights* and for fundamental freedoms for all *without distinction as to race, sex, language, or religion.*" If ever there was a chance to rebuild the loss of confidence in global governance following Rwanda, this is it.

Barring a robust Chapter VII intervention, two possibilities remain: an intervention under a Chapter VIII mandate, or an appeal to the *Uniting for Peace* Procedure.

Under Chapter VIII of the United Nations Charter, regional organizations are authorized to take robust action to deal with matters relating to the maintenance of international peace and security. The African Mission in Sudan (AMIS) could be seen to fall into this category, although Chapter VIII has not been specifically invoked in its case. Doing so would not only authorize the use of force, but would also improve the opportunities for coordination and support from the United Nations and its member countries.

Uniting for Peace, for its part, is a little-known procedure that, in fact, has been used several times to move the UN forward in the face of Security Council deadlock on matters that affect international peace an security, most notably for the Korean War and the Suez Crisis. In the face of continued obstruction by certain Permanent Members of the Security Council, it may be time to revive this practice. Any resolution passed by the General Assembly is certainly not binding, but given that it is a forum for all countries, and in which all countries have an equal voice, its resolutions can have significant normative impacts.

Let there be no mistake: if we are to advocate a military mission, it must be one of sufficient strength and conviction to succeed. We cannot afford another Rwanda or Somalia. I simply cannot understand how it is that a world that had no difficulty sending troops by the tens of thousands into the former Yugoslavia cannot muster the necessary force to establish an atmosphere of security in Darfur, and to alleviate the suffering of its people.

Taking Action: Non-Military Interventions

There are also a range of available options short of military force that have either not been explored or that have been held up by politics. Short of force, coherent and consistent pressure from a unified international community is the most effective way of coercing a state that massively abuses the rights of its people; double standards and inconsistent messaging are counterproductive. Respected international figures – be they individuals or states – must proactively rally broad-based support for humanitarian intervention, and develop coherent international strategies.

There has been a lively debate of late over the power of individual citizens in pressuring the Government of Sudan with targeted divestment campaigns – putting pressure on the foreign business interests that, indirectly, make the genocide possible. This is, I believe, a very good approach. Elsewhere, international financial institutions (IFI) present opportunities upon which the international community has yet to capitalize. Sudan is heavily indebted and in great need of financial credibility. The International Monetary Fund and the World Bank enhance the Government of Sudan's credibility through formalized relations. Given that China does not hold a veto in either institution, that these institutions have immense impact on Sudan's legitimacy as a financial actor, and that the Government's ability to maintain centralized power rests on its ability to attract investment, the IFI hold tremendous sway. Were the Group of Eight to link the massive abuse of human beings to endorsement by these institutions, the Government of Sudan would have credible incentives to abide by international law.

In particular, Middle Powers must take on a leadership role; their unifying power cannot be overvalued in this public exercise. While their wealth and influence has increased over the past twenty years, their contribution to global peace and security – specifically humanitarian causes - has lagged behind. And yet, as nations by-and-large without imperialistic histories, their voices stand to have more credibility in nations who are suspicious of Western intent – very real suspicions that can be and have been exploited in Sudan. Support from Muslim nations is key in this regard; the sensitivities and fears of those in opposition to the intervention must be understood and addressed.

Conclusion: The Future of International Humanitarian Intervention

And yet, I do feel that the international community is slowly but surely finding its way. Though not legally binding, a succession of declarations on human rights has slowly chipped away at the argument that actions undertaken within sovereign borders are of no concern to humanity; this was, in fact, a central argument of the International Commission on Intervention and State Sovereignty. Similarly, the establishment of criminal tribunals and of the ICC – which, promisingly, was recently given the jurisdiction to investigate charges of war crimes in Darfur – is sending the message that the age of impunity is over.

Separating my statement into military and non-military options may have been a bit misleading in that I do not believe that the two should be mutually exclusive; in fact, as the mission in Afghanistan demonstrates, they can be, should be, and are complementary. Our business in Afghanistan is building peace. It is a controversial business, but one that I wholeheartedly believe is the right one for a new age of humanity.

It may be worth noting that the peacekeeping operations of the Cold War period were also highly controversial to begin with, as many strongly believed that it was not within the purview of the UN. By the 1990s, it had become a central activity. The blue beret became a symbol of the UN – of peace, of hope, and of our unity as human beings. But the Cold War is over, and we are in a new era: one where humanitarian concerns must trump narrow nationalistic self-interest. An era where we must learn to stand together, truly united as nations, or risk tearing apart everything we've worked for. Disillusioned though some may be, the ideals of the United Nations are far too important to cast aside so easily.

That being said, the unfortunate truth is that international law *is* woefully inadequate when it comes to humanitarian interventions. The 1948 Genocide Convention was written while memories of the Holocaust were still fresh, yet it quite carefully excluded the possibility of action without the express authorization of the United Nations – authorization that was slow in coming even in the face of an obvious genocide in 1994. More often than not, invoking the Genocide Convention has simply led to sterile debates over whether a situation is – or is not – genocide. If it is not a genocide, does it make the massive abuse of human rights any less wrong?

We would do well to remember that humans are human – not one of us is more human than the other.

Opening Statement of Senator Dick Durbin
Chairman, Subcommittee on Human Rights and the Law
Hearing on "Genocide and the Rule of Law"
February 5, 2007

Welcome to "Genocide and the Rule of Law," the inaugural hearing of the Judiciary Committee's newly-created Subcommittee on Human Rights and the Law.

We are honored to welcome as well this distinguished panel of witnesses to share their views on this important and timely issue.

After a few opening remarks, I will recognize Senator Coburn, the Ranking Member, for an opening statement, and then we will turn to our witnesses.

Human Rights and the Law Subcommittee

But first a word about this new Subcommittee. I want to thank Senator Patrick Leahy, Chairman of the Judiciary Committee, for establishing the Subcommittee, and for asking me to serve as Chairman. Senator Leahy has championed human rights for many years, and this Subcommittee is another indicator of his commitment to this issue.

This is the first time in Senate history that there has been a subcommittee focused on human rights. And the timing is right. At this moment in our history, it is vitally important to our national interest to promote greater respect for human rights around the world.

When our leaders speak of our inherent desire for freedom and our communal need for democracy, they are acknowledging the fundamentals of human rights. And those who ignore and violate these fundamentals do more than challenge some idealistic goal.

Repressive regimes that violate human rights create fertile breeding grounds for suffering, terrorism, war, and instability. In our time, the world is a much smaller place, and the social ills caused by human rights abuses know no borders. We will never be truly secure as long as fundamental human rights are not respected.

Our Declaration of Independence says, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights." Too many times in our history we have fallen short of this ideal, but this commitment to human rights was, and is, the promise of America.

I hope that this Subcommittee will give the Senate an opportunity to work together to maintain America's leadership in protecting and promoting fundamental human rights.

America also stands for another revolutionary idea: the rule of law. As John Adams said, we are "a government of laws, not of men." We should keep in mind that human rights are little more than empty promises if they are enforceable in law.

That is why this is the Human Rights and the Law Subcommittee, and that is why it is part of the Judiciary Committee. And that is why this Subcommittee will focus on the law as a means for making the promise of human rights a reality.

Genocide and the Rule of Law

When Chairman Leahy asked me to chair this Subcommittee, I knew that our first hearing had to be on the subject of genocide and the rule of law.

Rafael Lemkin, a Holocaust survivor and the architect of the Genocide Convention, placed his faith in the ability of the law to prevent genocide. He implored the international community to adopt laws against genocide, saying, "Only man has law... You must build the law!"

The legal prohibition against genocide is obviously an unfulfilled promise. We see this most clearly today in Darfur in western Sudan. In this region of six million people, hundreds of thousands of people have been killed and over two million people have been driven from their homes. For them, the commitment of "never again" rings hollow.

We must ask ourselves why. Is this a failure of law, or of will? Or both? What are the legal obligations of states to prevent genocide before it has begun? Do debates about the legal definition of genocide serve as an excuse for governments not to act? What is our responsibility to protect victims of atrocities that do not meet the legal definition of genocide?

And we must explore legal options for preventing genocide, or, in the worst case scenario, stopping an ongoing genocide, like the one in Darfur.

During today's hearing, we will explore using the law to impose criminal and civil sanctions on individuals who are guilty of genocide. We will discuss the status of the International Criminal Court's Darfur investigation, and whether the federal government is doing everything it can to facilitate that investigation. We will also examine the possibility of criminal and civil liability under U.S. law for people who commit genocide anywhere in the world.

Divestment is another legal tool that has put pressure on the government of Sudan to stop the genocide. Today's divestment movement is the heir to the anti-apartheid movement of the 1980's. Apartheid ended because of the courage and determination of people like Nelson Mandela, but divestment was also a source of external pressure on the apartheid system.

Today I want to announce that I plan to introduce legislation to authorize state and local governments to divest from Sudan. Senator Brownback, my colleague Senator Obama and members of this Subcommittee have played leading roles in the divestment movement and, more broadly, the fight against the Darfur genocide. I look forward to

working with the members of this Subcommittee to enact divestment legislation and other legal measures that will help end the genocide in Darfur.

A little over a year ago, Senator Brownback and I visited Kigali, Rwanda. We stayed in the Hotel Mille Collines, made famous by Don Cheadle's movie *Hotel Rwanda*. As I walked down the corridor to my room, I could not help but think of that movie and the hundreds of frightened Rwandans who huddled there, fearing the worst. Early one morning, I walked down the hill to Saint Famille, a simple, red brick Catholic Church. I learned later that Saint Famille was a sanctuary for people fleeing the genocidaires. Sadly, this sanctuary was no refuge at all. It was overrun and nearly one thousand people were massacred in the church I visited that morning.

In 1994, my predecessor and friend, Senator Paul Simon of Illinois, pleaded with the Clinton Administration to do more to stop the genocide in Rwanda, and President Clinton later called his inaction the worst foreign-policy mistake of his administration. I salute the Bush Administration for calling the situation in Darfur the genocide that it is. Now that we have acknowledged for more than four years that this horror is happening on our watch, we must summon the courage act to stop this carnage, this genocide.

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February 2, 2007

The Honorable Richard Durbin
Subcommittee on Human Rights and the Law
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C.

Dear Chairman Durbin:

Freedom House welcomes the creation of the Senate Judiciary Committee's Human Rights and the Law Subcommittee.

Throughout history, countries around the world have looked to America as a beacon of human rights and freedom. The legal framework governing human rights in the United States and around the world is an issue that Freedom House has monitored for decades. In the coming year, Freedom House will release an in-depth report highlighting the state of political rights and civil liberties entitled, *Today's American: How Free?* We hope that this effort will spark debate on these critical issues and look forward to sharing the results of this research with the Subcommittee.

At this point in history, it is critical that the United States renew its commitment to defending human rights around the world as established in the Universal Declaration of Human Rights. We consider the Human Rights and the Law Subcommittee an ally in this effort and we look forward to your success.

Sincerely,

Jennifer Windsor
Executive Director

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February 5, 2007

Honorable Chairman Durbin:

The Genocide Intervention Network thanks you for the opportunity to submit testimony and for your leadership in working to stop the first genocide of the 21st century in Darfur, Sudan.

We support you and your Senate colleagues' recent request to President Bush that due to the deteriorating security situation in Darfur "the time has come to begin implementing more assertive measures."

The Darfur Peace and Accountability Act (P.L. 109-344), signed by the President in October 2006, included several non-binding provisions that, if implemented, would impose significant costs on the National Congress Party in Khartoum for continuing its campaign of genocide in Darfur.

In April 2006 the President imposed asset freezes and travel bans on four Sudanese individuals (one member each of the Government of Sudan, Janjaweed militia, Justice and Equality Movement, and the Sudanese Liberation Army). The list should be expanded to include the findings by the UN Panel of Experts which identified additional senior officials in the Government of Sudan – among them, Security Chief Salah Gosh – as responsible for crimes in Darfur.

The Darfur Peace and Accountability Act also includes a provision requesting the President to deny entry at U.S. ports to foreign oil tankers that have done business with the government of Sudan. Our research on oil tanker movements between July 22, 2004 (when Congress declared the violence in Darfur to be genocide) and December 18, 2006 shows over 250 trips where oil tankers that had previously transported Sudanese oil eventually made their way into U.S. ports. We were able to conduct further research with the assistance of oil experts and maritime legal counsel that demonstrates the implementation and enforcement of the port-entry denial provision will have little to no impact on the U.S. economy, and represents an easy way for the U.S. to put additional pressure on Khartoum. A recent poll commissioned by the Genocide Intervention Network found that more than half of American voters support this measure.

In addition to supporting these important federal actions, the Genocide Intervention Network, through its project, the Sudan Divestment Task Force, is actively involved in dozens of successful and developing targeted Sudan divestment campaigns around the world at the university, asset manager, city, state, and national levels. Our organization has developed a unique approach to shareholder engagement and divestment, focusing its efforts on the most problematic companies in Sudan. This approach, termed "targeted divestment", helps to maximize impact on the Sudanese government, while minimizing potential harm to both innocent Sudanese civilians and investment returns.

The Sudanese government has a long history of susceptibility to economic pressure, with a foreign debt nearly as large as its GDP. More than U.S. diplomacy, the country has responded to U.S. economic pressure in the past. Despite this historical responsiveness, the regime has faced little in the way of economic consequences for its perpetuation of genocide in Darfur, heavily protected by a small set of international protectors whose commercial interests in Sudan are very strong. Indeed, while the regime has been brutal towards its own citizens, it has been a shrewd attracter of foreign investment. Sudan currently ranks in the top 20 countries in the world in attracting foreign investment dollars as a percentage of its GDP and it holds international investor conferences, even as the genocide is ongoing, with amazing regularity. This is a government acutely attuned to the country finances but facing little challenge from the international community. As if to emphasize this point, Sudan's President recently stated to the international press, "When countries gave us sanctions, God gave us oil."

Ironically, the number of companies propping up this genocidal regime is relatively limited. While there are over 400 multinational corporations operating in Sudan, only a few dozen play a truly detrimental role in the country. Our targeted divestment model surgically targets those few dozen companies.

Furthermore, the emerging Sudan divestment movement – including over two dozen state campaigns and recent passage of targeted divestment legislation in California – has already caught the attention of the Sudanese government, which has spent considerable time and energy attacking the campaign. Several major companies operating in Sudan, including ABB, Siemens and Total, have also recently altered their business practices, partly in response to the divestment movement. Prominent foreign policy experts and think tanks which do not classically support blanket sanctions, including the International Crisis Group and Human Rights Watch, have all endorsed surgical economic sanctions on the Sudanese regime, calling it a critical tool in the armamentarium for influencing the behavior of the Sudanese government and bringing long-term peace and security to the region.

Divesting from targeted companies doing business in Sudan will demonstrate that Americans will not allow their pension funds, endowments and personal holdings to facilitate genocide, while simultaneously putting much-needed economic pressure on the government of Sudan – pressure that has already caught the attention of Sudan's government and changed company behavior.

We thank you for your leadership and support you in this important fight to end genocide in Darfur, Sudan.

Mark Hanis
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February 5, 2007

The Honorable Richard J. Durbin
Chairman, Subcommittee on Human Rights and the Law
Senate Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Durbin:

I am writing to express our profound thanks for your leadership on human rights and, in particular, for the central role you played in creating the new Judiciary Subcommittee on Human Rights and the Law. We believe this new Subcommittee is an important step towards ensuring that the United States Government understands its human rights treaty commitments as part of domestic law. This is what our Constitution requires, and thus it is particularly fitting that the Judiciary Committee will now have jurisdiction over them.

Eleanor Roosevelt, the mother of the international human rights movement, famously said: "Where do universal human rights begin? In small places, close to home. So close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighborhood he lives in; the school or college he attends; the factory, farm, or office where he works." The human rights treaties to which the United States is a party – on civil and political rights, torture, and racial discrimination – are intended to protect people "close to home" against government abuses of their rights. They are, under our Constitution, part of "the supreme law of the land." But most Americans have never heard of them, nor have the executive agencies that have – or ought to have – protection of these rights as part of their mandate. Historically, the United States Government has confined examination of human rights issues to the State Department, where they are treated as a matter of foreign policy. Congress has largely taken the same approach, limiting jurisdiction over these issues – as human rights issues – to the committees which oversee the State Department and foreign relations.

That approach misses Eleanor Roosevelt's point. Human Rights First has long argued that all three branches of the United States Government treat human rights laws as part of our domestic law, and that Congress and the Executive Branch bring these obligations into the mainstream of the domestic agencies with primary jurisdiction over their subject matter. President Clinton broke new ground in this direction with his 1998 Executive Order 13107 on the Implementation of Human Rights Treaties, issued on the 50th anniversary of the Universal Declaration of Human

Rights. The Executive Order created an inter-agency working group that brought together the domestic agencies charged with implementing human rights treaty obligations and charged them with ensuring that executive branch policies comported with those obligations.

Human Rights First welcomes the creation of the Subcommittee as an extension of this approach. The new Subcommittee presents an opportunity for the United States to view human rights as Eleanor Roosevelt did – close to home, and relevant to all Americans.

Sincerely,

Elisa Massimino
Washington Director

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Kati Marton
Linda Mason
Barry Meyer
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Samuel K. Murumba
Catherine Powell
Sigrid Rausing
Victoria Riskin
Kevin P. Ryan
Darian W. Swig
John R. Taylor
Shibley Telhami

Robert L. Bernstein, Founding Chair, (1979-1997)
Jonathan F. Fanton, Chair (1998-2003)
Bruce Rabb, Secretary

HUMAN RIGHTS WATCH

www.hrw.org

February 5, 2007

The Honorable Patrick Leahy
United States Congress
433 Russell Senate Office Building
Washington, DC 20510

The Honorable Richard Durbin
United States Congress
309 Hart Senate Office Building
Washington, DC 20510

The Honorable Thomas Coburn
United States Congress
172 Russell Senate Office Building
Washington, DC 20510

Dear Senators Leahy, Durbin, and Coburn:

We write to commend you on your leadership in setting up the new Judiciary Committee Subcommittee on Human Rights and the Law. The United States' longstanding commitment to fundamental human rights, as enshrined in the Bill of Rights and in international treaties that the US helped negotiate, has long been one of America's greatest strengths. But events over the last several years have undermined the US's credibility as a leader on human rights. We hope that the actions of this Subcommittee will help to correct some of the abuses of the last few years and restore the United States' moral authority around the world.

We look forward to working with the Subcommittee in the upcoming months on the many pressing human rights issues of concern, including genocide, war crimes, torture, and arbitrary detention.

Thank you for your important leadership on these issues.

Sincerely

Jennifer Daskal
Advocacy Director, US Program

Tom Malinowski
Washington Advocacy Director

PIERCE LAW
FRANKLIN PIERCE LAW CENTER

JOHN D. HUTSON *Dean*

January 12, 2007

Senator Richard Durbin
332 Dirksen Senate Building
Washington, DC 20510

07 JAN 23 PM 1:33

Dear Senator Durbin,

I want to offer my strong endorsement and support your new subcommittee of the Senate Committee on the Judicary on Human Rights and the Law. A subcommittee with this focus is critically important in this new age and is long overdue. Congratulations to you and Senator Leahy for taking this bold step.

As we move into a new era, with new international and domestic challenges, the United States must work diligently to remain true to our traditions and not lose our way as we pursue our enemies, foreign and domestic. I believe Heraclitus' warning that "Character is Destiny" applies to nations as well as to individuals. Indeed, perhaps most especially to nations. Our national character is threatened if we lose sight of the leadership role that we have played on the world scene over the decades in support of human rights and the rule of law. We dare not falter.

You were an early and steadfast supporter of these principles, Senator Durbin. Please know that I stand ready to assist you in your efforts to ensure that the United States continues to be the world leader in support of human rights and the rule of law.

Sincerely,

John D. Hutson
RADM JAGC USN (ret.)

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February 1, 2007

The Honorable Richard J. Durbin, Chair
U.S. Senate Committee on the Judiciary
Subcommittee on Human Rights and the Law
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Durbin,

On behalf of the Jewish Community Relations Council of the Jewish Federation of Metropolitan Chicago, representing 47 constituent organizations, we wish to congratulate you on your appointment to Chair the new Senate Judiciary's Subcommittee on Human Rights and the Law. Your commitment to improving the lives of American citizens and those striving for security, human dignity and protection across the world is reflected in your desire to head this important committee.

The world is facing many serious challenges. The people of Darfur, Sudan continue to die and suffer under the brutal policies of their own government. Violence in other regions of Africa, including the Congo and Uganda cause untold suffering to the most vulnerable. In the Middle East, the regime of Iranian President Ahmadinejad openly calls for the destruction of the State of Israel, while continuing a nuclear program of uranium enrichment against international will.

We are proud of the role the United States has played in addressing these issues, but more must and can be done.

For over three years the people living in the Darfur region of Sudan have been attacked, brutalized and killed by forces under the control of the central government in Khartoum. In June 2004 – for the first time in its history-the Committee on Conscience of the United States Holocaust Museum declared a "genocide emergency" in the Sudan. In July 2004, the U.S. Congress passed resolutions declaring a state of genocide in Darfur. In January 2005, the United Nations Commission of Inquiry declared that throughout Darfur: "government forces and militias conducted indiscriminate attacks on a widespread and systematic basis, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging, and forced displacement." Both the US Senate and House have passed Darfur Accountability Act bills, reiterating, "that the atrocities taking place in Darfur are genocide" and calling for various measures that would serve as vital steps in bringing an end to the genocide.

In spite of the acknowledgment by the international community that acts of mass-killings are occurring, efforts to halt these atrocities have failed. Sudanese President Omar Hassan Bashir continues to oppose the will of the international community to disarm the militias and accept an international peacekeeping force in the region.

We commend the leadership role the United States has played in addressing this crisis, and that the Jewish community has assumed a central voice in this country calling for action.

We must however remain vigilant, do more, and mobilize others to action.

In all cases of previous genocides, the response of the international community has been too little and too late. As Former U.N. Secretary General Kofi Annan plaintively stated on the tenth anniversary of the Rwandan genocide, "We must never forget our collective failure to protect at least eight hundred thousand defenseless men, women and children who perished in Rwanda ten years ago. Such crimes cannot be reversed. Such failures cannot be repaired. The dead cannot be brought back to life. So, what can we do?"

President Mahmoud Ahmadinejad of the Islamic Republic of Iran has made the destruction of Israel his avowed policy. Ahamadinejad's declaration in 2005 that "Israel should be wiped off the map" was met by widespread international outcry. Yet, this declaration was not an isolated incident, but the first of many during the past year. Indeed, it is fair to consider the elimination of Israel as Iran's foremost foreign policy objective, to be facilitated by arming Hizbullah and Hamas, advancing Iran's rogue nuclear weapons program, and expanding its arsenal of long-range nuclear-capable missiles that can reach anywhere in Israel and Europe. The statements emanating from the Iranian President are not only alarming and destabilizing. They also constitute direct and public incitement to commit genocide -- a gross violation of international law. Such incitement is reminiscent of historical incidents of genocide, like that which occurred in Rwanda. The critical difference is that while the Hutus in Rwanda were equipped with the most basic of weapons, such as machetes, Iran, should the international community do nothing to prevent it, will soon acquire nuclear weapons. This would increase the risk of instant genocide, allowing no time or possibility for defensive efforts.

On December 9, 1948, the General Assembly of the U.N. adopted the Genocide Convention. The Convention, originally signed by 25 states, came into force on January 12, 1951. By January 1985, there had been 96 ratifications, adherences or successions deposited with the U.N. Secretary General. Today 138 states are parties to it, making it one of the most widely accepted treaties in the realm of international law. It is vital to note that one of these ratifications was that of Iran that ratified the treaty without attaching any reservations thereto. Thus, under the international law of treaties, Iran is bound by the Convention.
The Convention defines the crime of genocide, and affirms the criminality of genocide in times of both peace and war. It also stipulates that the following acts are punishable: genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempts to commit genocide, and complicity in genocide. Persons who committed any of these listed acts would be subject to punishment, whether they were constitutionally responsible rulers, public officials or private individuals.

Article 1 of the Genocide Convention states that the contracting parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law that they undertake to prevent and punish.

Article 2 defines genocide as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such, "(A) Killing members of the group; (B) Causing serious bodily or mental harm to members of the group; (C) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part."

Senator Durbin, Ahmadinejad knowingly and intentionally calls for the destruction of Israel. He has attended rallies where placards calling for "death to Israel" are prominently displayed. He further organized a conference entitled "The World Without Zionism." Iran is currently risking sanctions by the U.N. Security Council to protect its rogue nuclear weapons development program from international supervision. Simultaneously, Iran has developed ever longer-range nuclear-capable missiles able to target all locations in Israel. Nor does Iran merely pose an inchoate threat. Indeed, Iran has furnished Hizbullah and Hamas, both terrorist organizations dedicated to the destruction of Israel, with between one and two billion dollars of weapons and military training. During the recent Hizbullah aggression, large numbers of these missiles and other Iranian weapons were employed, causing thousands of casualties among Israel's civilian population. Reminiscent of the deadly use of radio broadcasts during the Rwandan genocide, the Iranian government's radio and television channels feature inciting anti-Semitic broadcasts. Many of these broadcasts are also available across the region and the world via the Internet.

On the basis of international law, Iranian President Mahmoud Ahmadinejad is in breach of a prohibition contained in the Genocide Convention, which Iran has ratified.

Senator Durbin, we call upon the United States government to exercise its right as an original signer to the Convention to pursue the possibility of prosecuting Ahmadinejad either under our judicial system or through the International Criminal Court.

This time, we must act on our declaration "Never Again."

Thanks again for your inspiring, commendable work in this important arena.

Respectfully,

Alan Solow, Chair

Jay Teath, Director

National Member Agencies
American Jewish Committee
American Jewish Congress
Anti-Defamation League
B'nai B'rith
Hadassah
Jewish Labor Committee
Jewish War Veterans
National Council
of Jewish Women
Union for Reform Judaism
Union of Orthodox Jewish
Congregations of America
United Synagogue
of Conservative Judaism
Women's American ORT
Women's League
for Conservative Judaism

February 7, 2007

The Honorable Dick Durbin
U.S. Senate Committee on the Judiciary
Subcommittee on Human Rights and the Law
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Durbin:

On behalf of the Jewish Council for Public Affairs (JCPA), I would like to express my whole-hearted support for the creation of the Human Rights and the Law Subcommittee of Senate Judiciary Committee, and congratulate you on your chairmanship. The Jewish Council for Public Affairs is the coordinating body for the organized Jewish Community. Our membership includes 13 national agencies and 125 local Jewish community relations councils throughout the country. For over 50 years, JCPA has been dedicated to building unity amongst our members and developing consensus policies. The Jewish community is united in our commitment to human rights and we hope this new subcommittee, under your stewardship, will help our nation focus on the legal aspects and options for protecting human rights. Genocide is the most vicious violation of human rights and we thank you for focusing on this issue first.

The Jewish community is committed to upholding human rights, both domestically and internationally, and defending against genocide. Our history and experience has made us keenly aware of the depth of the hatred and inhumanity that fuels genocide. Never again should any people face these horrors. Our experience drives us work diligently to prevent genocide and stop needless killings. Unfortunately, even after the Holocaust, the world has too often continued to turn a blind eye to genocide.

In the past sixty years, the world community has developed legal institutions to protect people across the globe from the horror of genocide. Unfortunately our efforts have often been unsuccessful. In the last fifteen years, we have seen horrible atrocities in Rwanda and Bosnia. Today in Darfur, we witness the death and displacement of millions.

Over the past several years, the JCPA has worked closely with other agencies and institutions to call attention to the devastation in Darfur. We were pleased that in recent months, President Bush named Andrew Natsios as his Special Envoy to Sudan. We have confidence in Ambassador Natsios and support his efforts bring an end to the violence. However, we would like to see the United

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States do more. It has been two-and-a-half years since the Congress and former Secretary of State Colin Powell spoke truth about the situation in Darfur and declared it, "genocide". Despite our efforts, we still face a perilous situation. In the past three years, more than 400,000 people have been systematically murdered. As the situation continues to deteriorate, we are obligated to re-double our efforts. We must examine and fulfill all of our legal obligations under the Genocide Convention and strengthen our international judicial institutions to protect against these travesties. We are looking forward to the insights of the Senators and witnesses.

Thank you very much for holding this hearing. We look forward to working with you and your committee closely as you explore other international and domestic human rights issues.

Sincerely,

Steve Gutow
Executive Director

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Edward M. Kennedy Statement
Senate Judiciary Subcommittee on Human Rights Hearing on
"Genocide and the Rule of Law"
February 5, 2007

I welcome the decision by our Chairman, Sen. Leahy, to create this new Subcommittee. It signals our determination to reclaim America's role in the world as a leading defender of human rights.

I also commend Senator Durbin, as Subcommittee Chair, for focusing this first hearing on genocide and the rule of law. The world needs America's leadership if it is to act upon the cries for help and justice being made by the hundreds of thousands of men, women, and children throughout the world. America's leadership is essential to prevent the crimes such as those in Rwanda from ever happening again.

Almost ten years ago, when President Clinton traveled to Kigali, Rwanda's capital, he recognized that the United States did not do as much as it could have done or should have done to limit the genocide that took place there. The same indictment can be made against us again for our weak response to the horror that is happening now in Darfur. The Government of Sudan must understand that its complicity in the death and destruction in Darfur is unacceptable. The Administration should use the authority that Congress has provided, impose the sanctions and convince the international community to do the same.

More than two years ago, Congress declared "the atrocities unfolding in Darfur, Sudan are genocide." In October 2006, we passed and President Bush signed the Darfur Peace and Accountability Act. That was important step, but we need to do much more. In the last Congress, Senator Smith and I introduced legislation to encourage greater international pressure on the Government of Sudan, including basing U.N. peacekeepers in Darfur. We called for targeted sanctions, reports on investments in Sudan and on the assets of its leaders, the enforcement of a no-fly zone, and additional humanitarian assistance for Darfur, and $750 million in humanitarian assistance for Darfur - $150 million for each of the next five years.

Our bill also called on the Department of Commerce to prepare a report on companies investing in Sudan and publish a list of those companies in the Federal Register. We should shine a bright light on companies and institutions whose investments in the Sudan, directly or indirectly, provide support to a regime that approves genocide. That requirement would be an essential first step if Congress decides to call for divestment from the Sudan.

Senator Patrick Leahy
Committee On The Judiciary Subcommittee On Human Rights And The Law
Hearing On "Genocide And The Rule Of Law"
February 5, 2007

This is the first hearing of our newly established Subcommittee on Human Rights and the Law. I want to commend the Subcommittee Chairman, Senator Durbin, who was instrumental in the decision to establish this Subcommittee and whose concern for these issues is longstanding and deeply rooted.

It is our intention that this Subcommittee will closely examine some of the important and difficult legal issues that have increasingly been a focus of the Judiciary Committee. Many derive from actions taken by this Administration over the last five years. Its policies of declaring persons enemy combatants, imprisoning them incommunicado indefinitely in isolated and dehumanizing conditions without charge, and denying them lawyers or access to the courts until forced to do so by the Supreme Court, make our work particularly necessary.

The United States played the key role in the creation of the Universal Declaration of Human Rights. Our Bill of Rights and our independent judiciary have been models for other nations for more than two hundred years.

Justice Jackson's role at the Nuremberg trials, and our support of war crimes tribunals for perpetrators of genocide and crimes against humanity in the former Yugoslavia, Rwanda, and Sierra Leone are part of a tradition of which we can be proud.

During the last five years, America's reputation has suffered tremendously. Some of our ability to lead on human rights issues has been needlessly and carelessly squandered. Abu Ghraib and Guantanamo have tarnished that role and that tradition. And so has, I believe, our refusal to join the International Criminal Court – indeed, the Administration's efforts to undermine the Court – after our nation played a central role in the negotiations on the Rome Treaty. The secret prisons that the President confirmed last year and this Administration's role in sending people to other countries where they would be tortured have led to condemnation by our allies, to legal challenges and to criminal charges.

One of the reasons the image of our country has been so damaged during recent years is because the world believed that we stood for something better. They hold us to a higher standard, and they want us to live up to our own ideals, as do we all. When we fall short of that standard it is not only our reputation that suffers; it is the cause of justice everywhere that also suffers.

In Darfur we see the tragic replay of suffering and death. Hundreds of thousands of innocent people killed, or raped, or tortured, or forced to flee the ashes of their homes. This is the topic of today's hearing.

I thank our witnesses, who include a representative from the Justice Department; a Senator from our ally Canada, who served as a military officer in the United Nations mission in Rwanda; a distinguished professor and legal expert; and an activist who moves us to see the right and, I hope, do what is right. We will be confronted with the horrific consequences of the failure to act to stop genocide. What happened in Rwanda was, I believe, among the most egregious failures of the international community to protect human rights since the Cambodian genocide of the 1970s. We cannot allow that kind of horror to be repeated.

I commend Senator Durbin for his role in seeking – at every opportunity – additional humanitarian aid and funding for international peacekeeping troops in Darfur. I will do what I can, as well.

We need to ask what more can be done to convince the Sudanese Government to disarm the militias that are responsible for the genocide and to allow the United Nations to deploy additional troops to buttress the African Union force. I know Senator Durbin has some ideas, and I look forward to working with him.

We also need to determine whether our own laws provide adequate authority to prosecute, in the United States, acts of genocide by non-U.S. nationals that occur outside this country, whether in Darfur or anywhere else.

I thank our witnesses for arranging to be with us and look forward to their testimony.

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Department of Justice

STATEMENT

OF

SIGAL P. MANDELKER
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION
DEPARTMENT OF JUSTICE

BEFORE THE

SUBCOMMITTEE ON HUMAN RIGHTS AND THE LAW
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

GENOCIDE AND THE RULE OF LAW

FEBRUARY 5, 2007

Statement of
Sigal P. Mandelker
Deputy Assistant Attorney General
Criminal Division
Department of Justice

Before the
Subcommittee on Human Rights and the Law
Committee on the Judiciary
United States Senate

Concerning
Genocide and the Rule of Law

February 5, 2007

Chairman Durbin, Ranking Member Coburn, and distinguished Members of the Subcommittee, thank you for inviting the Department of Justice to testify at this hearing. Perpetrators of genocide have participated in the commission of some of the ghastliest crimes in modern history, and so long as these individuals are at liberty they pose a continuing danger to the civilized world. As the Deputy Assistant Attorney General in the Criminal Division who supervises the Office of Special Investigations and the Domestic Security Section, I am pleased to address the Department of Justice's ongoing efforts against the perpetrators of genocide and other human rights violators.

Bringing these perpetrators to justice is a mission of the very highest importance. As Ambassador Alejandro Wolff, the Acting U.S. Permanent Representative to the United Nations, said just eleven days ago in introducing a landmark U.S.-drafted General Assembly resolution to condemn Holocaust denial, "all people and all states have a vital stake in a world free of genocide."[1] Acting on President Bush's injunction that those who commit war crimes must be pursued, both "to advance the cause of justice ... [and] to consolidate peace and promote the rule of law,"[2] we continue to utilize all avenues available against human rights violators found in this

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[1]Statement of the United States Permanent Representative on the Introduction of the Resolution on Holocaust Denial, January 25, 2007. www.state.gov/p/io/rls/rm/79424.htm The resolution, which had 104 co-sponsors, was adopted by consensus the following day. *See* State Department January 26, 2006, press release at http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2007&m=January&x=20070126160123eaifas0.887356, reprinted at http://media-newswire.com/release_1042289.html.

[2]Statement by the President on Bringing War Criminals to Justice, August 3, 2001, www.whitehouse.gov/news/releases/2001/08/20010803-15.html ("Those who commit war crimes must face justice. As I said in Kosovo, we must not allow difference to be license to kill, and vulnerability an excuse to dominate. These two steps [the transfer of three suspects to the

country – including criminal prosecution, denaturalization, extradition and removal. The United States also continues to provide assistance to foreign governments and to various international tribunals that are investigating and prosecuting cases abroad against these individuals.

Federal efforts directed against participants in genocide are part of an important and time-honored national commitment. The United States government has long been a key participant in global law enforcement efforts to help end impunity for genocide, war crimes and crimes against humanity. Thus, for example, our nation has taken a leading role in establishing and supporting such notable institutions as the Nuremberg and Tokyo Tribunals after World War II and, more recently, the International Criminal Tribunals for Rwanda[3] and the former Yugoslavia, the Special Court for Sierra Leone, and the Iraqi High Tribunal. Most recently, the United States has been the worldwide leader in diplomatic efforts to stop the ongoing genocide in Darfur. In 2004, the U.S. State Department commissioned an Atrocities Documentation Team which on only a few weeks notice assembled a team of experienced law enforcement investigators and legal experts, including Department of Justice personnel. The team interviewed over 1,100 Darfurian refugees who had taken shelter in refugee camps in neighboring Chad. Based on the information elicited in those interviews, then-Secretary of State Powell was able to conclude and state publicly that genocide was occurring in Darfur.

The Department of Justice provides training and other assistance to national and international investigative and prosecutorial authorities that are pursuing justice in the aftermath of conflicts that were characterized by large-scale human rights violations. By way of example, the Department of Justice loaned a significant number of experienced law enforcement professionals to the International Criminal Tribunal for the Former Yugoslavia (ICTY). Indeed, the current head of the Domestic Security Section of the Department's Criminal Division was detailed to that tribunal by the Department, as was a senior Federal prosecutor who now serves in the State Department as the Ambassador at Large for War Crimes Issues. The Justice Department provides extensive assistance to authorities in countries in which human rights violations took place, in part via the training programs that the Department operates for foreign prosecutors and judges through its international network of Resident Legal Advisors.

Three components of the Justice Department's Criminal Division provide much of the assistance given to foreign law enforcement authorities. The Office of International Affairs (OIA) takes the lead in executing foreign requests for evidence or other legal assistance and

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UN International Tribunal for Former Yugoslavia and the Tribunal's conviction of General Radislav Krstic] advance the cause of justice, but also help to consolidate peace and promote the rule of law.")

[3]The full name of the Rwanda Tribunal is "The International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States."

works closely with the State Department in matters relating to international extradition. OIA has responded to dozens of requests for assistance in matters relating to war crimes, genocide and other human rights offenses since 2000, including requests received from both the ICTY and the Rwanda Tribunal. Similarly, the Criminal Division's Overseas Prosecutorial Development and Training section (OPDAT) and the International Criminal Investigative Training Assistance Program (ICITAP) take the lead for the Department in providing training and assistance in criminal justice sector reform and development.

OPDAT has provided capacity-building assistance in the investigation and prosecution of war crimes to the various countries and jurisdictions of the former Yugoslavia, principally Serbia and Bosnia-Herzegovina, as well as Croatia, and to a lesser extent (and more recently) Kosovo, Macedonia and Montenegro. This has included provision of training services; advice on legislation; assistance in the development of witness protection programs; videoconferencing equipment (to allow witnesses in criminal cases, including war crimes cases, to testify from one country to another); and assistance to promote the exchange of information and cooperation among the countries and jurisdictions in the region. Prosecutors and other personnel of the National Security Division's Counterterrorism Section, the U.S. Attorney's Office for the District of Columbia, and the Criminal Division's Office of Special Investigations have also participated in the training programs in Croatia.

The Justice Department's efforts in the former Yugoslavia have been coordinated with the ICTY. For example, we have sponsored study tours by Bosnian prosecutors to the Tribunal (at The Hague), and ICTY representatives have participated in conferences that we have sponsored, such as a regional conference held last October in Montenegro. The October conference was attended by officials from all six jurisdictions of the former Yugoslavia (Serbia, Croatia, Bosnia and Herzegovina, Montenegro, Macedonia and Kosovo).

The assistance that we have provided in the former Yugoslavia, as elsewhere, is given in large part with a view toward increasing the ability of these countries and jurisdictions to prosecute war crimes cases. This capability is especially important now that the mandate of the ICTY is drawing to a close and the Tribunal has begun transferring cases to the individual countries in the region.

ICITAP has similarly provided assistance directly to foreign law enforcement authorities in the former Yugoslavia. In Serbia, ICITAP conducted extensive assessments of the needs of the Interior Ministry's War Crimes Unit and Organized Crimes Directorate. Equipment, software, and training that ICITAP subsequently supplied has significantly enhanced the capacity of the Serbian authorities to identify and investigate complex and politically charged crimes. In Croatia, ICITAP, in coordination with OPDAT, provided specialized training to members of the criminal justice system who are directly responsible for the investigation and prosecution of war crimes cases. That training focuses on evidence collection, courtroom presentation, and witness protection. The work undertaken in this field by OPDAT and ICITAP draws extensively on the resources of Federal investigating agencies and the U.S. Attorney's Offices. It is an integral part of the Justice Department's commitment to assisting foreign governments and tribunals that are investigating genocide and other human rights violations.

When evidence surfaces that implicates residents of this country in genocide or crimes against humanity, the Federal government moves swiftly to investigate and take legal action. In some instances of human rights offenses committed outside the United States, Federal criminal prosecution is possible. However, even when offenders are not subject to prosecution here (for example, when the crimes were committed before the applicable Federal statutes were enacted, as was the case with World War II-era Nazi criminals, among others), the U.S. government can often employ other effective law enforcement tools, such as extradition (or, alternatively, denaturalization and/or removal) or prosecution for such crimes as visa fraud, unlawful procurement of naturalization, and making false statements.

Among the numerous Federal agencies involved in these law enforcement efforts are the Department of Justice's Criminal Division (primarily through the Domestic Security Section, the Office of International Affairs and the Office of Special Investigations) and National Security Division (through its Counterterrorism Section), the United States Attorneys Offices, the Federal Bureau of Investigation, and the U.S. Immigration and Customs Enforcement (ICE) within the Department of Homeland Security. Their efforts receive important support from the State Department and other components of the Federal government.

At the Justice Department, we have made great efforts to facilitate the criminal prosecution abroad of the perpetrators of genocide and other human rights violators found in this country. For example, in March 2000, following the conclusion of hard-fought extradition litigation,[4] the United States turned over Elizaphan Ntakirutimana to the International Criminal Tribunal for Rwanda (ICTR). He had been a pastor in Rwanda at the time of the 1994 genocide. Ntakirutimana was accused of devising and executing a lethal scheme in which Tutsi civilians were encouraged to seek refuge in a local religious complex, to which he then directed a mob of armed attackers. With his participation, the attackers thereupon slaughtered and injured those inside. The United States surrendered Ntakirutimana to the ICTR in response to a request made by the Tribunal pursuant to an Executive Agreement by which the U.S. agreed to transfer Rwandan suspects in its territory to the ICTR for trial.[5] Indeed, this is the only case to date in which an international tribunal has made a formal request for extradition. In 2003, Ntakirutimana, a onetime Texas resident, was convicted by the Tribunal of aiding and abetting genocide and he was sentenced to ten years' imprisonment. A prosecutor from the Justice Department played a significant role in charging Ntakirutimana.

The United States has extradited other human rights violators to other countries to stand trial in their domestic courts. A recent extradition of an accused human rights violator in the bilateral context was the January 2006 extradition of Mitar Arambašič to Croatia. Arambašič had been convicted in absentia in Croatia and sentenced to twenty years' imprisonment for crimes against humanity and war crimes perpetrated against civilians during the break-up of the

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[4]*See* Ntakirutimana v. Reno, 2000 US 851 (2000).

[5]Agreement, Jan. 24, 1995, U.S.-Int'l Trib. Rwanda, KAV No. 4529, 1996 WL 165484.

former Yugoslavia. The charges included the murder of two Croatian police officers in 1991 and the beheading of civilians with an axe. The Department of Justice vigorously and successfully pursued this extradition, which was contested by Arambašič in litigation spanning three years. The Justice Department also accomplished the extradition of several accused participants in Nazi crimes between 1973 and 1993 (when the last such extradition request was received).

Extradition matters are coordinated in the Justice Department by the Criminal Division's Office of International Affairs, which also responds each year to thousands of requests and inquiries from foreign law enforcement authorities for assistance in their investigations and prosecutions. The Federal government works diligently to locate international fugitives and return them to the countries in which their alleged crimes were committed. Extradition, however, is contingent upon receipt of a request from a foreign government with which the United States has an extradition treaty for the surrender of a fugitive human rights violator found in this country who has committed an offense covered by the treaty. The United States has received relatively few requests for the extradition of human rights violators; indeed, there have been fewer than 20 since 2000.

Human rights violators in this country who have violated Federal criminal laws are prosecuted for those violations by the Department of Justice. Although the Title 18 genocide statute, which was enacted in 1988, is limited to cases in which genocide has either been committed in the United States or committed abroad by a U.S. national,[6] the Justice Department makes use of other criminal and civil charges to ensure that the perpetrators of genocide or other egregious human rights violations do not find safe haven in the United States. The Criminal Division's Office of Special Investigations has compiled a 27-year record of identifying, investigating, and bringing civil denaturalization and removal actions against World War II-era participants in genocide and other Nazi crimes. OSI has successfully pursued more than one hundred of these criminals and it is widely considered to be the most successful law enforcement operation of its kind in the world. The program's most recent victory was recorded on January 3, when a U.S. immigration judge ordered the removal of Josias Kumpf of Racine, Wisconsin. By his own admission, during a mass killing operation in occupied Poland in 1943 Kumpf stood guard at a pit containing dead Jewish civilians and others he described as "halfway alive" and "still convuls[ing]," with orders to shoot to kill anyone who attempted to escape.

To date, some 60 Nazi criminals have been returned to countries of Europe that possess the criminal jurisdiction that the United States lacks in the World War II cases. OSI continues to work with prosecutors overseas to facilitate the criminal prosecution of Nazi criminals, including, of course, those perpetrators whom we succeed in removing from the United States. Those efforts have borne fruit in a number of important instances. For example, in Vilnius, Lithuania, in 2001, former OSI defendant Kazys Gimzauskas became the first person ever convicted on genocide charges in any of the successor states to the former Soviet Union. Year after year, in recognition of its commitment to, and success in, pursuing justice in the World War II Nazi genocide cases, the United States government has been the only government in the world

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[6] *See* 18 USC 1091.

to receive the "A" rating of the Simon Wiesenthal Center, the Los Angeles-based organization named after the renowned Nazi-hunter.

In 2004, the Intelligence Reform and Terrorism Prevention Act expanded OSI's mission to include investigating and bringing civil denaturalization cases and criminal prosecutions for unlawful procurement of U.S. citizenship against post-World War II participants in genocide, extrajudicial killings and torture perpetrated under color of foreign law. With this law, OSI became only the newest component of a comprehensive Federal interagency effort to ensure that perpetrators of these terrible crimes find no sanctuary in this country. A leading role in this effort is played by the Department of Homeland Security, particularly ICE and its Human Rights Violators and Public Safety Unit and Human Rights Law Division, as well as Citizenship and Immigration Services. Other components of the Department of Justice that participate in this effort are the Criminal Division's Domestic Security Section and Office of International Affairs, the National Security Division's Counterterrorism Section, the FBI and the U.S. Attorneys Offices. In 2005, seeking to strengthen their collaborative work on these often very challenging cases, the aforementioned agencies, along with the Department of State and the Central Intelligence Agency, formed an ad hoc working group on human rights violator matters. The member agencies meet frequently to share information and to coordinate enforcement strategies.

This law enforcement partnership has achieved numerous significant successes by employing a variety of legal tools, including criminal prosecution for such Federal offenses as visa fraud, unlawful procurement of naturalization, and false statements, as well as seeking civil and administrative remedies like denaturalization and removal. For example, in April 2005, ICE removed Enos Kagaba from this country to his native Rwanda on the basis of his participation in the genocide that ravaged his country in 1994. His removal was effected on the grounds of a provision of the Immigration and Nationality Act, added by Congress in 1990, that renders any alien who "engaged in conduct that is defined as genocide" by the International Convention on the Prevention and Punishment of Genocide removable from this country.[7] In 2004, Jean-Marie Vianney Mudahinyuka was convicted in Chicago of lying on his U.S. immigration forms to gain entry to the U.S. as a refugee. He was sentenced to 51 months in prison for that offense and for assaulting Federal officers who arrested him. Upon his release from prison, Mudahinyuka will also be subject to removal. He is wanted in Rwanda for charges of genocide and crimes against humanity.

In September 2005, more than a dozen Bosnian Serbs who lied on immigration forms about their prior service in the Bosnian-Serb army were arrested by ICE in Phoenix and indicted by the U.S. Attorney's Office on immigration-related charges. Two of those who have since been removed by ICE to Bosnia were indicted this past December 13 by Bosnian authorities on charges of murder and other serious offenses. And in December, sixteen individuals in six states were charged with criminal violations in connection with their efforts to obtain refugee status in the United States by concealing their prior service in the Bosnian Serb military. One of the defendants is described in a Federal affidavit as having been a commander of a police unit

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[7]Section 212(a)(3)(E)(ii) of the Immigration and Nationality Act, 8 USC 1227(a)(4)(D).

that cooperated with other Bosnian Serb entities in the Srebrenica massacres. Two of those who have since been removed by ICE to Bosnia were indicted this past December 13 by Bosnian authorities on charges of murder and other serious offenses.[8] All but one of the defendants face criminal charges that include immigration fraud and/or making false statements. The maximum sentence for making false statements is five years in prison, while the maximum sentence for immigration fraud is 10 years imprisonment. One defendant is a naturalized U.S. citizen, and he has been charged with unlawful procurement of citizenship and making false statements, offenses that carry maximum potential sentences of 10 and 5 years, respectively. The cases were investigated by ICE special agents with assistance from the Justice Department's Office of Special Investigations. They are being prosecuted by the U.S. Attorney's Offices for the Middle District of Florida; Eastern District of Wisconsin; Middle District of North Carolina; District of Colorado; Eastern District of Michigan; and Northern District of Ohio. (The Office of Special Investigations is also participating in the prosecution of the U.S. citizen defendant, in Tampa, Florida.)

The Kelbessa Negewo case is another example of Federal agencies working together to pursue justice in human rights violator cases. Negewo served as a local official under the repressive military regime that ruled Ethiopia from 1974 to 1991. He subsequently immigrated to the United States, settled in Georgia, and obtained U.S. citizenship. Three Ethiopian women later filed suit against him under the Alien Tort Claims Act in U.S. District Court in Atlanta, alleging that they had been tortured in a jail that he had controlled. The district court found that Negewo had both supervised and directly participated in the torture of the women, and the court awarded damages. A civil denaturalization action was filed against Negewo in May 2001 by the U.S. Attorney's Office in Atlanta. His U.S. citizenship was revoked in October 2004 pursuant to a settlement agreement negotiated by that office. Removal proceedings were initiated by ICE in 2005 following Negewo's denaturalization. These proceedings were the first to charge participation in torture and extrajudicial killings, charges that were added under amendments made to the Immigration and Nationality Act by the 2004 Intelligence Reform and Terrorism Prevention Act. This past October, Negewo was removed to Ethiopia and handed over to Ethiopian authorities, where he had already been convicted in absentia of numerous human rights violations, including murder, disappearance, torture, and unlawful taking of property.

In conclusion, Mr. Chairman, I would like to express to you and the Subcommittee the Justice Department's appreciation for this opportunity to discuss the government's ongoing efforts to ensure that justice is pursued both here and abroad on behalf of the victims of genocide and other serious human rights violations. We are very grateful for the tools that Congress has provided for law enforcement use in these enormously important cases. We will continue to wield those tools, both to bring the perpetrators of these terrible crimes to justice and, it is to be hoped, to hasten the arrival of the day in which the post-Holocaust imperative "Never Again" becomes, at long last, not just a slogan or a barely imaginable aspiration, but a *reality*.

I would be pleased to answer any questions that the Subcommittee may have.

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[8] The two men are Zdravko Bozic and Mladen Blagojevic, who were arrested in Phoenix in 2005 and subsequently convicted there on visa fraud and related charges.

OPEN SOCIETY INSTITUTE O S I

GEORGE SOROS
Chairman

ARYEH NEIER
President

February 2, 2007

The Honorable Richard J. Durbin
United States Senate
Washington, DC 20510

Dear Senator Durbin:

I am writing to congratulate you on chairing the inaugural meeting of the new Judiciary Subcommittee on Human Rights and the Law and on helping to bring the Subcommittee into existence. Your leadership on human rights issues has been and remains vitally important.

The Subcommittee's initial hearing on "Genocide and the Law" illustrates the important work that lies before you. In the years after Nuremberg, the governments of the world signed and ratified several treaties that oblige them to prosecute and punish those who commit great abuses of human rights. The Genocide Convention requires that "persons charged with genocide … shall be tried by a competent tribunal …." The Third Geneva Convention requires that "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed such grave breaches [war crimes] and shall bring such persons, regardless of their nationality, before its own courts." The International Covenant on Civil and Political Rights requires states to provide "an effective remedy" to "any person whose rights or freedoms … are violated." The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires states to seek out torturers, take them into custody, and bring them to trial.

Nations have honored these obligations largely in the breach. To examine the nature of these legal obligations and the efforts of states – or the disinterest of states – in living up to them is vitally important. Enormous efforts have been devoted to drafting and ratifying these historic documents. Equal effort most be devoted to ensuring that they are implemented and enforced. Those who consider committing violations of human rights must be forced to reckon seriously with the possibility that they will be brought before the bar to face truth, be held accountable, and serve justice.

We look forward to supporting the important work of the Subcommittee and congratulate you on launching this important venture.

Best regards.

Sincerely,

Aryeh Neier

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United States Senate
Committee on the Judiciary
Subcommittee on Human Rights and the Law

Hearing on Genocide and the Rule of Law
February 5, 2007

Testimony of Diane F. Orentlicher
Professor of Law, American University

Mr. Chairman, Ranking Member Coburn, and distinguished members of this Subcommittee, thank you for the opportunity to appear before you. It is an honor to testify at this historic session—the first hearing of a Senate body established to address the role of U.S. law in advancing the deepest interests of humanity and of our nation. This hearing could not be more timely, coming at a time when the need for action to prevent further atrocities in Darfur is urgent.

In larger perspective, it is fitting that this subcommittee has chosen to devote its inaugural hearing to genocide and the *rule of law*. Raphael Lemkin, the Polish scholar who devised the word *genocide* to capture the ghastly essence of crimes aimed at obliterating a human group and who campaigned relentlessly for a treaty on genocide, would have been gratified by the premise of this hearing. In Lemkin's view, it was essential to confront genocide through law—not just a code of conscience, although Lemkin was a man of surpassing conscience, but an *enforceable* law of humanity. No matter how often history and humanity gave cause to shatter Lemkin's faith, he passionately believed in the power of law to compel us to do better the next time we learned that a human group faced grave peril.

Lemkin's tireless crusade culminated in 1948, when the fledgling United Nations General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide.[1] As its title suggests, the treaty imposes two core obligations: First, States parties undertake to prevent genocide and, failing that, to mount effective action to halt its further sweep. Second, they commit to punish genocide as well as several related acts, such as attempting to commit genocide.

In 1988, Congress enacted legislation to bring U.S. law into conformity with the Genocide Convention, paving the way for U.S. ratification later that year.[2] My testimony this afternoon will address the question of how the United States can more effectively implement its obligations as a party to the Genocide Convention. In brief, I commend for this subcommittee's consideration the following legislative action:

- Amending the Comprehensive Peace in Sudan Act of 2004 and the Darfur Peace and Accountability Act of 2006 to make clear that, in passing the sanctions provisions of these laws, Congress did not intend to pre-empt at least certain kinds of state and local initiatives aimed at ending the human rights crisis in Darfur;

- Amending the Genocide Convention Implementation Act to establish federal criminal jurisdiction over the crime of genocide wherever the crime is committed. This jurisdiction should be exercised when the alleged offender is present in the United States and he or she will not be vigorously and fairly prosecuted by another court with appropriate jurisdiction;

- Amending the same law to recognize explicitly that its criminal provisions encompass those who bear criminal responsibility for genocide in accordance with well-established doctrines of superior responsibility;

- Amending the Immigration and Nationality Act to express a preference for action that would ensure prosecution of an alien suspected of participating in genocide who can be denied admission or deported on that ground; and

- Amending the Torture Victim Protection Act, which establishes a civil cause of action against those who are legally responsible for torture or extrajudicial executions, to establish a cause of action against those responsible for genocide and to remove any doubt that potential defendants include juridical as well as natural persons.

Before I explain the bases for these suggestions, it may be helpful first to summarize the basic obligations that the United States assumed when it ratified the Genocide Convention. Article I of the convention affirms in clarion terms the two core obligations that I mentioned earlier: "The Contracting Parties confirm that genocide . . . is a crime under international law which they undertake to prevent and to punish."

Article II sets forth what has become the authoritative definition of genocide under international law, defining genocide as one of five enumerated acts when they are committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such. The acts that constitute genocide when committed with this very specific intent are:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;[3]
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction;
(d) Imposing measures intended to prevent births within the group; and
(e) Forcibly transferring children of the group to another group.

To constitute genocide, these acts must be undertaken with the aim of destroying the targeted group—or a substantial part of that group—as such. Article III of the convention provides that, in addition to genocide itself, the following conduct "shall be punishable": conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide.

Other provisions set forth measures that parties to the Genocide Convention must or may undertake to give effect to their core duties of prevention and punishment. Because of its primacy, I want to turn first to the duty to prevent genocide.

The Duty to Prevent Genocide

By requiring treaty parties to prevent genocide, Article I enacts into law the vow of conscience, "never again." The Genocide Convention speaks explicitly of prevention in only one other provision, Article VIII, though the duty to prevent genocide infuses the entire treaty.[4]

Article VIII provides: "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III"—a reference to the provision that makes conduct such as attempting to commit genocide "punishable."

It has sometimes been noted that Article VIII is framed in permissive terms: States parties "may" call on competent UN organs to take appropriate action to prevent and suppress genocide. But it would deform the meaning of Article VIII to suggest that effective action to prevent genocide is optional. Instead, as the negotiating history of the Genocide Convention makes clear, the phrasing of Article III reflects the drafters' awareness that, when collective action to prevent or repress genocide is warranted, the most effective approach will vary depending on the imperatives of a particular situation. (Thus, other negotiating States resisted the Soviet delegation's efforts to assign exclusive UN competence to take action against genocide to the Security Council, where the Soviet Union could exercise veto power.[5])

Just as important, this provision's reference to competent UN organs underscores the global reach of the duty to prevent genocide and the drafters' belief that collective action would at times be necessary. States must, of course, do all they can to prevent genocide in their own territory. But States' duty to prevent genocide does not stop at their own borders. Wherever genocide occurs, it engages other countries' responsibility to act.

In short, the Genocide Convention alludes to a range of possible action States *may* take to discharge a duty they must *not* shirk. Simply put, the convention charges States parties to take effective action to prevent genocide or, when prevention has failed, to bring its murderous violence to a swift and certain end.

The United Nations General Assembly reaffirmed the principle of prevention in its 2005 World Summit Outcome document. Affirming that each State "has the responsibility to protect its populations from genocide" as well as "war crimes, ethnic cleansing and crimes against humanity" and that this duty entails preventing such crimes, the General Assembly recognized that, when governments fail to protect their own citizens, the responsibility falls to the international community.[6]

All too often, governments have failed to meet their obligation to prevent and suppress genocide, with ruinous results. At times, one ground for hesitation has been doubt about whether the narrow definition of genocide set forth in the Genocide Convention can accurately be applied to the situation at hand.

And so it is important to emphasize that governments do not face the same definitional challenges when they act to prevent genocide that a prosecutor must meet to secure a genocide conviction. To the contrary, for a State to wait until it is legally certain that genocide has occurred before it mounts effective action is to wait too long to prevent genocide. (And, it should be emphasized, the responsibility to protect humanity is also engaged by mass atrocities that do not constitute genocide.) Of course invoking the word *genocide* hardly assures that effective action will be taken to end a campaign of extermination. More than two years have passed since the United States government forthrightly described the violence in Darfur as a genocide, yet the carnage there continues to rage.

Recognizing the need for more concerted action, a growing roster of American states and cities have adopted or are considering divestment laws relating to Sudan with the aim of pressuring the Sudanese government to bring an end to atrocities in Darfur. These initiatives cannot by themselves bring the carnage in Darfur to an end, but they bolster and amplify initiatives taken by the Administration, Congress and others to do so.

Some of these laws now face legal challenges on the asserted ground that they are pre-empted by congressional sanctions legislation addressing the situation in Darfur as well as by Executive orders imposing specific sanctions against the government of Sudan. The most important step that Congress could take in support of these state and local initiatives would be to make clear that, in taking action against Sudan, it did not intend to foreclose at least certain kinds of state and local initiatives that go farther than federal law requires.

A clear statement of Congress's intent in this regard may in fact be necessary to avert judicial nullification of state divestment laws. When the United States Supreme Court struck down Massachusetts' selective purchasing law directed against Burma in *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), it reasoned that the Massachusetts law frustrated the intent behind federal legislation that, *inter alia*, imposed certain sanctions, authorized the President to impose others (and, if he did so, to terminate them), and authorized the President to pursue diplomatic strategies aimed at improving the human rights situation in Burma. A linchpin of the Court's analysis was the intent that it attributed to Congress. In the Court's view, "Congress manifestly intended to limit economic pressure against the Burmese government to a specific range," *id.* at 377, and the Massachusetts law exceeded that range.

U.S. courts might attribute a similar intent to Congress in relation to sanctions it has imposed or authorized against Sudan *unless* Congress makes it clear that it welcomes state and local divestment initiatives aimed at ending the violence in Darfur. Thus if

Congress wishes to see its own Darfur sanctions initiatives amplified by state and local divestment laws, it would do well to make its intention explicit.

The Duty to Punish

After affirming that genocide is a crime under international law that treaty parties undertake to punish, the Genocide Convention sets forth several specific obligations aimed at making this duty effective. These provisions represent minimum measures that treaty parties must take and are not meant to exclude more assertive action to ensure that those who act to destroy a human community are brought to justice. In fact, viewed through a lens of contemporary developments in international criminal law, these provisions stand out for their comparatively modest reach. I will come back to this point.

Although the Genocide Convention contemplates prosecution before an international court, it looks principally to States to ensure prosecution of genocide when committed in their own territory. Article VI provides in full:

> Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Article V requires States parties to enact "the necessary legislation to give effect to the provisions of the . . . Convention," particularly its provisions concerning punishment. The question I would like to address in my remaining time is whether the United States has satisfactorily fulfilled this duty.

The Genocide Convention Implementation Act of 1987,[7] or "Proxmire Act," is the key U.S. law implementing the Genocide Convention.[8] When read together with other provisions of the federal criminal code concerning conspiracy and complicity, the Proxmire Act for the most part fulfills the explicit obligation set forth in Article VI concerning prosecution of genocide and related criminal acts in courts of the State where genocide occurs.[9] The law goes one step farther, making it a federal crime for a U.S. national to commit genocide anywhere.

This is entirely consistent with the drafters' intent. As noted in the Senate Foreign Relations Committee Report concerning U.S. adherence to the Genocide Convention, "[t]he negotiating history makes it clear . . . that [the territory in which genocide occurred] is not the only place where trial may be had."[10]

But if the Proxmire Act largely fulfilled our obligations under Article VI when it was enacted,[11] both the Genocide Convention and U.S. implementing legislation now seem strikingly anachronistic in light of broader developments in international criminal law. More recent human rights treaties, such as the 1984 Convention against Torture[12] and the 2006 Convention on Enforced Disappearance,[13] require States parties to establish their

jurisdiction over persons suspected of committing treaty crimes in one of several circumstances: when the crime is committed 1) in their territory, 2) by one of their nationals, 3) against one of their nationals, or 4) outside their territory when the alleged perpetrator is in their territory and he or she is not extradited for trial to another State or transferred to an international tribunal.

Many countries have adopted or enforced legislation establishing jurisdiction over certain international crimes, including genocide, wherever committed if the alleged perpetrator is in their territory and any additional requirements are satisfied. Summarizing these developments in a United Nations study that I undertook in 2004, I noted that in recent years:

> [T]here has been unprecedented recourse to extraterritorial jurisdiction in respect of serious crimes under international law committed outside the context of World War II atrocities. Some States enacted legislation in the 1990s to ensure that they did not become havens for individuals responsible for crimes committed in the former Yugoslavia and Rwanda who would not likely be prosecuted before the [International Criminal Tribunal for the former Yugoslavia or the International Criminal Tribunal for Rwanda]; in other States, the presence of alleged perpetrators from these regions provided the occasion to enforce existing laws. Thus the operation of international tribunals created an atmosphere in which States were motivated to play their own part in bringing alleged perpetrators of international crimes to justice.[14]

As this study reflects, a new legal architecture for enforcing the law of humanity is now emerging. While the most visible emblems of this trend are several international criminal courts, these tribunals have been a catalyst for other legal innovations. Hybrid courts—courts comprising a mix of local and international judges, prosecutors and other personnel—have been established in Sierra Leone, Cambodia, Kosovo, East Timor, and Bosnia-Herzegovina. None of these courts has the capacity to prosecute more than a fraction of those who participated in grotesque forms of violence, and this has spurred many national courts to do their part to narrow the impunity gap.

While the United States has played a leading role in supporting many of the legal innovations I have mentioned, our own law has in some respects lagged behind that of many other countries, with the principal exception of legislation implementing the Torture Convention. As a party to the Torture Convention, the United States enacted legislation enabling U.S courts to exercise criminal jurisdiction when the alleged offender is a U.S. national or when he or she "is present in the United States, irrespective of the nationality of the victim or alleged perpetrator."[15] This past December, the United States brought its first indictment under the Torture Convention Implementation law.

But the United States cannot indict someone for genocide committed outside the United States, even when the victim is an American citizen, unless the perpetrator is a U.S. national. This makes no sense. Imagine what would happen if a U.S. citizen belonging

to a particular ethnic or racial group were a foreign correspondent, and traveled abroad to cover an ethnic conflict in a region like Darfur. Suppose as well that her membership in this group is sufficient to make her a target of a genocidal campaign underway in that region. If the perpetrator of this crime traveled to the United States, he could not be charged with genocide under our law.

Through legislation enacted in 2004, Congress took an important step toward addressing this issue. While expanding grounds for denying admission to and deporting aliens on human rights grounds, the legislation also directed the Attorney General, when considering appropriate legal action against aliens who are inadmissible or deportable on grounds that include their participation in genocide, to consider avenues for prosecution.[16] Through this action, Congress addressed a longstanding concern—by deporting aliens on human rights grounds without acting to ensure their prosecution, the United States and other countries could inadvertently undermine efforts to ensure that those who violate the basic code of humanity face the bar of justice.

Yet when the Attorney General considers appropriate legal action against those believed to have committed genocide, his options are unwisely limited. As noted, under current law someone can be prosecuted for genocide only if she is a U.S. national or for conduct committed in the United States. And so the first time the United States enforced its law making participants in genocide inadmissible and deportable, it deported Enos Iragaba Kagaba, a prominent suspect in the 1994 genocide in Rwanda, to Rwanda instead of prosecuting him here. While this action had the salutary effect of denying a suspected *genocidaire* sanctuary in the United States, it is less clear how well it advanced the interests of justice. Although the Rwandan government is generally willing to prosecute *genocidaires*, its courts have been overwhelmed by staggering numbers of cases. Moreover the International Criminal Tribunal for Rwanda has so far declined to transfer any cases to Rwanda, determining that Rwanda's legal system does not yet satisfy international standards of fair process.[17]

The Kagaba case highlights gaps in our legal framework that curtail our ability to ensure that those who commit genocide face justice, fairly administered. As this subcommittee considers how it can strengthen the United States' capacity to combat genocide, I urge you to give serious consideration to legislation that would enable U.S. courts to prosecute individuals suspected of genocide and related crimes when they are present in U.S. territory unless the United States extradites them to another State or surrenders them for trial before a competent international or hybrid tribunal.

In addition, the subcommittee should consider further strengthening 8 U.S.C. §1103(h)(3), the statutory provision directing the Attorney General to consider avenues for prosecution when determining, in consultation with relevant authorities, how to proceed against an alien who is inadmissible because she participated in genocide. That law directs the Attorney General, when "determining the appropriate legal action to take against" such an alien, to give "consideration" to:

> (A) the availability of criminal prosecution under the laws of the United States for any conduct that may form the basis for removal and denaturalization; or
> (B) the availability of extradition of the alien to a foreign jurisdiction that is prepared to undertake a prosecution for such conduct.

While this provision represents an important advance in U.S. efforts to ensure that those who participate in genocide do not escape justice, it may not adequately convey our country's commitment to ensure prosecution, whether in the United States or in another venue where a fair and vigorous prosecution is assured. To accomplish this, the subcommittee should consider introducing an amendment to §1103(h)(3) that would express a general policy preference for options that ensure prosecution over deportation.

This subcommittee should also consider amending the Proxmire Act to make it clear that U.S. courts can prosecute individuals who bear criminal responsibility for genocide under the doctrine of superior responsibility. Well established in U.S. law,[18] this doctrine has played a crucial role in holding leaders responsible for international crimes committed by subordinates that they could and should have prevented or repressed. The statutes of international and hybrid criminal tribunals established since 1993 include a provision establishing jurisdiction over persons who are criminally responsible under this doctrine for genocide and other crimes committed to the relevant court's jurisdiction. The recently-adopted Convention on Enforced Disappearance reflects this trend, requiring States parties to "take the necessary measures to hold criminally responsible" *inter alia*:

> A superior who:
>
> (i) Knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance;
> (ii) Exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; and
> (iii)Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution.[19]

Turning to civil actions, I encourage this subcommittee to support legislation to amend the Torture Victim Protection Act of 1991 (TVPA)[20] to enable plaintiffs to bring civil actions against individuals who are legally responsible for genocide. The TVPA establishes a civil cause of action against persons who subject an individual to torture and/or extrajudicial killing as those terms are defined in the act. Proponents of this law, which was enacted shortly before violence constituting genocide ravaged Rwanda and consumed Srebrenica, could not have easily imagined that, in the final decade of the 20th Century, survivors of genocidal campaigns might have fresh cause to seek legal redress. Now we know that genocide can happen in our time, and we should correct the anomaly

in our law that provides recourse for a single extrajudicial execution but not for a campaign of ethnic extermination.

Should this subcommittee decide to pursue such legislation, I would encourage it to make clear that Congress does not intend to exclude corporate persons from potential liability under the TVPA. Let me be clear: I am not suggesting that corporations should be liable on grounds that would not satisfy appropriate criteria of legal liability. But there should be no doubt that they can be successfully sued when they satisfy the standards of liability Congress crafted when it adopted the TVPA. Consider, for example, a situation in which a corporation provided poison gas to the Nazis knowing—and I want to emphasize the word *knowing*—that its deadly product would be used to exterminate Jews.

Some courts have interpreted the TVPA, which uses the word "individual" when it refers to potential defendants, to allow suits against corporate defendants when other statutory criteria are satisfied[21] but some others have not.[22] While further decisions may clarify this issue, Congress could helpfully resolve it either by amending the TVPA to allow suits against "an individual, either natural or juridical," who meets relevant statutory criteria or through a clear statement of its intent to include juridical persons.

Conclusion

Ten years ago, Justice Ruth Bader Ginsberg spoke these words, written by South African jurist Albie Sachs, at the U.S. Holocaust Memorial Museum: "There are some crimes so horrendous that they either hush us into silence or else hurl us into screams." Those who commit genocide count on our collective silence, committing their crimes beyond any thought of shame or account.

The Genocide Convention was intended radically to alter the depraved calculus of annihilation, transforming our enabling silence into mobilized action. By highlighting that treaty's implications for Darfur and for our country, this subcommittee has acted to ensure that the United States redeems the promise of the Genocide Convention.

[1] Done at New York, Dec. 9, 1948; entered into force Jan. 12, 1951; 78 UNTS 277. Signed by the United States Dec. 11, 1948; ratified by the United States Nov. 25, 1988; entered into force for the United States Feb. 23, 1989.

[2] When the United States Senate provided its consent to U.S. ratification, it did so subject to a declaration that the President would not deposit the instrument of ratification until the implementing legislation contemplated by Article V had been enacted. U.S. Reservations, Understandings, and Declarations, International Convention on the Prevention and Punishment of the Crime of Genocide, § III, 132 Cong. Rec. 2350 (1986) [hereafter "U.S. RUD's"].

[3] When the United States ratified the Genocide Convention, it did so subject to an understanding that "mental harm" means "permanent impairment of mental faculties through drugs, torture or similar techniques." U.S. RUD's, supra note 2, § II(2). This restrictive interpretation is reflected in the law enacted to implement the Genocide Convention. See 18 U.S.C. § 1091(a)(3).

[4] Most important, the Genocide Convention seeks to prevent genocide by ensuring punishment of those who commit this crime or who undertake certain conduct likely to cause genocide, such directly and publicly inciting others to commit genocide.

[5] As the Senate Foreign Relations Committee noted in the context of U.S. ratification, "Article VIII was included to underline the fact that complaints of genocide could be brought directly to the Security Council, the General Assembly or other parts of the United Nations. Otherwise, the Convention might be interpreted as limiting complainants to the International Court of Justice." Report of the Committee on Foreign Relations, United States Senate, Genocide Convention, Sen. Exec. Rept. 99-2, 99th Cong., 1st Sess., p. 11 (1985) [hereafter "Senate Committee Report"].

[6] UN Doc. A/RES/60/1, ¶¶ 138-139 (2005).

[7] Codified at 18 U.S.C. §§ 1091-1093.

[8] Various other provisions of U.S. law address genocide. For example, the Immigration and Nationality Act provides that "[a]ny alien who ordered, incited, assisted, or otherwise participated in conduct outside the United States that would, if committed in the United States or by a United States national, be genocide, as defined in section 1091 (a) of title 18, is inadmissible." 8 U.S.C. § 1182(a)(3)(E)(ii). Any such alien is also deportable. 8 U.S.C. §1227(a)(4)(D).

[9] Article V of the Genocide Convention requires States parties to enact any legislation necessary to "provide effective penalties for persons guilty of genocide or any of the other acts in enumerated in article III." Those "other acts" include conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide." The Proxmire Act explicitly criminalizes "attempts" to commit acts constituting genocide, 18 U.S.C. § 1091(a)(6), and penalizes direct and public incitement of genocide, *id.*, § 1091(c). While the Proxmire Act does not itself criminalize conspiracy to commit or complicity in genocide, other provisions of the federal criminal code make it a crime to conspire in or to aid and abet the commission of any federal crime. See 18 U.S.C. § 371 (conspiracy); 18 U.S.C. § 2 (aiding and abetting).

Federal law also permits the United States to transfer an individual indicted by the International Criminal Tribunal for the former Yugoslavia or the International Criminal Tribunal for Rwanda, each of which has jurisdiction over genocide under certain conditions, to the relevant tribunal. See National Defense Authorization Act, Pub. L. No. 104-106, § 1342, 110 Stat. 486 (1996). The American Servicemembers' Protection Act of 2002 (ASPA), codified at 22 U.S.C. § 7421 et seq., permits the United States to cooperate in various ways with genocide (and other) prosecutions of non-U.S. nationals by the International Criminal Court (ICC). While 22 U.S.C. § 7423(d) bars U.S. authorities from transferring "any person" from the United States to the ICC, its implications for non-U.S. nationals are largely superseded by § 7433, which provides that no other provision of the act "shall prohibit the United States from rendering assistance to international efforts to bring to justice . . . foreign nationals accused of genocide, war crimes or crimes against humanity." The ASPA generally bars U.S. authorities from transferring or supporting the transfer of U.S. citizens and permanent resident aliens to the ICC, see § 7423(d), but even this prohibition is subject to action taken by the President in the exercise of his constitutional authority, id., § 7430(a).

[10] Senate Committee Report, supra note 5, p. 9. The Senate did not believe that it was modifying the Convention but instead clarifying its meaning when it consented to ratification subject to the proviso that "nothing in Article VI affects the right of any state to bring to trial before its own tribunals any of its nationals for acts committed outside a state." U.S. RUD's, supra note 2, § II(3).
[11] The restrictive interpretation of the treaty phrase "serious . . . mental harm" set forth in the Proxmire Act, see note 3, may undermine U.S. compliance with the Genocide Convention. Although the definition of genocide set forth in the Proxmire Act tracks an "understanding" set forth in the package of U.S. RUD's, see id., the United States did not enter a reservation to the definition of genocide set forth in the convention.
[12] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 5 and 7, adopted Dec. 10, 1984; entered into force June 26, 1987; 1465 UNTS 85; ratified by the United States Oct. 2, 1994; entered into force for the Untied States Nov. 20, 1994.
[13] International Convention for the Protection of All Persons from Enforced Disappearance, art. 9, adopted Dec. 20, 2006, UN Doc. A/RES/61/177 (2006) (hereafter "Convention on Enforced Disappearance").
[14] *Independent study on best practices, including recommendations, to assist states in strengthening their domestic capacity to combat all aspects of impunity, by Professor Diane Orentlicher*, UN Doc. E/CN.4/2004/88, ¶ 49 (February 27, 2004) (footnote omitted).
[15] Torture Convention Implementation, codified at 18 U.S.C. §§ 2340-2340B, § 2340A(b)(2).
[16] 8 U.S.C. §1103(h)(3).
[17] See Statement of Justice Hassan B. Jallow, Prosecutor of the ICTR, to the UN Security Council, Dec. 15, 2006.
[18] See Ford v. Garcia, 289 F. 3d 1283 (11th Cir. 2002).
[19] Convention on Enforced Disappearance, supra note 13, art. 6(1)*(b)*. Article 6 goes on to provide that this provision "is without prejudice to the higher standards of responsibility applicable under relevant international law to a military commander or to a person effectively acting as a military commander." *Id.*, art. 6(1)*(c)*.
[20] Codified at 28 U.S.C. § 1350 note.
[21] See, e.g., Sinaltrainal v. Coca-Cola Co., 256 F. Supp. 2d 1345 (S.D. Fla, 2003); Estate of Rodriguez v. Drummond Co., 256 F. Supp. 2d 1250 (N.D. Ala., 2003).
[22] See, e.g., Bowoto v. Chevron Corp., 2006 U.S. Dist. LEXIS 63208 (N.D. Cal., 2006). Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164 (C.D. Cal., 2005).

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February 5, 2007

The Honorable Richard Durbin
United States Senate
309 Hart Senate Office Building
Washington, D. C. 20510

Dear Senator Durbin:

On behalf of the Save Darfur Coalition (which comprises 181 mainly American faith-based, human rights and community organizations representing 130 million Americans), permit me to express my congratulations on your chairmanship of the new Judiciary Subcommittee on Human Rights and the Law, and to thank you for holding its inaugural hearing on "Genocide and the Rule of Law." I am grateful for the opportunity to underscore the concerns of the Save Darfur Coalition about the world's current ongoing genocide, in Darfur, and to put forth suggestions as to how the United States and other countries should act to end it.

The humanitarian situation in Darfur continues to deteriorate. A concerted Sudanese government campaign against its own civilian population in Darfur, now in its fourth year, has already killed some 400,000 people, displaced over 2.5 million more, and pushed the conflict across the borders of Chad and the Central African Republic. Continuing attacks by the Sudanese Armed Forces and its proxy Janjaweed militias, combined with fragmentation of rebel movements in the absence of an active political process, have rendered sustainable political resolution of the conflict ever more remote. The government's blatant violations of the 60-day ceasefire affirmed by President al-Bashir in his January 10 Joint Statement with Governor Richardson are spurring further large-scale displacements of innocent Darfurians into refugee camps, in and outside of Darfur.

Virtually all analysts agree that three elements – civilian protection, a ceasefire, and a lasting political solution – are essential to ending the genocide and underlying conflict. These have been developed and are ready for implementation. Sudanese government obstruction is the main barrier to progress for these crucial elements:

- AU/UN hybrid peacekeeping force: Ignoring an initial agreement in November 2006 and reconfirmation via an exchange of letters between himself and Secretary General Annan in December 2006, President al-Bashir has backtracked from his commitments, redefining since the New Year his agreement in ways that impede

UN efforts to assemble its contribution and would minimize the UN's agreed-upon role, vitiating the capacity of the hybrid force to protect civilians and advance its mandate as prescribed in UN Security Council Resolution 1706.

- Ceasefire: President al-Bashir committed on January 10, 2007 to a 60-day cessation of hostilities, but then started bombing attacks just two days later; they continue unabated.
- Political process: A conference of field commanders of the rebel movements that did not sign the Darfur Peace Agreement last year, which is the critical first step towards resumption of peace talks agreed to by President al-Bashir on January 10, 2007, has been obstructed by the Sudanese government's ceasefire violations, some of which have specifically targeted commanders' conference venues.

Time is working against the people of Darfur. The UN and non-governmental agencies' unusually stark recent warnings of an imminent collapse in their ability to sustain their relief operations for the 2.5 million internally displaced persons in Darfur are alarming. Without quick progress on all three elements of a sustainable solution to the crisis, it is probable that most aid organizations will have to depart Darfur, leaving the 2.5 million displaced persons vulnerable to Janjaweed attack and to dispersal, sickness and starvation, with the real risk of massively spiked mortality early in 2007.

It is clear: diplomacy will not end this tragedy unless accompanied by intense and sustained pressure. President al-Bashir does not *want* to work with the international community to develop a just outcome and allow protection of the 2.5 million vulnerable displaced persons in Darfur. Pressure must be brought to make him do so. Concrete steps are needed, in the form of concerted U.S. and international targeted economic sanctions and other measures, before President al-Bashir will act as the international community and the tragedy in Darfur demand. Various forms of leverage are authorized in UN Security Council resolutions and U.S. legislation, but almost none have been used. There has been plenty of talk and verbal outrage; there has been very little concrete U.S. and international action. That has led President al-Bashir to conclude that threats are hollow.

As you noted in a letter signed by yourself and 21 of your colleagues and sent to President Bush on January 16, the time has come for implementation of "Plan B" measures. We would encourage this subcommittee to press Administration witnesses and demand specific, action-oriented answers during this hearing. In his State of the Union speech, President Bush pledged to continue raising consciousness about Darfur. We and others engaged on this cause have "raised consciousness"; polls last week showed a majority of Americans want action to end the genocide. That is the President's and the Administration's clear responsibility, and we hope you will press them to act now, not talk more.

While overcoming the Sudanese government's obstruction of peace efforts should be the primary focus of American efforts to resolve the conflict, it is also imperative that the U.S. government encourage the UN Secretariat to act with dispatch to prepare for and

rapidly deploy peacekeepers to Darfur, up to and including the full 22,500 complement called for in Phase III of the AU-UN hybrid force as established in Addis Ababa in November 2006. The timeline to full deployment must be minimized to whatever degree possible, so that UN forces can reach the ground and quickly improve the security situation in Darfur as soon as the political obstacles are removed. In this regard, the Coalition applauds the inclusion of $50 million to support peacekeeping logistics in the soon-to-be-passed Fiscal Year 2007 Continuing Resolution.

The Save Darfur Coalition encourages the Congress as a whole, and this subcommittee in particular, to remain engaged in achieving an end to the genocide in Darfur. Additionally, we suggest that the subcommittee can usefully focus on two critical longer-term issues:

- What steps – potentially including capacity building, dedication of human resources, and relative prioritization of humanitarian crises within U.S. foreign policy – should be taken in the future to better enable the U.S. government and the international community to prevent and respond to future incidents of genocide, ethnic cleansing, and/or crimes against humanity?

- How should the Responsibility to Protect doctrine, adopted by the United Nations on September 17, 2005, be interpreted by the U.S. and other signatory nations, in terms of any legally binding or implied obligations to respond effectively to future outbreaks of genocide, ethnic cleansing, and/or crimes against humanity?

Again, congratulations on your chairmanship, and thank you for holding this inaugural hearing on such transcendent issue for our Nation.

Sincerely,

David C. Rubenstein
Executive Director

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