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FROM NUREMBERG TO DARFUR: ACCOUNTABILITY FOR CRIMES AGAINST HUMANITY

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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FROM NUREMBERG TO DARFUR: ACCOUNTABILITY FOR CRIMES AGAINST HUMANITY

TUESDAY, JUNE 24, 2008

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Subcommittee on Human Rights and the Law,
WASHINGTON, DC

The Subcommittee met, pursuant to notice, at 9:59 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Richard J. Durbin, Chairman of the Subcommittee, presiding.

Present: Senators Feingold, Whitehouse, and Specter.

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

Senator DURBIN. The Subcommittee on Human Rights and the Law will come to order.

The subject of this hearing is: "From Nuremberg to Darfur: Accountability for Crimes Against Humanity." In our first year and a half, this subcommittee has broken much new ground. Today is another first. This is the first-ever congressional hearing on crimes against humanity.

For generations, the United States has led the struggle for human rights around the world. Over 50 years before Nuremberg, George Washington Williams, an African-American minister, lawyer, and historian, called for an international commission to investigate "crimes against humanity" in the Congo, which was then ruled by Belgium's King Leopold II.

Under Leopold's iron fist, Congo's population was reduced by half, with up to 10 million people losing their lives. In a letter to the U.S. Secretary of State, Mr. Williams decried the "crimes against humanity" perpetrated by King Leopold's regime. Those who are interested in this touching story should read King Leopold's Ghost, which is a great book that I recommend.

Over 50 years later, in the aftermath of World War II, the United States led the first prosecutions for crimes against humanity in the Nuremberg trials. The promise of Nuremberg is that the perpetrators of mass atrocities will be held accountable for their actions.

As we have in previous hearings, I am going to preface this hearing with a short video to provide some context for our discussion on accountability for crimes against humanity and historical U.S. support for holding perpetrators of these crimes accountable.

[Whereupon, a video was shown and the text follows:]

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"From 1993–1945, the Nazi regime killed approximately 6 million European Jews. Over 250,000 Roma were murdered. At least 200,000 mentally or physically disabled individuals were 'euthanized.'

Under U.S. leadership, the Allies established war crimes tribunals to prosecute the Nazi perpetrators. Crimes against humanity were first defined in the Nuremberg Charter in 1945.

Sixteen men were found guilty of crimes against humanity in the Nuremberg trials, including Hermann Goring, commander of the Luftwaffe and the highest-ranking official to order the 'Final Solution.'

Since then, the United States has supported efforts to prosecute the perpetrators of crimes against humanity, including Nazi war criminals who had escaped accountability.

In 1961, Adolf Eichmann, the so-called 'architect of the Holocaust,' was convicted in Israel for committing crimes against humanity. Michael Musmanno, a U.S. Naval officer and judge at the Nuremberg trials, was a key prosecution witness.

In 1987, Klaus Barbie, the 'Butcher of Lyon,' was convicted in France for crimes against humanity he committed while heading the Gestapo in Lyon.

With U.S. support, the International Criminal Tribunal for the former Yugoslavia has convicted perpetrators of crimes against humanity.

With U.S. support, the International Criminal Tribunal for Rwanda has convicted participants in the Rwandan genocide for crimes against humanity.

With U.S. support, the Special Court for Sierra Leone is prosecuting Charles Taylor, the former president of Liberia for crimes against humanity, including murder, rape, sexual slavery, mutilating and beating, and enslavement.

Three decades after Cambodia's 'Killing Fields,' the first trials of Khmer Rouge perpetrators for crimes against humanity are scheduled to begin later this year.

We have come a long way since Nuremberg, but we must do more at home and abroad to fulfill our responsibility to protect innocent civilians from crimes against humanity.

In Darfur, civilians continue to be attacked, murdered, raped and forcibly displaced.

The perpetrators of these crimes against humanity must be held accountable."

Senator DURBIN. Crimes against humanity are acts of murder, enslavement, torture, rape, extermination, ethnic cleansing, or arbitrary detention committed as part of a widespread and systematic attack directed against a civilian population. With far too few exceptions, we have failed to prevent and stop these crimes.

The promise of Nuremberg remains unfulfilled. We have seen this most clearly in Darfur in western Sudan. In this region of 6 million people, hundreds of thousands have been killed and as many as 2.5 million have been driven from their homes. There is much that must be done to end this carnage in Darfur. Part of the solution is arresting and prosecuting the perpetrators. Otherwise they will continue to act with impunity and victims will feel they have no recourse but to resort to violence themselves.

For several years, both Democrats and Republicans have criticized the Bush administration for failing to stop the genocide in Darfur, and I am sure our witnesses today will urge the administration to do more. But we should give credit where it is due, and I especially want to commend President Bush for supporting efforts to prosecute the perpetrators of crimes against humanity in Darfur. I have had several personal conversations with President Bush about this issue and I know that he really feels in his heart, as many of us do, that we have a special obligation in this situation.

Let me be frank. The International Criminal Court is still a source of controversy on Capitol Hill, but the administration and their allies have set aside their concerns because of the humanitarian crisis in Darfur, and they should be commended for doing so.

Recently, the Chief Prosecutor of the International Criminal Court, Luis Moreno-Ocampo, reported to the U.N. Security Council that massive atrocities are ongoing and that "the entire Darfur region is a crime scene." In the meantime, the Sudanese Government has put Ahmad Harun, who was indicted by the court for committing crimes against humanity, in a high-ranking position where he can continue to threaten victims of the violence in Darfur and humanitarian workers. That is an outrage.

Following Mr. Moreno-Ocampo's most recent report to the Security Council, Zalmay Khalilzad, the U.S. Ambassador to the U.N., said that the U.S. Government "strongly believes that those responsible for the acts of genocide, war crimes, and crimes against humanity committed in Darfur must be held accountable and be brought to justice." The administration is right. We owe it to the victims in Darfur to ensure that those who have perpetrated these horrific crimes are held accountable.

But it is not only Darfur that is a safe haven for perpetrators of crimes against humanity. Sadly, it is also our own country. This subcommittee's first bill, which became law in December of 2007, closed a loophole in U.S. law that made our country a safe haven for perpetrators of genocide.

But despite longstanding U.S. support for prosecution of crimes against humanity perpetrated in World War II, Rwanda, the former Yugoslavia, and Sierra Leone, among other places, there is no U.S. law prohibiting crimes against humanity. As a result, the U.S. Government is unable to prosecute perpetrators of crimes against humanity found in our own country. In contrast, other grave human rights violations, including genocide and torture, are crimes under U.S. law.

This loophole has real consequences. During our recent hearing on "Rape as a Weapon of War," we discussed the fact that if a foreign warlord who engaged in mass rape came to the United States, he would be beyond the reach of our law.

During our oversight hearing on the U.S. Government's enforcement of human rights laws, we learned about the case of Marko Boskic, who allegedly participated in the Srebenica massacre in the Bosnian conflict and still found safe haven in Massachusetts. Because of the gap in our laws, Boskic was charged with visa fraud rather than crimes against humanity. Upon learning this, Emina Hidic, whose two brothers were among the estimated 7,000 men

and boys killed in Srebenica, said that "[t]hey should condemn him for the crime."

By signaling to perpetrators of genocide that they will not find a safe haven in the United States, the Genocide Accountability Act moved us a little closer to fulfilling our pledge of "never again." We should take the next step and make sure that those who commit crimes against humanity cannot escape accountability in America, but we must go further and ensure the perpetrators of crimes against humanity cannot escape accountability anywhere in the world. Only then will the promise of Nuremberg be fulfilled.

I am honored that Senator Specter has joined us today, and I would invite him, if he would like to make an opening comment at this time, to do so.

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Well, thank you, Mr. Chairman. Thank you for convening this important hearing for the Subcommittee on Human Rights and the Law.

I had not planned to be in attendance, but the Ranking Member of the subcommittee could not be here, so I wanted to come and indicate my view of the importance of this hearing.

Regrettably, Senators are very busy. The absence of Senators here today does not indicate a lack of very deep concern on the issue, but there are just many other meetings, subcommittee hearings, and full committee hearings in process at this time.

This issue was one of enormous importance. All you have to do is talk about the 2.45 million people being displaced and 450,000 people killed, and the atrocities are just overwhelming. The regrettable fact of life is, it has become a way around the world, and perhaps especially in Africa at this time. It is hard to view the scene in Africa without seeing some ruthless dictator, some ruthless political leader using the most horrific tactics to gain power. Genocide, regrettably, has become a common practice.

I visited Tanzania in 2002 and have participated, as has the Chairman, Senator Durbin, on many, many efforts. There is a lot of concern in the Congress and there is a lot of concern on the American people. As we all know, there was a large joint A.U./.U.N. task force that was supposed to be developed, 26,000 peacekeepers to go to Darfur, but only about a third of them are there and it took a very, very long time to get there. My sense is that we have to get a lot tougher about it through the International War Crimes Tribunal. That is something that these people will pay attention to.

In 2002, 6 years ago, I visited the International War Crimes Tribunal in Tanzania. There is a man in jail there who was convicted of genocide, the first head of state, a man named Jean Kambanda, who is serving a life sentence for genocide. That is what we really need to do, we really need to marshall our forces. It is a relatively recent development in international law to hold people like this accountable for crimes against humanity, a relatively recent War Crimes Tribunal in Yugoslavia.

The United States has been in the forefront, with help from the FBI, the CIA, and the investigative agencies and funding. So, I

thank the witnesses for coming today. I regret that I cannot stay too long. But this is a very, very important issue. You see a lot of people behind us? They are the staffers, the people who do all the work, write the memos, make sure that the Senators know what you said so that there can be appropriate follow-through.

Thank you, Mr. Chairman.

Senator DURBIN. Thank you, Senator Specter. I appreciate your being here.

We are going to turn to our witnesses now. Unfortunately, one of our witnesses, Mia Farrow, had last-minute scheduling difficulties and could not attend. But we are really honored to have four excellent witnesses here today.

Let me ask if the witnesses would please stand and raise their right hands to be sworn.

[Whereupon, the witnesses were duly sworn.]

Senator DURBIN. Let the record reflect that the witnesses answered in the affirmative.

Our first witness, Daoud Hari, is the author of a book which I was given yesterday. I am going to promote your book here. It's entitled, The Translator: A Tribesman's Memoir of Darfur. This is an incredible book. It tells the story of Mr. Hari's life in Darfur, and of his travels and struggles. I'm half-way through it, and I promise you I will finish it. I commend you, as I said to you personally before, for some of the beautiful images that you create in a book about a very terrifying and troubling issue in your home country of Sudan and Darfur.

I believe that you have extraordinary skills and I hope that those who feel as intensely about the situation as many of us do will read your words.

Mr. Hari was born in the Darfur region of Sudan. After escaping an attack on his village in 2003, he entered the refugee camps in Chad and began serving as translator for major news organizations, including the New York Times, NBC, and BBC.

Mr. Hari was captured in Darfur while working with Paul Salopek, a Pulitzer prize-winning journalist at the Chicago Tribune and a friend of mine. I didn't know Mr. Hari at the time, but the Chicago Tribune called and asked if I would try to get Mr. Salopek out of jail, so we tried to get you all out of jail, and eventually we did after more than 30 days of imprisonment. That detention was totally unnecessary, and thankfully all of them were released without serious injury or any other retribution.

Following the release, Mr. Hari became the third of reportedly only five Darfuris who have been granted refuge in the United States since this crisis began. We talk about 2.5 million displaced and hundreds of thousands killed in this genocide, but we have reportedly accepted only five refugees in the United States. Mr. Hari now lives in the Baltimore area and advocates for an end to the conflict in Darfur.

Mr. Hari, this issue is personal for you in a way that most of us can't even begin to understand, but I thank you for your courage and for sharing your story, and I look forward to your testimony.

Your entire statement will be made part of the record and I invite you to add at this point anything you would like in the time allotted. Please proceed.

STATEMENT OF DAOUD HARI, AUTHOR, THE TRANSLATOR: A TRIBESMAN'S MEMOIR OF DARFUR, BALTIMORE, MARYLAND

Mr. HARI. Thank you, Chairman Durbin. Thank you to the honorable Members of Congress. Thanks very much for your working to end the genocide in Darfur.

After 5 years since the crisis began in Darfur, I will have to thank you again. You let me out from the prison with Paul Salopek after 35 days in prison in Sudan, where, as you said, with the dictator, it is very hard to be inside the prison in—and how we have been treated for 35 days.

As some of you know, I am Daoud Hari from north Darfur. I was born—my age is 35 years old and I've been going to a school in Sudan in—and—Darfur. I left Sudan and came back in 2003 and what I saw happening to my people in Darfur, how the people were treating the government troops and how people were killed in Darfur, I stand up to working with the journalists to be able to share stories for the journalists. Since I was working as a translator in Darfur, in 2004 I was working with the U.S. Department—what you call the CID, which was investigating about the genocide in Darfur. They told us the estimated killing in Darfur—400,000 people have been killed in Darfur. This was in 2004.

After they left, I tried working with the journalist Paul Salopek with the Chicago Tribune, and in the course—new time—U.K., and when I was working with the U.K. journalist who'd been in the place, there were 81 persons who had been killed 3 days ago. When we go over there and we saw the bodies, some of them didn't have even the heads. This is mostly the people who have been captured by the—the government in the bush. After that, they killed them through the bushes. So we saw the bodies. Some of them, mostly 10 years or maybe less than 10 years that people were dying over there.

I saw—when I worked with him, we crossed Darfur and we met two soldiers who had been captured, child soldiers, 13 years. They'd been captured by some of the villagers, the defenders who tried to kill them. We interviewed them and I saw one of them. He'd been shot by a bullet when he had been beaten very hard, and I was able to talk to him and—witness. He showed me some money which was the government's gift to him to come to attack these people.

The areas of the village they were attacking, they were neighborhoods. They would go into a school with children in the school together and they have their animals and camels together. After that—began to tell them—Arabs—and they have to be—to defend themselves before these people come in to kill any of your people. They give them some money and they're training them for 3 days. After 3 days, the child who's 13 years, maybe if it's not able to carry the gun, it's mostly the weight of the guns, it's almost more than 5 or 6 kilos. So he comes and they were—they told us what is happening, the government, how they treat them and how to give them the idea to come to attack the neighborhood and their friends.

After all this, 5 years, when I work in, the people who were responsible for those crimes, now they were free. I appreciate the U.S. Government and Europe and the international law they were

asking to be possible for the court 1 day, but we believe that—now they were working outside were free and they were happy—doing the same—the same crime in Darfur. Just over the last week of May, there's more than 300 to 3,000 people who have been captured from Darfur.

Darfur is where living in Khartoum—attacked by the rebels. Some of them, they were students in a school in Khartoum and—just all—they were Darfuris that were being accused by the government, being they were helping for the rebels. They never saw even the rebels in their life and now they were in the prison. The government—them, they give them more than 10 or 15 years in prison. I would like to say thank you for the United States and international law. The laws will be longer for us to be coming 1 day, but I will ask and try to ask the international community to stop this genocide and to bring those responsible before the court as soon as possible.

Thank you.

Senator DURBIN. Thank you, Mr. Hari. We'll have a few questions after the other witnesses have had a chance to speak.

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

Senator DURBIN. Our second witness, Gayle Smith, is co-founder of the ENOUGH Project to end genocide and crimes against humanity. She's also a Senior Fellow at the Center for American Progress.

Ms. Smith was based in Africa for over 20 years as a journalist covering military, economic, and political affairs for major news organizations, including BBC, Associated Press, Reuters, the Boston Globe, and Financial Times.

She served as a Special Assistant to the President and Senior Director for African Affairs at the National Security Council from 1998 to 2001, and as Senior Advisor to the Administrator and Chief of Staff of the U.S. Agency for International Development from 1994 to 1998.

Ms. Smith, thank you again for being here today. Please proceed with your testimony.

STATEMENT OF GAYLE SMITH, CO-CHAIR, ENOUGH PROJECT, WASHINGTON, DC

Ms. SMITH. Thank you, Mr. Chairman. Thank you for convening this hearing. I've been in government, I've been a reporter, I'm now here as an advocate. Like the many people behind me, we're really, really appreciative of all you are doing to make sure that the United States is on the right side of history when it comes to genocide and crimes against humanity.

I think as your brief film points out, we've made some progress. We've seen referrals by the United Nations Security Council to the International Criminal Court of the case of Darfur, also the Democratic Republic of Congo and Northern Uganda.

Charles Taylor is in custody. There has been an increase in the number of emerging democracies in Africa who are turning over those indicted for genocide in Rwanda. But I think the fact that we are sitting here today as we enter the sixth year of the crisis in

Darfur is, in large measure, because the perpetrators have not been held to account.

I think we would all agree that there's a need for a sustained and robust peace process and a desperate need for a viable peacekeeping mission to be deployed to Darfur. But the bottom line is accountability. If this Committee can propose legislation that would in fact make crimes against humanity a violation of U.S. law, I think it would strengthen our ability to enforce accountability around the world and strengthen that chain that we need that allows the perpetrators no way out.

Let me just say a couple of things about the reasons why this is so important. In the case of Sudan, we have a government that is ruthless, but it is also smart and calculating. They operate on the basis of their own interests. To this date, they have no reason to believe that there will be any meaningful costs imposed if they continue to perpetrate crimes against humanity against the people of Darfur. Yes, there have been indictments, yes, the Security Council last week—and importantly, unanimously—demanded that they turn the indictees over to the ICC, but they haven't done it and there is no cost.

We've seen with this regime that the only time it acts is when it perceives that there are real costs, whether it's cooperating with the United States in the war on terror, whether it was trying to get out from under multilateral U.N. sanctions for their complicity in an attempt to assassinate the president of Egypt, or in the case of the peace agreement in southern Sudan. They knew there was a cost and they knew there was no way out.

Right now they believe, and they have evidence to believe, that they can get away with it. Their victims have the evidence to believe that the international community has abandoned them. So by strengthening that chain of accountability by amending our laws, I think we send a signal and inform the calculations of the perpetrators not just in Darfur, but elsewhere.

Second, obviously it's the right thing to do. At a time when the United States needs to, as it has throughout our history, stand-up and champion the right thing to do, I think also it is important that we send the signal as American citizens that we see these crimes not just as abuses of their victims, but as violations of our common humanity.

Third, it is in our national interests to do this and to do more across the board on accountability, not least because in so doing we strengthen the moral foundations from which we lead, but also, quite frankly, for reasons of security. We cannot afford the violence and instability that we see when these crimes occur.

Look at Sudan today. It is the largest country in Africa. It is bleeding into Chad and the Central African Republic. The future of generations has been destroyed, and the ability of that country over time to be a stable anchor in the sub-region has been severely compromised.

Finally, by making crimes against humanity a violation of U.S. law we uphold the rule of law, and that, Mr. Chairman, is, quite frankly, the sledgehammer with which we can attack the cycle of impunity. I lived in Sudan for many years. It is a country I was just talking to Daoud about that is heartbreaking for many rea-

sons, but perhaps none more than the fact that it is one of the most friendly, generous peoples I have ever lived with, and that is being fundamentally compromised because the rule of law has been abused, has been distorted, has been disobeyed. The government of Sudan has flouted the will of the international community, the Security Council, the ICC, the government of the United States, and others.

I honestly believe if we take this small but very significant step we can remind them that we will, as the United States, hold them accountable and further strengthen that chain of accountability that we need to make sure that we're not sitting here again a year from now testifying about the crisis in Darfur. Thank you very much.

Senator DURBIN. Thank you, Ms. Smith.

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

Senator DURBIN. Our next witness is Diane Orentlicher, who is Professor of Law at the Washington College of Law, American University. She's also co-director of the law school's Center for Human Rights and Humanitarian Law, and was the founding director of its War Crimes Research Office, which she headed up from 1995 through 2004. Professor Orentlicher is currently on leave from the Washington College of Law and serving as Special Counsel to the Open Society Justice Initiative.

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.

Professor Orentlicher received a B.A. from Yale University and her J.D. from Columbia Law School. She testified at our first hearing of this subcommittee on "Genocide and the Rule of Law," and she is back again and we appreciate that very much.

Please proceed with your testimony.

STATEMENT OF DIANE ORENTLICHER, PROFESSOR, WASHINGTON COLLEGE OF LAW, AMERICAN UNIVERSITY, WASHINGTON, DC

Ms. ORENTLICHER. Thank you, Mr. Chairman. It's an honor to provide testimony before this distinguished body again. I join Gayle Smith and others who have noted the extraordinary leadership your subcommittee has already provided in the one and a half years since its creation. I was, again with others, especially heartened by your leadership and success in introducing, and then shepherding through to enactment, the Genocide Accountability Act of 2007.

Its entry into law was truly a landmark, and it significantly shrank the space for impunity for those who commit some of the worst crimes known to man. But as you noted in your opening remarks, it does not fully discharge our country's historic commitment to ensure that there is no safe haven for those who commit crimes of such savagery and staggering scope as to violate the conscience of humanity. I mean, in particular, that it's not yet a crime,

as you noted, to commit crimes against humanity under Federal law.

I think that Americans would be both surprised and disturbed if they understood this and understood what it meant. I say this for two reasons in particular. One, as you already noted, it was the United States above all that ensured that crimes against humanity were punishable at Nuremberg. I do not think, without U.S. leadership, we would have seen crimes against humanity become an enforceable crime.

As your opening video and your opening remarks noted, the United States has, since Nuremburg, provided indispensable leadership in ensuring prosecution of crimes against humanity by various international tribunals, as well as by other countries we have supported. So it's quite remarkable that we of all countries don't have a law on our books making it possible to prosecute this crime when perpetrators show up in our own territory.

The second reason I think Americans would be concerned has to do with the nature of crimes against humanity. Here, what I have in mind is that I believe many people assume—and unfortunately incorrectly—that Federal law already criminalizes mass episodes of extermination, and that's because, as you know, Federal law already criminalizes genocide.

There's a widespread belief, and it is not accurate, that genocide is a crime that encompasses the worst episodes of mass atrocities that we know. And yet that's not true.

I want to give just two examples to illustrate why, as important as it is, our legislation on genocide doesn't do all that our law needs to do. First of all, when we ask people to think about the worst atrocities that they can think of that happened in recent decades, everybody's short list includes the notorious atrocities of the Khmer Rouge in the 1970's in Cambodia. Estimates vary, but at least a fifth of the population of the country were wiped out during that period of staggering, mindless, unspeakable atrocities.

There is now a court that's been established jointly between the government of Cambodia and the United Nations to prosecute surviving leaders of the Khmer Rouge. When the prosecutors handed down their first indictments, against surviving leaders of the Khmer Rouge, they didn't include genocide in their charges. That could change as further indictments are presented, but the point will not change: When they issued their first, historic indictments, prosecutors were not confident that they could make out a case of genocide, even for this infamous episode of mass atrocity

The principal reason it's so difficult to make out a charge of genocide has to do with the very narrow and rigorous legal requirement of a specific intent on the part of a perpetrator to destroy a particular community as such.

And again, if I could illustrate how challenging and daunting it is for a prosecutor to make out this case, let me give you one more example. In 2006, the International Criminal Tribunal for the former Yugoslavia found one of the most senior leaders of Bosnian Serbs responsible personally for the killing of thousands of Muslims and Croats during the period of the worst carnage in Bosnia in the 1990's. The Trial Chamber even found that the crimes deliberately targeted Muslims and Croats. Despite these findings, the

court was unable to find that the defendant had genocidal intent. There was, however, a charge that the court believed fit this crime, and that was the charge of crimes against humanity.

So, again, the point is clear. If we want to be in a position to deter those who commit the most atrocious crimes, we must make it a crime under Federal law to commit crimes against humanity.

Thank you, Mr. Chairman.

Senator DURBIN. Thank you, Professor Orentlicher.

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

Senator DURBIN. Our fourth witness today is Joey Cheek, co-founder and president of Team Darfur, an international coalition of athletes committed to raising awareness about, and bringing and end to, this crisis. You're going to remember his name when I tell you a little bit more about him.

Mr. Cheek represented the United States as a member of the men's Speed Skating Team at the 2006 Olympics, and after winning gold in the 500-meter race and silver in the 1,000-meter race, he donated the $40,000 award to Right to Play, an international aid organization focused on bringing the benefits of sport and play to the most disadvantaged children in the world.

Time Magazine named Mr. Cheek one of their "100 People Who Shape Our World." He's currently a student at Princeton University. Mr. Cheek, I thank you for being with us today and invite you to testify.

STATEMENT OF JOEY CHEEK, CO-FOUNDER AND PRESIDENT, TEAM DARFUR, GREENSBORO, NORTH CAROLINA

Mr. CHEEK. Thank you. Chairman Durbin, Ranking Member Coburn, and honorable members of the committee, it is my pleasure and an honor to be asked to submit a brief testimony on such a weighty issue as human rights and accountability. I'm certainly not an expert on the legal intricacies of international accountability, I'm simply a student and an athlete. But in those positions I've had experiences that I feel are unique.

In 2006, after 17 years of preparation, I became the Olympic champion in my chosen sport of speed skating. After spending years traveling around the world as an athlete representing the United States, my eyes opened to a tragedy that was occurring in a part of the world that I felt was vastly under-reported in my home country. That tragedy was the mass killings occurring in Darfur, Sudan.

For more than 2 years now I have continued to try and raise awareness about the horrible atrocities faced by so many innocents in Darfur. I founded a coalition, Team Darfur, to bring together like-minded athletes to bring awareness to the abuses that are occurring. I have spoken in front of groups of thousands and I've traveled to Chad to visit first-hand with refugees driven from their homes in Darfur.

Like all of us here today, I'm appalled by the suffering that these innocents have gone through. The numbers of people killed in Darfur is as massive as the worst of natural disasters. However, unlike the loss of life and home that occur when natural disasters

strike, these vicious crimes are the result of conscious and willful effort by a group of people.

Over the last five years in the deserts of Darfur, almost every day men make the decision to aim a gun at the head of an innocent and pull the trigger. They make the decision when they storm into a village to rape women over and over again, and then they make the decision to burn that village to the ground and drive every living thing out into the desert to starve to death.

In Khartoum, the capital of Sudan, decisions are being made every day that are every bit as vile as those made in the field. Officials of the government empower these savage acts on men, women and children. They arm these militias. As Daoud would say, they pay these militiamen to slaughter innocents and they use military aircraft to bomb civilians. Then they make the decision that they can destroy a group of people simply because they do not want them around.

When I first became aware of Darfur, my intention was only to try and raise a bit of awareness, and perhaps raise a little bit of money for relief. I felt that once people knew what was happening throughout the world in this region, that this crisis would somehow magically stop. What I've come to realize is that it takes much more than awareness. In the face of crimes such as these, people must be willing to fight back. We must be willing to fight back. It doesn't always mean picking up a gun and charging into the fray, but using every available tool at your disposal to bring these murders and rapists to justice.

The situation in Darfur was complex and has become increasingly so, but complexity cannot conceal the fact that throughout this conflict men have consistently made the decision to indiscriminately take the lives of huge numbers of innocent people. For that decision there must be accountability. There must be the knowledge throughout the world that, if you willfully destroy the lives and homes of innocents, you will be held responsible.

I hope the Senate will followup on the June 3rd letter to Secretary Rice to ensure that she directs the State Department to take advantage of the few remaining days of the U.S. presidency and the U.N. Security Council to advocate for the expanded U.N. sanctions against the Sudanese regime. The U.S. has, of course, been a leader in using sanctions as a method of accountability for the perpetrators of this genocide, but we need to ask the rest of the international community to join us in implementing these important measures.

After hearing the stories of refugees from Darfur, people have had to flee their lives because of decisions these individuals made to rape and murder. I know there are more than the few people now listed on the Treasury Department's list who are responsible for these crimes. I hope the Senate will request that the administration expand the list of specially designated nationals to include all parties responsible for the atrocities, most particularly those at the highest levels of the Sudanese government.

Respected individuals from around the world are working tirelessly to ensure that perpetrators of the crime in Darfur are held accountable. What I and other athletes who make up Team Darfur

hope to do is to call upon the international community to observe an Olympic truce period for Darfur.

The Olympic truce originated in ancient Greece, but in recent history world leaders have invoked the truce as an opportunity for the international community to expand exceptional effort, as athletes do when they're striving for medals, to create and promote peace.

An Olympic truce for Darfur would only be possible with increased deployment of the U.N. peacekeeping force and a rejuvenated peace process that has the full support of permanent members of the U.N. Security Council.

If this Olympic truce period is marked by an increased effort by the international community to secure peace for the people of Darfur, the measures of accountability that this committee hopes to pursue, I believe, can be more possible and more effective.

I was raised to believe that we live in a Nation that values justice. I've seen that belief validated time and time again, and I'm proud of the work that we as a Nation have done to help the innocents of Darfur. As we all know, there's much more that we need to do. We must continue to lead the international community bring justice to the criminals that continue to perpetrate this violence. Doing so will not only help the hundreds of thousands of innocent people still living in Darfur, but will move one step closer to a place where men will know that they face consequences for committing these crimes against humanity.

Thank you.

Senator DURBIN. Thank you very much, Mr. Cheek.

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

Senator DURBIN. Without objection, we will enter into the record a statement from the Chairman of the Judiciary Committee, Senator Patrick Leahy.

[The prepared statement of Chairman Leahy appears as a submission for the record.]

Senator DURBIN. And I might just say, as I have before, he graciously allowed the creation of this subcommittee, the first subcommittee to our knowledge in the history of Congress, dedicated to human rights and the law.

We also will enter statements from organizations and individuals, including the Armenian Assembly of America, the Armenian National Committee of America, the Center for Justice and Accountability, Human Rights First, and Human Rights Watch.

Without objection, they will be entered into the record.

[The prepared statements will appear as a submission for the record.]

Senator DURBIN. Mr. Hari, I'm going to start my questioning by asking you what may be an obvious question. As I spoke to President Bush in several meetings about the peacekeeping force and the need for us to bring in some outsiders to try to bring peace to your country, I told him that it was my feeling that Khartoum would resist every step of the way, would find as many obstacles as possible to stop the United Nations, or the African Union, or any other force from actually coming in on the ground and supervising

or trying to take control of this vast territory which, as you say in your book, is as large as France or Texas.

Do you have the same impression from your experience in watching the government of Khartoum? Is there any hope there that they will open the country to any kind of international participation?

Mr. HARI. Thank you, Senator. I think if there's enough pressure from the international community to the Sudanese government, they will have to accept it. Since I came to the United States, the Sudanese government sometimes will say now we will extend—peacekeepers from the Security Council, sometimes they were denied because they were playing a game with the international community because they were being governed by the Chinese—in the Security Council. But if the United States is working more with the Chinese Government and the Arab League, they have to put pressure more for the government of Sudan and they have to accept it.

I know that what is happening in Darfur, the government of Sudan knew that if there's any international peacekeeper in Darfur, especially from Europe and the United States and the other countries have—for this, there's too many responsibility from their government people who had done the crimes. So it's maybe holding—will be going to international court one day, so that's why they were delaying to accept some and they did—some time. The African peacekeeper—we have in Darfur 7,000—as you know, Senator, I work with them three times in African Union. They aren't able to defend themselves. How come, 7,000, they have to keep peace for the—

Senator DURBIN. Yes. Now, you have seen the refugee camps in Chad, you have seen what's happened to the Darfurians who have been forced out of their country. Can you describe the living conditions of those who have been forced to leave?

Mr. HARI. I, myself, lived for 13—in Chad for 2-years where I was staying—I would be visiting. Our living in camps in eastern Chad is very hard. Sometimes—Goz Bedi when I was visiting Goz Bedi with journalists because there has been attacks by the Janjaweed who were coming from Sudan. These special camps called Goz Bedi is inside Chad from the Darfur border more than 180 kilometers, so all this where the—were crossing and they came to attack this camp. Since I was visiting there—

Senator DURBIN. Let me make sure it's clear. You said 180 kilometers, which would be about 108, 110 miles. The Janjaweed would come from Sudan and attack the refugees in the camps in Chad. Is that what you're saying?

Mr. HARI. Yes. Yes, that's exactly—about 115 or 110 to 15 miles from the Sudan. They were crossing to inside Chad to attack in the camp. Sometimes there was a U.S. Ambassador visiting there. People would be very—the children were very afraid. I was talking to my people. It was just only a few days maybe from Goz Bedi, you can cross to Central Africa and they were talking about, what can we should do? We have to go to Central Africa, for example, from here to be safe.

I know there are Central African—the East Central Africa has also been attacked by the Janjaweeds, and were even—by the government of Sudan and they were coming in Chad. So we were wondering ourselves when we were coming out from our lands and we

don't have peace in Chad because there is no security. So there's no aid workers able to work in the refugees camp because there's no security.

Senator DURBIN. I'm going to ask one last question before I give Senator Whitehouse an opportunity. In your book, you describe the attacks. It seemed to me they came from so many different levels: the planes overhead dropping bombs—and you described the shrapnel as being pieces of old appliances that had been chewed up and put into these bomb casings that explode and kill people—the helicopters, the Janjaweed on horseback and on camels.

But in your opening here you talked about the child soldiers who were involved in this and that was the subject of one of our earlier hearings. I might just say for the record, I'm disappointed at this point that we don't have the support of the administration on our Child Soldiers Accountability Act, but we are working to try to achieve that before the end of the year.

Tell us about these child soldiers that you've seen who were part of this devastation and genocide in Darfur. Are they children who were stolen away from villages? Are they receiving money, are they receiving drugs, as we've heard in other parts of Africa? Tell me, if you can, the conditions of these child soldiers.

Mr. HARI. As I mentioned in my book, Senator, when I was captured—by—by the government, which was be paid by the government, and those others my tribe also, speaking the same language.

Senator DURBIN. Zaghawa.

Mr. HARI. Yes, Zaghawa. Two children, me, and my driver that was taking us, they have orders already from their commander they have to shoot us inside the van. When we are—they were smoking a cigarette, they have a—and they were less than 14 years old, and both of them know me and the families.

Senator DURBIN. They knew you?

Mr. HARI. Yeah, they knew me. It—my family, they knew me, who I am. They were discussed over there, and they decided they don't wanted to shoot me. I even asked them, don't shoot me if—if you don't tie my eyes—if you do not tie our eyes, because I don't want to see you—you are shooting me, because, yes, I came yesterday from your family, I saw your mothers or your sisters in the refugee camps. One of them, they said, oh, we decided we don't want to shoot you, Daoud, because we know you and we know your family, and you know us. So if the commander want to kill you, he'll have to kill you himself. But we used to kill the prisoners when a prisoner was captured by the rebels. Maybe even people we don't know we can shoot, but we can't shoot the person we know.

I said, OK, even you are very children. You're a child, it's 14 years, you don't know anything about how to shoot the—why you have to shoot him? And they said they have orders from their commanders. For example, these people were the enemy for them and they don't know—for example, Senator, they don't know this children, what is the international law supposed to be the world's prisoners be killed even if that's who the Janjaweed or the government soldiers. But if they left with those children they were—may very easily killed them. They were very easy. They were telling me this. You get in this area one cigarette to smoke is more hard than to

shoot someone in this land. So we can—we can do that's how we are living in Darfur.

Senator DURBIN. Thank you very much.

Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman. Thank you for hosting this hearing. The work of the subcommittee, I think, has been very valuable. I know it was your personal desire and wish that it be established, and your personal energy that saw to its establishment as the first such subcommittee in the Senate. Once again, I think this hearing has proven how wise that course of action was.

I'm interested in, Professor, particularly how a criminal statute, making it an American crime to commit a crime against humanity in a foreign country, would work procedurally with respect to the trial itself, with respect to efforts to seize the defendant, either before trial or before he or she were convicted?

Ms. ORENTLICHER. First of all, the basic assumption of my testimony is that jurisdiction would be established only if the defendant were in the United States. We would have to have physical custody over that person. Unfortunately, it's not at all uncommon for perpetrators of very serious atrocities to elude detection when they come into the United States. An organization that works on this issue estimates that there are thousands of perpetrators of very serious atrocities in the United States. Some of them have come to a kind of justice when victims of their abuses run into them in the United States and are able to file civil actions against the perpetrators. But even when those actions are successful, that is, even when a judgment is rendered of civil responsibility for atrocities including crimes against humanity, the perpetrators can remain in the United States and not fear prosecution for those same crimes. So, that's one part of it. We would have to—

Senator WHITEHOUSE. Would you be able to procure an indictment before somebody was in the country or at the very beginning of jurisdiction? Could you not even indict while somebody's abroad?

Ms. ORENTLICHER. Normally jurisdiction would be established when you find someone in the country, but I think it would be a mistake to—

Senator WHITEHOUSE. Indictment would have to follow. You wouldn't be able to indict them.

Ms. ORENTLICHER. Well, what I was going to say is I would think it's desirable to frame the legislation in a way that allows the possibility of seeking extradition under extraordinary circumstances. Perhaps I should say, I don't assume that the United States should be a forum of first resort for prosecution of individuals who commit atrocities elsewhere. The United States has long cooperated to ensure prosecution of such crimesin other countries and should continue to do that. But there will be circumstances when this is the only place where someone who has committed atrocities that are beyond the pale can be seriously prosecuted.

An example is a helpful founation for my answer to your second question: In 1997, Pol Pot, the notorious leader of the Khmer Rouge, was suddenly available for prosecution when his own forces rebelled against him. The U.S. Government wanted to bring him to justice and discovered that our own law didn't make it possible to

prosecute him here. The administration at that time tried desperately to find another government that would prosecute Pol Pot and was unable to do so before he died a year later.

In a circumstance like that, the United States should be able to seek Pol Pot's extradition to the United States and prosecute him here. Those are exceptional circumstances, but I think it desirable that U.S. law provide for that type of possibility.

Senator WHITEHOUSE. Without that law presently, if it becomes known to the U.S. Government that someone who has participated in crimes against humanity is passing through a United States airport or one way or another entering the territorial jurisdiction of the United States, is there anything that can be done other than to refuse entry?

Ms. ORENTLICHER. We can't prosecute that person for crimes against humanity. We might be able to prosecute them depending on the nature of their offenses for torture. We have a statute that enables us to prosecute torture wherever it was committed. That particular statute has been on the books now for about 14 years, and there has so far been only one prosecution under that statute.

But that would not begin to cover all of the kinds of crimes against humanity that are committed, such as enslavement and so forth, and generally would not capture the enormity of the crime. So, yes, we could deny them entry, we could try to remove people, but we don't have, even in our immigration laws, crimes against humanity as such as a basis for removal.

Senator WHITEHOUSE. And would the idea be that the United States would exert its diplomatic pressure to try to expand this kind of jurisdiction and this kind of statute throughout the world so that people who engage in crimes against humanity find it increasingly difficult to find shelter in any other country?

Ms. ORENTLICHER. Well, first of all, quite a few other countries do have crimes against humanity in their statutes and establish the possibility of exercising jurisdiction over perpetrators of crimes against humanity. Who come to their country.

Senator WHITEHOUSE. Any examples of where it's been done?

Ms. ORENTLICHER. It's been done in Germany, I believe Australia.

Senator WHITEHOUSE. A question for the record.

Ms. ORENTLICHER. I'd be happy to get back to you on that.

Senator WHITEHOUSE. That's for the record then.

[The information appears as a submission for the record.]

Ms. ORENTLICHER. It's happened in quite a number of countries. A lot of countries are now in the process of changing their laws so that they can prosecute crimes against humanity. The United States has provided quite important leadership in helping countries that are recovering from mass atrocities to strengthen their own ability to prosecute perpetrators, and so the type of leadership you described is already happening to some extent. I apologize for repeating myself, but what we can't do is prosecute perpetrators here, and that's a problem, in part, because often we don't have a place we can extradite people to where they can be prosecuted.

That's for the most obvious reason: when crimes against humanity occur almost by definition the country where they occurred has descended into a state of wholesale collapse of the rule of law. So

if it's possible to send perpetrators back to the country where they perpetrated their crimes, that would be ideal; often, though, it is not possible.

The United States has helped countries in the former Yugoslavia to institute proceedings in a credible fashion, but that was possible only some years after the conflict there ended and it was possible for shattered judicial systems in the region to begin to get back on their feet. So, of course we should continue to do that, but we should always be able, when that's not possible, to prosecute perpetrators here. I believe it's shameful that when we find people who've committed the most staggering crimes our imaginations can conjure—and those we can't even begin to imagine—we prosecute them for visa fraud.

Senator WHITEHOUSE. Well, I appreciate your testimony very much and I look forward to working with you and the Chairman on the legislation.

Thank you.

Senator DURBIN. Thank you, Senator Whitehouse.

Senator Feingold.

Senator FEINGOLD. Thank you, Mr. Chairman, for holding this hearing today. Thanks to the witnesses for testifying before this subcommittee on such an important issue.

I'd like to make some quick comments and then turn to a couple of questions.

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Over the last century, genocide, ethnic cleansing, and crimes against humanity have occurred too frequently, in many cases because the will to stop these atrocities has been lacking or far too late in coming. Today, as we watch the genocide in Darfur continue to unfold, we are reminded that even though the international community has made great strides in addressing such atrocities through the law, there is still a long way to go to ensure that this legal framework is adequately developed and robustly implemented.

I have long believed that the protection of basic human rights and accountability for human rights abuses must be a cornerstone of American foreign policy. The failure to prosecute those guilty of crimes against humanity makes it more likely that such crimes will be repeated. Accountability must be established in order to overcome long-entrenched cultures of impunity, stem the potential for violent retribution, create conditions for meaningful reconciliation, and ultimately prevent new rounds of atrocities from occurring.

While we've made some progress in encouraging accountability for abuses of human rights, there are loopholes within our own legal framework here at home that allow individuals to find shelter from prosecution for their unspeakable actions.

Now, in part because my colleagues have already given such careful focus to Darfur during this hearing, let me note one particular example in which the perpetrators of human rights abuses in other nations have found shelter on American soil.

In 1980, four American church women who had been working with refugees in El Salvador were brutally murdered by members

of the Salvadoran National Guard. In command of these men were two Salvadoran generals who, although they bear direct responsibility for this atrocity, are currently living in the United States. In 2002, the generals were found liable in civil lawsuits for acts of torture carried out under their command. Yet, despite having been found liable for these terrible crimes, they continue to reside freely in Florida.

Criminal prosecution of these men is hindered by the fact that the statute criminalizing acts of torture was not passed until 1994, long after these acts were committed. Our immigration laws, however, do allow the United States to deport these men. Inexplicably, the Department of Homeland Security has not initiated deportation, despite repeated appeals from Members of Congress.

It is unacceptable that individuals who are known to be responsible for human rights abuses are allowed to find safe haven in the United States. I hope this hearing will help us find ways to hold these men, and others like them, accountable for their actions.

Professor Orentlicher, is there any doubt in your mind that United States law generally permits the prosecution of individuals for human rights violations like torture, which is prohibited by U.S. law, when those violations are committed by others acting under their direct command and control—and if there is any doubt, does Congress need to step in and fix this problem?

Ms. ORENTLICHER. There's no doubt in my mind that the torture statute that Congress enacted should be interpreted to cover people who exercise effective control over people who committed abuses and did not take the reasonable steps necessary to prevent or punish those abuses.

Unfortunately, as you know, there seems to be some doubt on the part of the Department of Justice about whether they can enforce the torture statute under that doctrine. So all I can say is, I commend this subcommittee's leadership in pressing the Department of Justice to interpret the statute the way you do. If there is continued reluctance to interpret the torture statute that way, then I think it would make sense for Congress to amend the torture statute to make it explicitly clear that command responsibility is a basis for prosecuting torture.

We all know that it's especially important to send a message to those who bear the highest levels of responsibility that they will be held to account if abuses occur that they were in a position to stop and there should be no doubt about our ability to do that.

Senator FEINGOLD. Well, let me ask you, then, about these two Salvadoran generals who were found liable for torture, yet are currently living in the U.S. As I'm sure you know, U.S. immigration law allows the Secretary of Homeland Security to deport someone if they are found to have "committed, ordered, incited, assisted, or otherwise participated in either any act of torture or any extrajudicial killing." They may also be deported if the Secretary of State reasonably determines that their presence would have "adverse foreign policy consequences" and that they were inadmissible due to a crime of "moral turpitude."

In November 2007 and again in March 2008, my colleagues, Senators Durbin and Coburn, wrote to Secretary Chertoff asking him whether he planned to deport these generals. Both times they re-

ceived the response that the Secretary is reviewing the facts of the case to determine whether deportation is appropriate.

Given your knowledge of the case and the applicable law, is there any reason why it should take 7-months to decide whether non-citizens who have been found liable for acts of torture should be deported?

Ms. ORENTLICHER. All I can say is, it's mind-boggling. If I recall correctly, they've been in the United States for almost 20 years. The U.S. Government has had long enough to figure out that these people do not—should not, under any understanding of our law, enjoy the privilege of lawful residence in this country.

Senator FEINGOLD. Thank you, Professor.

Thank you, Mr. Chairman.

Senator DURBIN. Thank you, Senator Feingold.

Mr. Cheek, I'd like you to explore with us a little bit more of this concept of an Olympic truce. You are not calling for a boycott of the Olympic Games. Is that true?

Mr. CHEEK. Correct. Obviously having been a participant in two Olympics, and really I think my world view having been shaped by the Olympic Games, what an incredible experience it was for me. I still believe, as idealistic as it may sound, that the Olympics can be a great force for promoting peace and promoting justice throughout the world.

What we believe, and there's some historical precedent for it over the years, governments have called for a truce during the Olympic Games for different regions, either war-torn regions, to allow athletes to travel from those regions or sometimes I believe—and again, I'd have to check to make sure—in 1994 there was a brief peace called in Yugoslavia during some of the conflicts there so that children could be immunized, and it was led by the IOC and signed off on by many members in the U.N.

What I would love to see happen, and what I think many athletes that I've spoken with believe is possible, is that if nations of the world, particularly members of—the permanent members of the Security Council were to try to enact something more than just a symbolic truce, but actually try and restart a peace process in which members of some of the rebel groups can perhaps be brought back to the table, or hopefully the most valuable thing is if there are some sort of concrete goals that can be realized, either redeploy UNIMID or deployment of more—troops or fulfillment of some of the U.N. security resolutions already passed.

Senator DURBIN. You're a student at Princeton, and yet I know you've traveled to many campuses talking about Team Darfur and what your goals are.

Mr. CHEEK. I have.

Senator DURBIN. Would you like to give me your observations about why this genocide in Darfur seems to resonate among the young people of our country?

Mr. CHEEK. I can speak for myself, pretty much, I think, only, in that I think that we are—I think we're offended by the thought that there are such—such huge numbers of people being slaughtered by their own government, and we're all aware of it. I think, perhaps in crimes in the past it was all dependent on whether one journalist could sneak in and get a few images out.

I think today students across the U.S. are so well-connected with events going on around the world within just a few seconds of hearing something about a crime that's happening half-way across the world in a country that we have no strategic interest in, we can be aware of the massive injustice and I think it offends us that we can be aware of this and that this can happen, and that people in power can know this is happening, and yet still, seemingly little is done to stop it. Again, I understand the complexities of the issue, but I think more than anything the ability that we have to reach out, see the world, and realize that we have the ability to stop these crimes and we haven't.

Senator DURBIN. Ms. Smith, most everyone knows that Sudan is an oil-producing country and that China is one of the major countries doing business with Sudan. There's been a lot of conversation about how to persuade China to take a more active role in dealing with the Sudanese government. Can you give me your impressions as to whether or not we can, should, or will effectively work in that direction?

Ms. SMITH. Yes. I think we can, and should. There's been some effort, arguably more by the public than by our own government, to put pressure on the Chinese. And it's quite interesting. It's less pressure aimed at impugning their character or isolating China and more pressure designed to call on China to use its leverage with Khartoum to, for example, allow the full deployment of the UNIMID peacekeeping operation. It's certainly not been successful, but I think there is evidence that it has had some impact.

I think it's evident in a couple of ways. One, a lot of the pressure around the Olympics and the reference to things like the Darfur Olympics is something that has resonated with the Chinese. They're just like anyone else; they don't want to be seen, particularly at a time that they're hosting the Olympics, as championing the cause of genocide.

Second, I have, and many others of us in a growing movement, have actually met with the Chinese on this. And I would say that, again, I don't know whether the pressure is sufficient to cause them to change their policy. I certainly don't think they're going to abandon Sudan and the oil supplies that it offers.

But I had every indication that they're hearing this and they want to figure ways to get out from under the pressure. Unfortunately, what they've done has been insufficient. They've sent an envoy, they've made statements, they've been largely superficial gestures. Just recently, they commended the government of Sudan for its excellent behavior and progress on Darfur, rather ironically.

But I believe that if there were united public pressure and if the administration acted on this in some way—and frankly there's been very little. There have been a couple of meetings with the Chinese about I think that's it—that it might be possible to get the Chinese to use their leverage on Khartoum.

Senator DURBIN. I might say, as I mentioned earlier, that I've had conversations with Condoleeza Rice, Secretary of State, as well as the President personally on this issue and I've reminded them that they've said "not on my watch" and that their watch is about

to end without a U.N. peacekeeping force in place and with the violence continuing.

Ms. SMITH. Yes.

Senator DURBIN. And so I'm hoping that in the closing months, even in the closing weeks before the Olympics, that they might be persuaded to renew this conversation with the Chinese about their role.

Mr. Hari, one of the things you've said here, though, makes this especially challenging because you've suggested there are 28 different rebel groups now involved in the violence in Darfur, and 3 different Janjaweed militia. We tend to oversimplify it here in the United States and say, well, if the government in Khartoum would just declare an end to this violence, it would end. But it seems to me that it's much more complicated on the ground in terms of who is in charge and who would be brought to the table if we are to find a truce or peace. Is that your impression, too?

Mr. HARI. Yes. We are, in Sudan—it's a very large country. When we had a war in south Sudan for 25 years, Senator, just only we had SPLM at that time, the Sudan People's Liberation Army, but the Khartoum regime said they are able to split that power for many, many factions in south of Sudan. They—very weak. So that's what they used the policy in Darfur for, for 25, 28 different rebel groups, surrounded by the tribals, they have to pay for some tribes or the tribal leaders and they're fighting. Sometimes—again, it's some of pride, and that's—they wanted to make very weak toward Darfurians to be united themselves.

But that is not going to be far along because you don't know right now if you are going to visit Sudan one day and you go into Khartoum from Darfur, it's very easy to get from what Sudan is telling you, look what is happening in Darfur. There's no government troops, there is not any Janjaweed, just only tribes fighting themselves. So, this is an ethnic problem, not a policy problem. So that's what they do. They make a different level of our problem in Darfur and it has to make—different for the international community. But that's the same problem they get with who is paying for the tribal leaders and others or different tribal leaders to do that.

Senator DURBIN. Professor Orentlicher, now, what Senator Feingold asked was, I thought, a legitimate question about how many of these people who might be charged with crimes against humanity came to the United States, and whether they answered the questionnaires honestly in order to come to the United States. I think he addressed part of that in his question. Secondly, there is the question of whether they could stay in the United States or be subject to deportation, as we've called for in several instances.

But I'd like you to address a comment which I've heard. When we suggest adding new crimes to be prosecuted, some say that we shouldn't be tying up our system of justice, but that we should deport them back to their country for prosecution. Could you address that particular critique?

Ms. ORENTLICHER. Well, we should do all we can to ensure that people can be prosecuted in the country where they committed crimes when there's a credible prospect that they will be pros-

ecuted. That should always be our first priority. But often removing someone is equivalent to guaranteeing their impunity.

In some instances when a country is still very unstable, if you send some of the worst perpetrators back and the system of justice is in a state of wholesale collapse, there's a risk of destabilization. So a decision has to be made on a case-by-case basis of where the best place for prosecution is, but we should always have the option of ensuring justice when it cannot be obtained elsewhere.

Senator DURBIN. And for the record, I think this relates to a question from Senator Whitehouse. We looked up earlier testimony from David Scheffer about crimes against humanity. This has been defined and incorporated in the criminal codes of Australia, Canada, Germany, the Netherlands, New Zealand, South Africa, Spain, Argentina, and the United Kingdom.

Ms. ORENTLICHER. Right.

Senator DURBIN. So other countries have seen the need to do what we are proposing here, and many of those have been our allies in wars against inhumane and terrorist conduct.

Ms. ORENTLICHER. Absolutely.

Senator DURBIN. Well, I want to thank this panel for their testimony here today, for bringing this issue forward. I've tried through this subcommittee and on the floor to continue to revisit this issue. I am reminded of the experience of my former college classmate and former President Bill Clinton, who, after the genocide in Rwanda, when his presidency had ended, said it was one of the real mistakes of his administration that they did not step forward.

At the time there were several leaders in the Senate calling for his administration to do something, including my predecessor, Senator Paul Simon of Illinois, and Senator Jim Jeffords of Vermont, then a Republican. It was a bipartisan effort which did not work. I felt that there was a need to continue to bring this issue forward in practical ways.

I've said from the outset that this subcommittee is going to focus on legislation, not lamentation. We are going to not just look in horror at the scenes of genocide and crimes against humanity, but think of practical ways for us to deal with them to reduce the violence and to end the killing. That is why this hearing has been held today.

I'm going to give special thanks as I close this hearing to some extraordinary staff people who have done great work to make this hearing a possibility, starting with my Chief Counsel on the Senate Judiciary Committee, Joe Zogby, Heloisa Griggs, Jaideep Dargan, Corey Clyburn, who is a legal intern, and Talia DuBovi.

I also want to thank on the other side Senator Coburn's staff, and particular, Brooke Bacak, his Chief Counsel, who's been very supportive and very helpful. Senator Coburn has been an excellent ally in this entire endeavor. I know he regrets not being able to be with us today, but I'm glad that he persuaded Senator Specter to join from the Republican side. As you can tell, there's bipartisan interest in this.

So at this point the record will be open for questions to be asked of the witnesses for several days, and I hope they can respond in a timely way.

I thank you all for the sacrifice of coming here today and being part of this testimony and we will continue to press forward for this legislation.

This meeting of the subcommittee will stand adjourned.

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

[Whereupon, at 11:18 a.m. the subcommittee was adjourned.]

[Questions and answers and submissions follows.]

QUESTIONS AND ANSWERS

Responses to Written Questions of Senator Richard Durbin
Chairman, Subcommittee on Human Rights and the Law
Hearing on "From Nuremberg to Darfur:
Accountability for Crimes Against Humanity"

June 24, 2008

Daoud Hari

1. *You testified that you are the third of reportedly only five Darfuri refugees that have been resettled in the United States. Following the hearing, you supplemented your testimony to include information the State Department subsequently provided to the effect that 350 Sudanese from Darfur have been resettled since approximately 2003. While this is a much larger figure than five, as you noted in your addendum, 350 is merely "a handful" in the context of a displacement of over 2.6 million people.*

   a. *Given the enormity of the crisis in Darfur and the displacement it has caused, why is this number so low?*

A number of factors explain why only a small number of Darfuri refugees have been resettled in the United States, including (1) the currently unstable security situation in Eastern Chad; (2) a fear that large scale resettlement will legitimize the strategy of displacement and "slow death" which has been set in motion by the Bashir regime; and (3) a lack of media attention on these issues in the United States and a general ignorance about the problem in the population at large. These factors are discussed in more detail below.

I. Security Situation in Eastern Chad

Non-governmental organizations have primarily been unable to implement large-scale efforts to resettle refugees from camps in Eastern Chad because the lack of security in such camps would compromise any such efforts. A lack of adequate support for the African Union/UN Hybrid operation in Darfur ("UNAMID") has been extremely destabilizing in a context of low-level inter-state conflict between Chad and Sudan, where cross-border attacks by Janjaweed militias and Chadian rebel groups armed by the Bashir government have become increasingly more frequent. Continuing arms sales in the region by the Chinese government, as well as a general intransigence with regard to sanctions, only exacerbate such already dangerous conditions and further discourage the establishment of effective resettlement operations.

The present security situation has also impaired the willingness of U.S. Federal agencies to assist in resettlement efforts. Such agencies have so far been reluctant to place staff in harm's way, and the Department of Homeland Security has not conducted regular circuit rides to interview and identify refugees for asylum. Such general inaction has been particularly

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detrimental for the large numbers of Darfuris internally displaced within Sudan who have been cut off completely from humanitarian assistance of any sort.

II. Fear of Legitimizing Bashir Regime

Both the international community and Darfur advocates in the United States have been hesitant to step up resettlement efforts in the region for fear of granting political legitimacy to Bashir's strategy of displacement and "slow death." Resettling Darfuri refugees on a large scale would require governments to acknowledge that such refugees may never be able to return to Sudan. Such "permanent" resettlement could be interpreted as vindicating Bashir's policies if not accompanied by additional sanctions or punitive measures against Sudan.

III. Lack of Media Attention

In the United States, the plight of Darfuris is known only to a relatively small constituency. I believe that poor media coverage of the present crisis has produced this lack of awareness. Such poor media coverage is likely due to the fact that any probing analysis of the conflict places a spotlight on the involvement of the Chinese government in the crisis, and offending China—which has become an increasingly important player in the global economy—could risk financial detriment to the corporations that own the major American media outlets.

While no news on Darfur may be good news for the corporate owners of these media outlets, this inattention keeps public concern at a minimum and results in less pressure on lawmakers to help both the displaced and the vulnerable in Darfur.

b. What needs to be done to ensure that victims of genocide and crimes against humanity in Darfur obtain much-needed refuge?

Efforts to ensure that victims of genocide and other crimes against humanity in Darfur receive refuge should begin with providing full support to UNAMID peacekeepers and funding the efforts of the United Nations World Food Programme to provide assistance in Eastern Chad and Sudan. While both Sudan and China should be pressed to achieve a broader political solution to the crisis, both the State Department and the Department of Homeland Security could take more proactive roles with regard to resettlement efforts as called for in House Resolution 1290. To this end, a Refugee Resettlement Bill that provides priority assistance to Darfur's most vulnerable populations would be useful.

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2. *Do you believe it is important for victims of genocide and crimes against humanity in Darfur that perpetrators of these crimes be held accountable in a court of law?*

International media outlets have suggested that a peaceful resolution to the crisis in Darfur can occur without holding the perpetrators of violence and genocide accountable for their actions (the British Broadcasting Corporation, for example, chronicles the present crisis in a section of its website entitled "Peace or Justice?"). I disagree with this suggestion and do not believe that peace can ever be fully obtained without justice. We must have both, and peace can only follow justice.

The decade-long civil war that raged in the southern part of my country provides a useful illustration of this point. As in Darfur, President Bashir's government committed mass atrocities, war crimes and other assorted crimes against humanity in this region of Sudan. Over two million people lost their lives. While a state of peace now exists in southern Sudan, those responsible—President Bashir and his agents—were never brought to trial in a court of law. As a direct consequence, the Bashir regime has been free to wage its current campaign of death in Darfur.

The present conflict in Darfur exists because justice has never been allowed to prevail with regard to the immediately prior conflict in Sudan. In Darfur, as everywhere, peace must flow from justice.

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Written Questions for Professor Diane Orentlicher
Hearing: "From Nuremberg to Darfur:
Accountability for Crimes against Humanity"

Subcommittee on Human Rights and the Law
United States Senate Committee on the Judiciary
June 24, 2008

Questions of Senator Richard Durbin

1) **Numerous reports have documented the use of widespread and systematic rape and other forms of sexual violence by militias and government soldiers in Darfur.**

a. **If a wartime rapist from Darfur found safe haven in the United States today, could he be prosecuted under U.S. law?**

Although the conduct described in this question is a war crime, it could not be prosecuted under the U.S. war crimes statute codified at 18 USC § 2441, which establishes federal jurisdiction over war crimes only when committed by or against a member of the United States Armed Forces or United States nationals. The type of sexual violence described in this question might be covered by the federal torture statute codified at 18 USC § 2340A, but this would depend on several factors, including whether a federal court is willing to conclude that rape and other sexual violence constitutes torture within the statute's definition. Although this law was enacted in 1994, only one person has been charged under the statute and there is not yet any case law interpreting its definition of torture. Accordingly, it is difficult to know whether a court would interpret it to cover rape. Moreover this statute defines torture to include certain conduct only when committed "under color of law," a definitional hurdle that would likely foreclose prosecution of rapists acting on behalf of non-governmental armed forces.

What we do know is that federal prosecutors have been reluctant to bring charges under the torture statute unless they are confident they will prevail in court, and thus any ambiguities in coverage are likely to be resolved against prosecution.

b. **Would crimes against humanity legislation make it possible to prosecute perpetrators of widespread and systematic rape in Darfur who are found in the United States?**

Yes, provided of course that the statute applies to the period when the crimes occurred. Such legislation would not only provide an unambiguous basis for prosecution but would also reflect the gravity of crimes against humanity, which by their nature involve not just isolated crimes but inhumane acts that are part of a widespread or systematic attack against civilians.

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2) **A witness at a prior hearing of this Subcommittee testified that many countries have enacted crimes against humanity legislation to prevent the International Criminal Court from prosecuting their nationals. It is my understanding that the ICC must defer to a country that demonstrates it can effectively prosecute its own nationals for crimes against humanity. Please explain how enacting crimes against humanity legislation could allow the United States to preempt ICC jurisdiction over U.S. nationals.**

The Rome Statute of the International Criminal Court (ICC) provides that the ICC can exercise its jurisdiction only when a State with jurisdiction over the crimes in question is unable or unwilling genuinely to investigate and/or prosecute those crimes. Whether a State can do so depends in part on whether its legal infrastructure enables it to prosecute crimes that are potentially subject to investigation and prosecution before the ICC. A significant number of States parties to the Rome Statute have adopted or are in the process of adopting legislation that enables their own courts to prosecute crimes that are subject to the ICC's jurisdiction, which include crimes against humanity, in part so that they can pre-empt ICC jurisdiction over crimes committed in their territory or by their nationals.

Questions of Senator Tom Coburn, M.D.

1) **In your testimony, you discussed American leadership with respect to crimes against humanity. Examples you mentioned included Nuremburg, the International Criminal Tribunals for both the former Yugoslavia and Rwanda, and the Special Court for Sierra Leone. Could you please discuss the jurisdiction of those courts, specifically with respect to their duration (and any relevant statutes of limitation) and reach (with respect to geography and individuals eligible to be tried)?**

Each of these tribunals was established to deal with crimes committed during a particular period and place but enforced international crimes, including crimes against humanity, that are not subject to statutes of limitation under international law. Their respective jurisdiction is/was as follows:

International Military Tribunal ("IMT" or "Nuremberg Tribunal"): The Nuremberg Tribunal had jurisdiction to try "the major war criminals of the European Axis" "whose offenses [had] no particular geographical location." The Agreement establishing the Tribunal came into force on August 8, 1945. The trial of major war criminals before the IMT began on November 14, 1945 and lasted nine and one-half months. (Other prosecutions of Nazi suspects for crimes against humanity and other charges were subsequently brought by the United States and other Allied Powers in their respective zones of occupation in postwar Germany, as well as by national courts in Germany and other countries. Proceedings against suspected Nazi suspects have continued to the present day.)

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The Nuremberg Charter defined *crimes against humanity* as certain acts committed "before or during the war"—i.e., before or during World War II. Since, however, the Charter limited the IMT's jurisdiction over crimes against humanity to those committed "in connection with" either war crimes or crimes against peace that were also subject to the Tribunal's jurisdiction, the IMT concluded that as a general matter it could not prosecute crimes against humanity committed before 1939.

International Criminal Tribunal for the former Yugoslavia (ICTY): The Security Council resolution establishing the ICTY, SC resolution 827 (1993), provides that the ICTY has jurisdiction over "persons responsible for serious violations of international humanitarian law," including crimes against humanity, "committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace." The Tribunal's personal jurisdiction is not limited to any nationality. Pursuant to the ICTY's completion strategy, its Prosecutor concluded investigations at the end of 2004 with a view toward concluding its work by the end of 2010 (a date that may be extended to allow the ICTY to complete its outstanding cases).

International Criminal Tribunal for Rwanda (ICTR): The Security Council resolution establishing the ICTR, SC resolution 955 (1994), provides that the ICTR has jurisdiction over "persons responsible for serious violations of international humanitarian law," including crimes against humanity, "committed in the territory of Rwanda [regardless of their nationality] and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994." In accordance with the ICTR's completion strategy, the Prosecutor of the ICTR undertook to conclude investigations at the end of 2004 with a view toward completing the Tribunal's work by the end of 2010.

Special Court for Sierra Leone (SCSL): The SCSL, which was established in 2002, has jurisdiction over "persons who bear the greatest responsibility for serious violations of international humanitarian law," including crimes against humanity, "and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone." This provision (in Article 1.1 of the SCSL Statute) is subject to the following qualification:

> 2. Any transgressions by peacekeepers and related personnel present in Sierra Leone pursuant to the Status of Mission Agreement in force between the United Nations and the Government of Sierra Leone or agreements between Sierra Leone and other Governments or regional organizations, or, in the absence of such agreement, provided that the peacekeeping operations were undertaken with the consent of the Government of Sierra Leone, shall be within the primary jurisdiction of the sending State.

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3. In the event the sending State is unwilling or unable genuinely to carry out an investigation or prosecution, the Court may, if authorized by the Security Council on the proposal of any State, exercise jurisdiction over such persons.

Originally expected to operate for three years beginning in 2002, the SCSL is now working to complete its cases by the end of 2010.

2) Would you please expand on the opinion you expressed that U.S. law should allow for the extradition of individuals who are not present in the United States to be brought here and prosecuted? Would such a provision imply or create a responsibility for the United States to seek such extraditions around the world?

In my testimony, I proposed that the United States adopt legislation making crimes against humanity a federal crime that can be punished not only if the offense were to occur in the United States, as happened on September 11, 2001, but also when committed abroad if the perpetrator is present in the United States and cannot be extradited to another country or transferred to another court where he or she could and should be tried. As a general matter, it is preferable for persons who commit crimes against humanity to be prosecuted in the country where the crimes occurred than to be prosecuted in another country or by an international court. In the immediate aftermath of mass atrocities, however, the country where they occurred may not be able to prosecute those responsible, either because its judiciary is in shambles or, as in Germany immediately after World War II, because its courts are not yet capable of rendering impartial justice. The proposal set forth in my testimony would close a gap in U.S. law that makes it impossible for the United States to prosecute individuals responsible for crimes against humanity who seek haven in this country *even when they cannot or will not be prosecuted in another forum.*

In response to a question about whether the proposed law should be limited to circumstances in which a suspect is found in the United States, I indicated that this was the principal circumstance in which enforcement would be relevant. I added that in truly extraordinary situations I believe the United States should have legal authority to request the extradition of individuals suspected of committing crimes against humanity (not that it should be required to do so). This response was informed by a situation that arose eleven years ago, which illustrates why this type of legal authority may be desirable and also why its use would be truly extraordinary: In 1997, the notorious leader of the Khmer Rouge, Pol Pot, unexpectedly became available for prosecution. The United States government worked tirelessly to make this possible but lacked the legal authority itself to prosecute Pol Pot and was unable to find another country that was legally able and willing to prosecute him before the window of opportunity closed forever.

3) You also testified that a number of other countries have statutes providing extraterritorial jurisdiction to prosecute crimes against humanity. Please

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provide examples of how those statutes have been used, especially with respect to Darfur. Do any of those statutes allow for the extradition of offenders who are not present in those countries? If so, has that authority been used?

I am not aware of a study that identifies every country whose law currently provides for extraterritorial jurisdiction over crimes against humanity regardless of the nationality of the victims or perpetrators. A forthcoming study by the International Bar Association, which includes information concerning 27 countries' laws, identifies nine of these countries as having legislation authorizing extraterritorial jurisdiction over crimes against humanity regardless of the nationality of the victims or perpetrators. Amnesty International is currently undertaking a comprehensive study of state practice in this area. According to the director of this study, as of June 2008, 37 countries' law included provisions establishing extraterritorial jurisdiction over crimes against humanity, regardless of the nationality of the victims or perpetrators.

Examples of cases in which countries have utilized such statutes include:

- In the early 1960s **Israel** prosecuted Nazi official Adolf Eichmann on charges of war crimes, crimes against humanity and crimes against the Jewish people for his role in organizing deportations of Jews to death camps.
- In the early 1990s **Canada** prosecuted Imre Finta for crimes against humanity committed in Hungary during World War II; Finta was acquitted in 1994 because the prosecutor was not able to establish all of the elements of this offense. In 2000, Canada replaced the legislation under which Finta was acquitted in 1998; its new Crimes against Humanity and War Crimes Act is the basis of a case brought against a Rwandan, Désiré Munyaneza, who has been charged with crimes against humanity, genocide and war crimes.
- In **France**, a case has been pending against a Rwandan priest, Wenceslas Munyeshyaka, for genocide and crimes against humanity.
- **Senegalese** authorities are expected to bring formal charges including crimes against humanity against former Chadian leader Hissène Habré. Habré would be charged pursuant to a law enacted in February 2007, which allows Senegal to prosecute crimes against humanity, genocide and war crimes even when they occur outside Senegal, and in accordance with a constitutional amendment adopted on July 23, 2008 making clear that the 2007 law can be applied retroactively.
- In late 2007 the Supreme Court of **Spain** upheld the conviction of, and the 25-year sentence imposed on, Adolfo Scilingo, a former Argentine Naval officer, for his role in executions and other crimes during Argentina's "dirty war," which the Court concluded amounted to crimes against humanity.

In recent years, **Australia, Denmark, Germany**, the **Netherlands**, **Sweden**, the **United Kingdom** and other countries have instituted prosecutions against individuals charged with torture, war crimes, genocide and "crimes against international law" committed in other countries. I am not aware of such prosecutions having been instituted against

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individuals allegedly responsible for atrocities in Darfur, although several suspects have been named by the Prosecutor of the International Criminal Court and preliminary investigations by national authorities may be under way.

In some of the countries mentioned above, domestic law permits local authorities to initiate an investigation of crimes against humanity committed abroad even before the country has established personal jurisdiction over the defendant and to seek the extradition of persons eventually indicted. Israeli agents apprehended Adolf Eichmann in Argentina so that he could be prosecuted in Jerusalem. Later, Israel sought the extradition of John Demjanjuk from the United States so that it could try Demjanjuk for his alleged role in crimes committed during World War II. In 1985, the Sixth Circuit Court of Appeals upheld the lawfulness of Demjanjuk's extradition to Israel; Demjanjuk was eventually acquitted of crimes against humanity on appeal following his conviction in Jerusalem. Under German, United Kingdom and Spanish law, it is possible to begin an investigation when a perpetrator is not physically present in the State's territory, but his or her presence must be secured before a prosecution can be instituted.

Question of Senator Sheldon Whitehouse

1) **Provide examples of instances in which countries have instituted prosecutions under their domestic law of crimes against humanity committed in another country by individuals who did not possess their nationality.**

Examples include:

- In the early 1960s **Israel** prosecuted Nazi official Adolf Eichmann on charges of war crimes, crimes against humanity and crimes against the Jewish people for his role in organizing deportations of Jews to death camps. Israel later prosecuted John Demjanjuk for crimes against humanity committed during World War II following his extradition from the United States; Demjanjuk s conviction of crimes against humanity was overturned on appeal.
- In the early 1990s **Canada** prosecuted Imre Finta for crimes against humanity committed in Hungary during World War II; Finta was acquitted in 1994 because the prosecutor was not able to establish all of the elements of this offense. In 2000, Canada replaced the legislation under which Finta was acquitted in 1998; its new Crimes against Humanity and War Crimes Act is the basis of a case brought against a Rwandan, Désiré Munyaneza, who has been charged with crimes against humanity, genocide and war crimes.
- In **France**, a case has been pending against a Rwandan priest, Wenceslas Munyeshyaka, for genocide and crimes against humanity.
- **Senegalese** authorities are expected to bring formal charges including crimes against humanity against former Chadian leader Hissène Habré. Habré would be charged pursuant to a law enacted in February 2007, which allows Senegal to prosecute crimes against humanity, genocide and war crimes even when they occur outside Senegal, and in accordance with a constitutional amendment

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adopted on July 23, 2008 making clear that the 2007 law can be applied retroactively.

- In late 2007 the Supreme Court of **Spain** upheld the conviction of, and the 25-year sentence imposed on, Adolfo Scilingo, a former Argentine Naval officer, for his role in executions and other crimes during Argentina s dirty war, which the Court concluded amounted to crimes against humanity.

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SUBMISSIONS FOR THE RECORD

June 24, 2008

Senate Judiciary Human Rights and the Law Subcommittee Hearing
"From Nuremberg to Darfur: Accountability for Crimes Against Humanity"

Statement by Bryan Ardouny, Executive Director of the Armenian Assembly of America

Mr. Chairman, Ranking Member Coburn, and Members of the Subcommittee:

The Armenian Assembly of America commends the ongoing work of this important Subcommittee in examining past crimes against humanity to draw lessons learned, to prevent future atrocities and to adopt meaningful legislation to address these critical present day issues.

America's humanitarian intervention in various parts of the world in saving lives and bringing relief to millions of people – victims of crimes against humanity – can be traced from the Armenian Genocide of 1915, to the ongoing carnage in Darfur today. It was nearly 100 years ago, in the early 20th century, that the Honorable Henry Morgenthau, U.S. Ambassador to the Ottoman Empire from 1913 to 1916, organized and led protests by officials of many countries, among them the allies of the Ottoman Empire, against the Armenian Genocide. Ambassador Morgenthau explicitly described to the Department of State the policy of the Government of the Ottoman Empire as "a campaign of race extermination" and was instructed on July 16, 1915, by Secretary of State Robert Lansing that the "Department approves your procedure ... to stop Armenian persecution."

Through its filing with the International Court of Justice (ICJ) in 1951, concerning the United Nations Genocide Convention, the United States squarely acknowledged the Armenian Genocide as a crime.

The document (relevant section attached) reads in part:

"The Genocide Convention resulted from the inhuman and barbarous practices which prevailed in certain countries prior to and during World War II, when entire religious, racial and national minority groups were threatened with and subjected to deliberate extermination. The practice of genocide has occurred throughout human history. The Roman persecution of the Christians, the Turkish massacres of Armenians, the extermination of millions of Jews and Poles by the Nazis are outstanding examples of the crime of genocide."

While our interventions in Kosovo and Bosnia helped arrest the ethnic cleansing associated with these wars and helped bring stability and rehabilitation to the Balkans, international action came largely as a result of the bitter lesson learned in an earlier crisis in Rwanda, where the tragic inaction of the world community led to the commission of some of the most heinous crimes against innocent populations.

In the case of the Armenian Genocide, while the Allied Powers charged, for the first time, another government, Turkey, with committing "crimes against humanity," the absence of international law to hold the perpetrators accountable was dishearteningly evident. But for a brief

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series of domestic trials in Turkey, which were too soon discontinued, the organizers of the Armenian atrocities avoided responsibility and escaped judgment.

The very lack of accountability to one's own nation and to the international community for having committed mass atrocities propelled Raphael Lemkin, a true giant in the defense of human rights, to ask why a murderer may be charged for a single crime, while a mass murderer is excused. It would take one more genocide – the Holocaust – 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.

The U.S. can and must utilize the resources at its disposal to stem the loss of life and end the cycle of genocidal violence. Nicholas Kristof, of *The New York Times*, who has written extensively on this matter enumerated six policy recommendations in his November 29, 2005 editorial, "What's To Be Done About Darfur?" and concluded that "Finding the right policy tools to confront genocide is an excruciating challenge, but it's not the biggest problem. The hardest thing to find is the political will." His foresight was on the mark then, as it is now.

The application of the law should not be limited to prosecution after the crime has been committed. The U.N. Genocide Convention did not call for punishment alone. It also aspired for the prevention of genocide. Prevention, whether of a single crime or atrocities on the scale of genocide, starts with education. The laws on public education are where prejudice is averted and the environment of tolerance first is instilled. The Armenian Assembly and the entire Armenian-American community stand ready to help in these efforts.

Armenian-Americans, as descendants of the survivors of the Armenian Genocide, cannot remain indifferent to the suffering of the people of Darfur. Inaction is not an acceptable course of action. As Nobel Laureate Elie Wiesel stated in his Foreword to the book *Not On Our Watch*, by Don Cheadle and John Prendergast, "our failure to speak out to end the ongoing genocide in Darfur would place us on the wrong side of history…for the sake of our humanity, SAVE DARFUR." Therefore, we support continued efforts to bring legitimate pressure on the government of Sudan to affect change in its domestic and international conduct, toward addressing the dire humanitarian situation in Darfur, and preventing future violence in that region.

We urge this Subcommittee to continue to actively generate and introduce new mechanisms to better protect potential victims from future genocides and the consequences of genocide denial. In doing so, the U.S. will build on the proud legacy of Ambassador Henry Morgenthau, as well as that of former House Foreign Affairs Chairman and Congressional Caucus on Human Rights Co-Founder, the late Congressman Tom Lantos (D-CA), in their defense of human rights and action to address man's inhumanity to man.

"Remember: silence helps the killer, never his victims" – Nobel Laureate Elie Wiesel.

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INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

RESERVATIONS TO THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

ADVISORY OPINION OF MAY 28th, 1951

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I. *The Genocide Convention*

The Genocide Convention resulted from the inhuman and barbarous practices which prevailed in certain countries prior to and during World War II, when entire religious, racial and national minority groups were threatened with and subjected to deliberate extermination. The practice of genocide has occurred throughout human history. The Roman persecution of the Christians, the Turkish massacres of Armenians, the extermination of millions of Jews and Poles by the Nazis are outstanding examples of the crime of genocide. This was the background when the General Assembly of the United Nations considered the problem of genocide. Not once, but twice, that body declared unanimously that the practice of genocide is criminal under international law and that States ought to take steps to prevent and punish genocide.

For more information please visit www.aaainc.org and www.armenian-genocide.org.

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Testimony submitted by Joey Cheek
Co-Founder and President, Team Darfur
2006 Olympic Gold Medalist

Senate Judiciary Subcommittee on Human Rights and the Law
"From Nuremberg to Darfur: Accountability for Crimes Against Humanity"
June 24, 2008

Chairman Durbin, Ranking Member Coburn, Honorable Representatives, it is my pleasure and an honor to be asked to submit a brief testimony on such a weighty issue as human rights and accountability. I am not an expert on the legal intricacies of international accountability. I am simply an athlete and a student, but in those positions I have had experiences that are unique.

In 2006 after seventeen years of preparation I became the Olympic Champion in my chosen sport of speedskating. After spending years traveling around the world as an athlete representing the United States my eyes opened to a tragedy occurring in a part of the world that was vastly unreported in my home country. That tragedy was the mass killings occurring in the Darfur region of Sudan.

For more than two years I have continued to try and raise awareness about the horrible atrocities faced by so many innocents in Darfur. I have founded a coalition, Team Darfur, to bring together like minded athletes to bring awareness to the abuses that are occurring. I have spoken in front of groups of thousands and I have traveled to Chad to visit firsthand with refugees driven from their homes in Darfur.

Like so many, I am appalled by the suffering that these innocents have gone through. The numbers of people killed in Darfur is as massive as the worst of natural disasters. However, unlike the loss of life and home that occur when natural disasters strike, these vicious crimes are the result of conscious and willful effort by a group of people. Over the last five years in the desert of Darfur, almost every day men make the decision to aim a gun at the head of an unarmed person and pull the trigger. They make the decision when they storm into a village to rape women over and over again. And then they make the decision to burn that village to the ground and drive anything living into a wasteland to starve to death.

In Khartoum, the capital of Sudan, decisions are being made that are every bit as vile as those occurring in the field. Officials of the government empower these savage acts on men, women and children. They arm the militias, they pay militiamen to slaughter innocents, and they use military aircraft to bomb civilians. Men there make the decision that they can destroy a group of people simply because they do not want them around.

When I first became aware of Darfur my intention was only to try and raise a little bit of money for relief and make a few more people aware of a crime that was occurring on such a horrific scale. I thought that once people realized what was happening this crisis would magically stop, what I have come to realize is that it takes much more than awareness.

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In the face of crimes such as these, people must be willing to fight back. That does not always mean picking up a gun and charging into the fray, but using every available tool at your disposal to bring those murderers and rapist to judgment.

The situation in Darfur was complex, and has become increasingly so, but complexity cannot conceal the fact that throughout this conflict men have consistently made the decision to indiscriminately take the lives of huge numbers of innocent people. For that decision, there must be accountability. There must be the knowledge throughout the world that if you willfully destroy the lives and homes of innocents that you will be held responsible.

Respected individuals from around the world are working tirelessly to ensure that the perpetrators of the crimes in Darfur are held accountable. What I, and the other athletes who make up Team Darfur, hope to do to help is call upon the international community to observe an Olympic Truce period for Darfur.

The Olympic Truce originated in ancient Greece; in recent history, world leaders have invoked the Truce as an opportunity for the international community to expend exceptional effort, as athletes strive for medals, to create and promote peace.

In 2003, the United Nations reaffirmed the importance of the Olympic Truce in an statement signed by more than 400 heads of state and dignitaries who pledged "to support and disseminate, individually and collectively, the symbolic call for Olympic Truce throughout all future Olympic Games and beyond, and to exercise our best efforts within our communities, countries, and relevant international organizations to achieve its recognition and observance."

On October 31, 2007, China introduced a resolution supporting an Olympic Truce for the 2008 Beijing Olympic Games [G/A 62/L.2, "Building a peaceful and better world through sport and the Olympic ideal"]. The resolution calls "upon all Member States to cooperate with the International Olympic Committee in its efforts to use sport as an instrument to promote peace, dialogue and reconciliation in areas of conflict during and beyond the Olympic Games period." It was co-sponsored and adopted by 186 nations, including Sudan.

A true Olympic Truce will only be possible for Darfur with an increased deployment of the UNAMID peacekeeping force and a rejuvenated peace process that has the full support of the permanent members of the UN Security Council. Therefore, we hope the Truce period will be used to exert diplomatic pressure to restart the peace process, and to initiate a rapid and effective deployment of the UNAMID peacekeeping force so that civilian protection would continue long after the Games.

With those measures in place, the international community could use the Olympic Truce period to provide humanitarian assistance in Darfur where hundreds of thousands of innocent civilians have no access to food, safe drinking water, and medical care.

In the spirit of the Olympic Truce, we issue a moral call for these essentials: a rejuvenated peace process, deployment of peacekeepers, a cessation of attacks, and unfettered access for humanitarian workers. If the Olympic Truce period is be marked by an increase of effort by the

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international community to secure peace for the people of Darfur, the measures of accountability that your committee hopes to pursue will be more possible, and more effective.

I was raised to believe that we live in a nation that values justice, and I have seen that belief validated time and time again. I am proud of the work that we as a nation have done to help the innocents of Darfur, but there is much more to be done. We must continue to lead the international community to bring to justice the criminals that continue to perpetrate this violence. In doing so we will not only help hundreds of thousands of innocents in Darfur, but we will move the world one step closer to a place where men will know they face consequences for committing these crimes against humanity.

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Statement of Senator Tom Coburn, M.D.

Hearing: "*From Nuremberg to Darfur: Accountability for Crimes Against Humanity*""
Subcommittee on Human Rights and the Law
United States Senate Committee on the Judiciary
June 24, 2008

I would like to thank Chairman Durbin for scheduling today's hearing, the focus of which will largely be on Darfur. The Chairman and I share an interest in the region and the unspeakable atrocities that have been committed there these past few years. I am pleased to see the Subcommittee focus on Darfur today, as we discuss the larger issue of crimes against humanity.

While crimes against humanity have been committed all around the world, there is, tragically, perhaps no better current example of such offenses than in the Sudan region of Darfur. From murder to torture to rape to enslavement and other heinous acts, crimes against humanity have run rampant throughout this conflict. As many as 400,000 people have been killed and more than two million have been displaced from their homes. The gravity and magnitude of this human calamity are unimaginable.

The United States has been concerned about Darfur for some time. President Bush has made Sudan one of his highest foreign policy priorities. I commend him for the progress that has been made during his watch, which includes providing more than $4 billion in humanitarian, peacekeeping, and development assistance to the people of Sudan and Eastern Chad since 2005, making the United States the largest single donor to the region. Other examples of U.S. efforts in Sudan, as documented by the State Department, include: funding 25% of the UN-AU peacekeeping operation and UN monitoring mission; constructing and maintaining 34 base camps for peacekeepers; committing more than $100 million to train and equip African battalions; and serving as the largest food donor to the Sudan by providing 40 tons of food aid every month.

Yet despite the incredible support of the United States and other nations around the world, the crisis in Darfur continues and its status today is unacceptable. This hearing will bring renewed awareness to the crimes against humanity that continue, and will lead to productive discussions about what can and should be done from here.

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I welcome all of our witnesses and wish to extend sincere appreciation to each of you for taking the time and effort to be here today. Your expertise is vital to a complete understanding of this issue. I look forward to hearing the unique perspective of each witness on this diverse panel.

Mr. Hari, I especially look forward to your testimony. There is no substitute for hearing from someone who has lived in Darfur and who has experienced the heartbreaking transition from a peaceful, happy homeland to a war-torn crime scene. I commend you for your incredible courage and urge you to continue speaking out about what is happening back home. Truth is a powerful tool in the battle of good and evil.

I will keep my statement short, as I am anxious to hear from our panel. Thank you all for being here today.

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Opening Statement of Senator Dick Durbin
Chairman, Subcommittee on Human Rights and the Law
Hearing on "From Nuremberg to Darfur:
Accountability for Crimes Against Humanity"
June 24, 2008

This hearing of the Judiciary Committee's Subcommittee on Human Rights and the Law will come to order.

The subject of this hearing is "From Nuremberg to Darfur: Accountability for Crimes Against Humanity." In our first year and a half, this subcommittee has broken much new ground. Today is another first. This is the first-ever Congressional hearing on crimes against humanity.

Accountability for crimes against humanity

For generations, the United States has led the struggle for human rights around the world.

Over 50 years before Nuremberg, George Washington Williams, an African-American minister, lawyer and historian, called for an international commission to investigate "crimes against humanity" in the Congo, which was then ruled by Belgium's King Leopold II.

Under Leopold's iron fist, Congo's population was reduced by half, with up to 10 million people losing their lives. In a letter to the U.S. Secretary of State, Mr. Williams decried the, quote, "crimes against humanity" perpetrated by King Leopold's regime.

Over 50 years later, in the aftermath of World War II, the United States led the first prosecutions for crimes against humanity in the Nuremberg trials. The promise of Nuremberg is that the perpetrators of mass atrocities will be held accountable for their actions.

I would like to show a brief video that will provide some context for our discussion of accountability for crimes against humanity and historical U.S. support for holding perpetrators of crimes against humanity accountable.

[SHOW VIDEO]

Crimes against humanity are acts of murder, enslavement, torture, rape, extermination, ethnic cleansing or arbitrary detention committed as part of a widespread and systematic attack directed against a civilian population.

With far too few exceptions, we have failed to prevent and stop crimes against humanity. The promise of Nuremberg remains unfulfilled.

Crimes against humanity committed in Darfur

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We have seen this most clearly recently in Darfur in western Sudan. In this region of six million people, hundreds of thousands have been killed and as many as 2.5 million have been driven from their homes.

There is much that must be done to end the carnage in Darfur. Part of the solution is arresting and prosecuting the perpetrators. Otherwise they will continue to act with impunity and victims will feel they have no recourse but to resort to violence themselves.

For several years, both Democrats and Republicans have criticized the Bush Administration for failing to stop the genocide in Darfur. And I'm sure our witnesses today will urge the Administration to do more.

But we should also give credit where credit is due. And I especially want to commend President Bush for supporting efforts to prosecute the perpetrators of crimes against humanity in Darfur.

Let me be frank. The International Criminal Court is still a source of controversy on Capitol Hill, especially on the other side of the aisle. But the Administration and their allies have set aside their concerns because of the humanitarian crisis in Darfur and they are to be commended for doing so.

Recently, the Chief Prosecutor of the International Criminal Court, Luis Moreno-Ocampo, reported to the UN Security Council that massive atrocities are ongoing and that, quote, "the entire Darfur region is a crime scene."

In the meantime, the Sudanese government has put Ahmad Harun, who was indicted by the Court for committing crimes against humanity, in a high-ranking position where he can continue to threaten victims of the violence in Darfur and humanitarian workers. This is an outrage.

Following Mr. Moreno-Ocampo's most recent report to the Security Council, Zalmay Khalilzad, the U.S. Ambassador to the UN, said that the U.S. government, quote, "strongly believes that those responsible for the acts of genocide, war crimes and crimes against humanity committed in Darfur must be held accountable and be brought to justice."

The Administration is right. We owe it to the victims in Darfur to ensure that those who have perpetrated these horrific crimes are held accountable for their actions.

No safe haven in the United States for perpetrators of crimes against humanity

But it is not only Darfur that is a safe haven for the perpetrators of crimes against humanity. It is also our own country.

This Subcommittee's first bill, which became law in December 2007, closed the loophole in U.S. law that made our country a safe haven for perpetrators of genocide.

But despite longstanding U.S. support for the prosecution of crimes against humanity perpetrated in World War II, Rwanda, the former Yugoslavia and Sierra Leone, among other places, there is no U.S. law prohibiting crimes against humanity.

As a result, the U.S. government is unable to prosecute perpetrators of crimes against humanity found in our country. In contrast, other grave human rights violations, including genocide and torture, are crimes under U.S. law.

This loophole has real consequences, which have been highlighted in two previous hearings of this Subcommittee. During our recent hearing on "Rape as a Weapon of War," we discussed the fact that if a foreign warlord who engaged in mass rape came to the United States, he would be beyond the reach of our laws.

And during our oversight hearing on the U.S. government's enforcement of human rights laws, we learned about the case of Marko Boskic, who allegedly participated in the Srebrenica massacre in the Bosnian conflict and found safe haven in Massachusetts. Because of the gap in our laws, Boskic was charged with visa fraud, rather than crimes against humanity. Upon learning this, Emina Hidic, whose two brothers were among the estimated 7,000 men and boys killed in the Srebrenica massacre, said "[t]hey should condemn him for the crime."

By signaling to perpetrators of genocide that they will not find a safe haven in our country, the Genocide Accountability Act moved us a little bit closer to fulfilling our pledge of "never again."

We should take the next step and make sure that those that commit crimes against humanity cannot escape accountability for their actions in our country.

But we must go further and ensure that the perpetrators of crimes against humanity cannot find safe haven anywhere in the world. Only then will the promise of Nuremberg be fulfilled.

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Written Testimony by Mia Farrow, Chair, Dream for Darfur
Presented to the Senate Committee on the Judiciary
Subcommittee on Human Rights and the Law
June 24, 2008

Senator Durbin, Ranking Member Coburn and other distinguished Members of this Subcommittee: Thank you for holding this hearing and for inviting me to participate.

I have recently returned from my ninth trip since 2004 into a triangle of human suffering: Darfur, eastern Chad and Central African Republic (CAR).

Darfur

Incomprehensibly, more than five years have passed since the government of Sudan and its proxy killers, Arab militia known as Janjaweed, launched their campaign of destruction upon the civilian population of Darfur. Only the perpetrators dispute that hundreds of thousands of innocent men, women and children have died.

Earlier this month the ICC issued a report listing multiple crimes against humanity and a widespread cover-up, concluding there is "evidence of a criminal plan based on the mobilization of the whole state apparatus, including the armed forces, the intelligence services, the diplomatic and public information bureaucracies, and the justice system."

The International Criminal Court has issued an arrest warrant against Minister Ahmed Harun, charging him with crimes against humanity in Darfur in 2003-2004. Instead of arresting him, the Sudanese regime made Harun their liaison to oversee the deployment of the UN protection force in Darfur (UNAMID).

My time on the ground and in on-going research leads me to ask one question; how long will the UN, the United States and the international community allow themselves to be manipulated by the government of Sudan?

The United States government must finally and fully support the ICC. Perpetrators of crimes against humanity must be brought to justice, or a destructive climate of impunity will continue to prevail in Darfur.

Unrelenting insecurity in Darfur has led to an additional 150,000 civilians being driven from their homes in the first four months of 2008. Today more than 2.7 million people are displaced in Darfur.

Attacks on the UN World Food Programme convoys distributing food aid to Darfur have forced a cut in the food ration of more than 40 percent since the start of May. At least 2.7 million people are affected by this reduction.

In order to reverse this progression toward starvation, the Government of Sudan must

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implement its stated commitment to ensuring that escorted food convoys are able to proceed every 48 hours into and throughout Darfur.

The latest reports released last September showed that in many camps 40% of the people are suffering acute malnutrition. More recent reports have not been cleared for release by Khartoum. This is simply unacceptable. The agreement made by the Government of Sudan to release the results of humanitarian nutrition surveys must be urgently implemented.

Thus far in 2008, there have been 120 hijackings of humanitarian vehicles and 51 attacks on humanitarian facilities and compounds. Eight humanitarian workers have been killed this year.

According to relief workers I have spoken with, almost 100 percent of women living in aid camps have been raped. Aid organizations working in the region are powerless to stop the attacks and will not speak out for fear of government reprisals. Scores of infants born of rape are abandoned in every camp.

Never has the need for a protection force been greater or more urgent.
But nearly a year after the UN/African Union protection force of 26,000 (UNAMID) was authorized by the Security Council, only a fraction of the mission is deployed, and it is badly underequipped.

The Khartoum regime continues to place every conceivable obstacle in the path of a full and effective deployment of this force (UNAMID). Khartoum has been able to thumb its nose at the UN, the United States and the international community because it can be confident in the unwavering support of China. Beijing has commercial and military ties with Sudan and has protected the regime and its genocidal policies with the veto power it enjoys in the Security Council.

Time and again, the United States has pushed for economic sanctions against Sudan, but failed due to fierce opposition on the Security Council from both China and Russia.

Nothing has changed. The UN head of peacekeeping operations expressed the fear that – quote- the "force will not have the capability to defend itself, and that carries the risk of humiliation for the Security Council and the United Nations, and tragic failure for the people of Darfur."

The wording of the UN resolution states that the force should be "predominantly African in character." But Khartoum has twisted the intention of the resolution and 'predominantly' has become exclusively." This is just one example of the on-going efforts by the government of Sudan to obstruct the full deployment of a capable protection force. If the failure of the mission is to be averted, the United States should take the lead in encouraging an array of militarily capable nations to partner with those African battalions in need of training and logistical support. In addition to the United States and the few European countries already committed, a group of volunteer nations might include Argentina, Brazil, Chile, Germany, the Netherlands, Norway, Sweden, Singapore, South Africa, South Korea, and Portugal.

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Chad

If we hear of Eastern Chad at all, it is as a spillover of the slaughter and misery in Darfur. But this swath of land along Darfur's border has become a full-scale catastrophe in its own right, and it is without the immense humanitarian infrastructure in Darfur.

Eastern Chad has been plunged into chaos and lawlessness. In border towns, pick-up trucks outfitted with machine guns and loaded with armed, uniformed men careen through the dusty streets. No one knows who they are: the army, Chadian rebels, bandits? It makes little difference to the victims of the escalating violence. More than 100 humanitarian vehicles have been hijacked in the last year; aid workers have been robbed, beaten, abducted and killed. The recent murder of the director of Save the Children in Chad is just one illustration of the existing climate for aid organizations working in the region.

In 2006, 40,000 Chadians had been displaced by Janjaweed attacks. Today the number is 200,000 and rising. "Mortality rates of children under five are double what is accepted as the threshold for an emergency," a Doctors Without Borders program director told me. "The situation here is massively deteriorating. The needs are huge. Assistance has been too little, and it comes too late."

On June 14 Chadian rebels backed by Khartoum seized the border town of Goz Beida, exchanging fire with EUFOR, the UN-authorized European Union force. Another coup attempt on Chadian president Deby is widely expected.

EUFOR a force of 3700 (just 2600 have deployed) is tasked by the UN with protecting civilians in danger, particularly refugees and displaced persons, and to facilitate the delivery of humanitarian aid and the free movement of humanitarian personnel by helping to improve security in the area of operations.

EUFOR is committed for a single year, from this past March. The need for an extension of their deployment is obvious. The United States Government should be thinking ahead—fully engaged and supportive of European efforts to bring security to this inflamed borderland.

Central African Republic

CAR is essentially a collapsed state. The government has control of the capital and a few strategic towns, but the rest of the country is being torn apart by cross currents of violent armed groups which include the government forces, the Chadian military, various rebel factions, poachers and bandits from Sudan, Chad. Niger, and Nigeria, and most recently the brutal Lords Resistance Army from Northern Uganda. A peace agreement between the government and two of the rebel factions was reached on June 23, 2008. But as things stand, remaining rebel groups, bandits and militia will continue to plunder and terrorize with complete impunity.

The victims, as always, are the civilian population. Countless villages have been attacked,

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looted and burned. Women and children are raped, children are abducted and held for ransom, possessions and cattle are stolen. 300,000 civilians are displaced. Many have fled deep into the bush where they are eating leaves and drinking swamp water. They are completely traumatized and in constant flight mode. They are without medical care, shelter or clothing. Their children are sick.

"Outside of a famine situation I have never seen people in such terrible shape," said the top official for the World Food Program for the Central African Republic. "In terms of weight, in terms of height, in terms of health, the population is really in rough condition."

Eufor is deployed in CAR but it lacks logistical support and sufficient numbers- Just 2600 troops patrol an immense, inhospitable region. No forces are on the CAR border with Chad where most of the incursions are now taking place.

When I first visited CAR in February 2007, there were just two aid organizations in the entire vast northern regions. Now there are 23 NGOs, but they have limited personnel and resources and are based in several clusters with very limited access to the people

Meanwhile the plundering of CAR continues: as the people starve, private planes fly in and out carrying away the wealth of the nation. I witnessed an illicit diamond exchange in remote Sam Ouandjo near the border with Sudan.

In 2005 the ICC issued arrest warrants for Kony and his top commanders for war crimes massive and crimes against humanity, citing the "brutalization of civilians by acts including murder, abduction, sexual enslavement, mutilation, as well as mass burnings of houses and looting of camp settlements-."

In April 2008, Joseph Kony and the LRA moved into CAR where they kidnapped 300 children (from Obo). Kony is believed to be receiving support from the government of Sudan and from Ugandan extremists. For the sake of defenseless civilians and in the name of justice, international efforts must be made to apprehend Joseph Kony and end one of Africa's longest and bloodiest rampages.

As long as we are more concerned about protecting the interests of governments and businesses than protecting people from needless suffering and death, these tragedies will continue. Are we really serious about protecting the most vulnerable human beings and those courageous individuals who are struggling to sustain them? Do we really believe we have a responsibility to protect defenseless populations from slaughter? Do we believe that perpetrators should be apprehended and brought to justice before they cause more suffering, create more victims? If so, then our response as human beings and as a nation must be more vigorous, more courageous, and more effective. History will long remember our failure to protect the world's most forsaken populations, and we will be judged accordingly.

This is a defining moment for the United States of America, and for each of us.

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Testimony of Daoud Ibrahim Hari

Hearing on *From Nuremburg to Darfur: Accountability for Crimes Against Humanity*
Before the **Senate Judiciary Subcommittee on Human Rights and the Law**
June 24, 2008

Accountability for the Genocide and Crimes Against Humanity in Darfur

I. My Story

Good morning Chairman Durbin, Ranking Member Coburn and Honorable Members of the Committee. Thank you very much for working to bring an end to the genocide in Darfur, and to hold accountable those who are committing crimes against humanity there. I hope what I have to say today will assist you in that important work. My name is Daoud Hari. I am 35 years old. I grew up in a small village in Northern Darfur, Sudan. My family and other families in our village had lived together on this land for generations. I had four brothers and three sisters. Like most of the men in our tribe, the Zaghawa, my father was a camel herder. I even had a favorite camel, whom I called Kelgi, and who was as smart as any man I have ever met. It was my job as a child to take care of our little goats and sheep. And when the moon offered us enough light to see, the children of my village would play games together long into the night. While it may seem simple to you, ours was a happy life. I am sorry to say I have never found such happiness anywhere else in all my travels.

Today, only a burnt skeleton remains of that happy village. My family and I were forced to leave it behind, helping women and children to safety in the surrounding hills and valleys. Many of the oldest refused to go. As the sound of machine guns and explosions got closer, they told us they had lived their whole lives in that village, and they would die there. The rest of us fled so that we could escape the attacks of Sudan's helicopter gunships, and the rape, torture and murder that followed at the hands of Sudan's agents—the Janjaweed militia. Since the genocide began in 2003, many of my family members have been killed, including my older brother, Ahmed, whom I buried with my own hands. It is for Ahmed, for the rest of my family and for the hundreds of thousands of other faceless, voiceless Darfuris who have been killed or displaced by genocide that I testify before you today. I am here as their face. I am here as their voice. I only pray that I can help you see their suffering, and respond to their cries for help.

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The part of my story I have told you so far is not unique. I am one of two and a half million people who have been driven from our homes by the Sudanese government's ongoing genocide and crimes against humanity in Darfur. I chose to stay behind in hopes that I could use my language skills—I speak Arabic, English and Zaghawa—to help the people of Darfur. I first worked for the U.N. and U.S. State Department team that was sent to find out if a genocide was happening. I then began working as a translator for non-governmental organizations like the Red Cross and Africares. In addition, I worked for journalists from all over the world. I quickly became known to journalists and NGOs as a trustworthy guide to the genocide in Darfur. I worked with Nicholas Kristof of the *New York Times*, and Ann Curry of *NBC News*.

We did not need to look very far to see that what was going on in Darfur is genocide. There was fighting everywhere we went, and I saw many terrible things—things that no human being should ever have to see: bodies mutilated, unexploded missiles in water points, poisoned water, mass graves and very small children killed—burned to death. I buried many of these bodies myself. On one mission into Darfur with British Television we entered a thick forest. As we walked through the forest, human heads and limbs started falling down from the trees. They had once belonged to village defenders who made their last stand there in those trees. When we got out of the forest, we found the bodies of 81 men and boys who had been hacked and stabbed to death by the Janjaweed. Some of the reporters became sick and had to go back to Chad to be hospitalized. The horrible things they saw and smelled were just too awful to bear.

The only thing as awful as what we saw were the experiences I translated for hundreds of Darfuris. Many of these stories still haunt me today. I hold in my heart the sad, empty eyes of a man who fled with his four-year old daughter, Amma, as the Janjaweed burned their village. When the Janjaweed caught this man, he shouted for Amma to run for the bushes, as fast and as far as she could go. But instead, she hid and watched as the Janjaweed tied the man to a nearby tree and tortured him with their swords. Amma ran toward her father, crying out his name: "Abba! Abba!"..."Daddy!" "Daddy!" Just before she reached him, one of the militiamen lowered his sword and ran it straight through her tiny body. Then he lifted Amma's body off the ground with his sword and held her up in front of her father, laughing. All Amma could do was look into her father's eyes as she bled to death on the Janjaweed sword.

I am sorry to say that experiences like these are not unique. Neither are the thousands of women and girls who have been raped while looking for firewood. Nor are the thousands of

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children who have been attacked and kidnapped from the camps—sold, or given away, the girls as sex slaves, and the boys as child soldiers or indentured laborers. Living through these crimes against humanity destroyed me inside. But I was determined to help tell the world about it, hoping that when people learned of these atrocities, all that is good and just in them would prompt them to act; to put this genocide to an end. I honestly believed—and I still believe—that the people who run the world we live in today will not allow this outrage to continue, if only they know about it.

Now to the part of my story that *is* unique. I am the third of reportedly only five Darfuri refugees the United States has resettled since the genocide began in 2003. How I came to land at JFK International Airport as a refugee on the night of March 15, 2007, is one of the greatest miracles of my life. On my sixth trip into Darfur—this one with Pulitzer Prize-winning American journalist Paul Salopek, of the *Chicago Tribune*, and on assignment for *National Geographic*—I was captured by rebels who turned us over to the Government of Sudan. I was imprisoned for more than 30 days, along with Paul and our driver. During this time, I was tortured, beaten and nearly executed. Once word of our imprisonment got out, appeals from world leaders such as the Pope and former President Jimmy Carter put pressure on the Sudanese government to let us go. Eventually, with the help of many good Americans like Chairman Durbin, Senator Chris Dodd, Senator Barack Obama, Congressman Christopher Shays and Governor Bill Richardson, we were released. While Paul returned to America, I was flown to Chad, where I faced further persecution. With the help of my lawyer, Christopher Nugent with Holland & Knight, and my friend, Megan McKenna, I was able to flee to Ghana and apply for refugee status in the United States. As I have said, I believe my life was spared by God so that I could share with the world my story of the genocide in Darfur, and call everyone to action that will finally put an end to this tragedy.

II. "We're Sorry" Will Not Be Enough This Time: Full Accountability for the Genocide and Crimes Against Humanity in Darfur

We are here today because we know how important it is to hold the people in Sudan who commit genocide and crimes against humanity accountable for their actions. Accountability will mean that someday soon we must have a big trial for the leaders of Sudan like the ones we had at Nuremburg. I hope that through the leadership of Chairman Durbin, Ranking Member Coburn,

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the members of this Subcommittee, the witnesses at this hearing, and too many others to name, that day is not far over the horizon.

Making people pay for their actions in court is important for the victims of crimes against humanity and for preventing future atrocities. But full justice for the victims of the genocide in Darfur requires more than finding people guilty. Elie Wiesel, a man who survived the Holocaust and who knows as much as anyone about the evil that led to the Nuremburg trials, said, "*Who is guilty? Those who commit these crimes. But to the question, 'Who is responsible?,' we are compelled to say: 'Aren't we all?'*" Full accountability means we all must accept responsibility for actually stopping the genocide. And until we can do that, we must protect the millions of people who hide in genocide's shadows.

During the rest of my time, which I know is short, I would like to share two things I think you all should know about the genocide in Darfur. Then I will offer three recommendations for actions you as lawmakers can take that will make things better for the people there.

III. Two Things Everyone Should Know About the Genocide and Crimes Against Humanity In Darfur

First, this genocide is about *resources*, not *religion*.

The majority of North, East and West Sudan is Muslim, and my tribe has lived together in relative peace with Sudanese Arab nomads for a long time. When the rains stopped coming in the 1980s and resources became more scarce, the Government of Sudan exploited tensions to turn the Arab nomads against us. The government started to pay the traditional Arab tribesmen, many of whom are otherwise our friends, to form deadly horseback militias called the Janjaweed to brutally kill the non-Arab Africans and burn our villages.

When I was in Darfur with Nicholas Kristof in 2006, we came across a Janjaweed attacker who had been captured by village defenders. He was about fourteen years old. As the villagers questioned this boy, I translated into Arabic. They asked, "Why did you attack this village?" The boy said, "We were told by the government soldiers that these people were going to attack our village and kill our families if we did not attack them first. They would give us money if we did this. Our families needed this money, and we had to protect them." The Government of Sudan is using the Janjaweed as part of a program to crush political dissent,

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remove challenges to power, make way for unobstructed resource development and turn an Arab minority into an Arab majority.

The land of Darfur is rich in natural resources. If the government can get these resources from our land without having to pay us or ask us to leave, they can make more money. But if the government of Sudan is using a genocide to make finding oil cheaper, who is giving them the money for that genocide, and why? Data collected by the United Nations from Sudan shows that China sold President Bashir over 24 million U.S. dollars worth of arms and ammunition, nearly 57 million U.S. dollars of parts and aircraft equipment and 2 million U.S. dollars of helicopter and airplane parts, all in the year 2005 alone.

Where did Sudan get the money to buy all of these deadly things? The government of China buys as much as 70% of Sudan's oil. They have at least three billion U.S. dollars invested in the Sudanese oil business, and they have spent ten billion U.S. dollars on oil there since the 1990s. With all this money at stake, it is not hard to see why China regularly shields Sudan from tough resolutions and sanctions in the UN Security Council. The military and economic interests of Sudan and China are aligned against bringing an end to the genocide, and until the world acknowledges this little-known fact, a solution will be unlikely. There are also reports that the Chinese are providing guns to rebel groups that are fighting the Sudanese government. Ongoing violence scares away foreign investment and competition, and less competition makes things much easier for the world's largest corporate sponsor of Sudan's genocide: the People's Republic of China.

Second, more than 2.5 million men, women and children face a humanitarian crisis, and action is needed now to help them.

Millions of Darfuris who have been driven from their land need greater security, more food, organized schools and economic development. The splintering among armed groups is contributing to a security situation that is spiraling out of control. There are now 28 different rebel factions and 3 different Janjaweed militias. Rebel groups are attacking refugee and IDP (internally displaced person) camps very often, and the Janjaweed continue to target women and girls for rape and sexual torture. Humanitarian convoys are being hijacked, with vehicles stolen, drivers kidnapped and aid workers murdered. The health and safety of people in the camps is at great risk because there aren't enough peacekeepers, and funding, from the international community. To prevent humanitarian groups from reaching people displaced inside Sudan, the

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Government of Sudan has reportedly begun painting its Antonov bombers white—the universal color of aid planes. They want to cut off the lifeline to those people. And they're not stopping with Darfuris. Khartoum is supporting rebel groups that are responsible for recent attacks on three towns in Eastern Chad, and are preparing to advance to the Chadian capital. The security threat is so serious that the U.S. Embassy there recently evacuated all non-essential personnel. Yet millions are left behind—innocent victims of what is looking more and more like a proxy war between Sudan and Chad, fought through the rebel groups. The United States must start accepting refugees from Darfur, especially those who are most helpless: widows, rape victims and orphaned children.

IV. Three Things You Can Do

Finally, I will leave you with three brief recommendations for ways you can help the people of Darfur.

1. Fully support the United Nations-African Union peacekeeping force (UNAMID) and fund the UN World Food Programme's Efforts in and around Eastern Chad.

It is vital that the entire contingent of 26,000 peacekeepers be on the ground as soon as possible. The U.N. World Food Programme recently reported a 48 million dollar budget shortfall for its Darfur crisis operations. The U.S. has generously pledged several million dollars to help in the near term. Extending that generosity to fully fund operations will help save the lives of hundreds of women and children who depend on World Food Programme deliveries for their only meals.

2. Continue to press Sudan, China and the rebel groups for a political solution.

For me, the genocide is personal. For you, it is political. You must continue to put political pressure for a ceasefire on the government of Sudan and on the rebel groups. Smart and effective pressure must involve China, too. Ultimately, the only end to the genocide will be a political one.

3. In the meantime, pressure the Department of State, and particularly, the Bureau of Population, Refugees and Migration, to create a refugee resettlement program for Darfuris, starting with the most vulnerable populations.

As I have told you, I am just the third of reportedly five Darfuri refugees resettled in the United States. I do not believe that this is because Americans do not want to welcome refugees

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of the genocide into your country. I have personally experienced your generosity, after all, and I have seen the goodwill of the American people toward others—including the Lost Boys of Sudan, who are from the southern part of my country. There are no Darfuri refugees in America because the agencies responsible for resettlement have not made it a priority to get the most vulnerable victims of genocide—widows, rape victims and orphaned children—out of harm's way. It is no answer to say the refugees are in areas that are too dangerous for the agencies to go. Those who are in grave danger are the ones who need refuge the most.

The State Department committed last year to initiate a program that would start resettling refugees of the genocide. But this has not happened. Please pressure your State Department's Bureau of Population, Refugees, and Migration to live up to its commitments and create a framework for finding and rescuing these deserving people. I also urge you to introduce a resolution in the Senate that will be a companion to the one Congressman Berman and others introduced in the House on Friday, H. Res 1290. That resolution calls on the State Department and the Department of Homeland Security to establish a refugee resettlement program for Darfuris that will be up and running by the next fiscal year.

If you remember nothing else about the genocide in Darfur, remember this: No one person has the power to stop it; but doing nothing guarantees it will continue.

Thank you for listening, and I look forward to your questions.

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July 9, 2008

Senator Richard J. Durbin, Chairman
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:

Thank you again for inviting me to testify before the Subcommittee on Human Rights and the Law. The standing-room-only audience and broad media coverage the hearing received speaks to the overwhelming interest of the public in Congress' efforts to promote a prompt, sustainable peace and create accountability for crimes against humanity in Darfur.

I am writing to add an addendum to the record of the testimony I offered, in light of facts that came to light shortly after I testified.

On the afternoon of the day I testified, my *pro bono* attorney, Christopher Nugent of Holland & Knight LLP in Washington, D.C., received an email from a House staffer concerning feedback on a resolution on Darfur that Congressman Berman introduced the previous Friday, June 20. Mr. Nugent and his team assisted with the preparation of that resolution—H.Res. 1290.

One of the clauses in the resolution referred to a figure that I also used in both my written and oral testimony, namely, that I am reportedly the third of five Darfuri refugees resettled in the United States since 2003. In response to this figure, the Congressional Liaison for the State Department's Bureau of Population, Refugees and Migration emailed Congressman Berman with new information to the effect that 350 Sudanese from Darfur have been resettled since approximately 2003.

This was the first my lawyers or I had heard of this number, and I must say, we were all stunned by it. I was particularly shocked because during the I have spent traveling across the United States and throughout Europe as an advocate, I have been telling people that I am the third of five Darfuris resettled. During these travels, I have met only a small number Darfuri refugees processed decades ago, prior to the beginning of the genocide in 2003. And nobody has ever contradicted the estimate of five Darfuri refugees in the course of over a year of very public advocacy.

My attorney, who assisted me with the preparation of my testimony before the Subcommittee, sent the following response to Congressman Berman's office concerning State's new Darfuri resettlement figures:

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"In general, it is our understanding that the number has been used since 2007 without public or private contradiction from the Department of State. Indeed, implicit in State's response is the admission that prior to the introduction of H.Res. 1290, their WRAPS [Worldwide Refugee Admissions Processing System] program did not in fact track that number. It is understandable, then, that if State itself didn't know the actual number of resettled Darfuris, those in the public without access to State's database were left to rely upon assumptions drawn from well-informed anecdotal evidence alone.

Thus, when Mr. Hari arrived and those who'd helped him get here wanted to know whether it had been done before, refugee resettlement NGOs were consulted, and in particular, RCUSA [Refugee Council U.S.A.]. RCUSA conducted periodic, anecdotal, informal surveys of NGO stakeholders involved in U.S. refugee resettlement. The number of reports of Darfuris resettled hovered around 3 for much of 2007, and increased to 5 in early 2008. In response to State's figure, RCUSA conducted another informal, internal survey, and they still believe the number is "under 10, around 5."

But nobody, including State, had offered an exact figure. According to RCUSA, "we [don't] have an exact paper trail for this number or a report to point to. My understanding is that this number if based largely on memories of those who work on resettlement in the U.S. The problem is also that when resettled Darfuris are noted as 'Sudanese' and it is hard to know where exactly they are from."

All indications from State were consistent with those assumptions. For instance, State indicated no established program from resettling Darfuris out of the region, and focused instead on 142 Darfuris who had made their way to a refugee camp in--of all places--Anbar Governate in Iraq. (http://www.state.gov/documents/organization/91978.pdf)

See p. 6, in particular, which reads: "Looking ahead, we will continue to work closely with UNHCR and other partners to begin to address the needs of other refugee groups around the world, such as the Darfurian population in Chad." To "begin" implies that there has not already been work on addressing those needs--an implication consistent with other published reports, and the experiences on the ground.

Next, I would point you to articles published about Daoud Hari shortly following his arrival in the United States. These articles cite Mr. Hari as being one of "a handful" of Darfuris resettled. DOS has not responded or requested a correction to any of them.

1. Brian Donohue, A Tale of Horror and Hope: Darfuri refugee shares his story to save his nation The Star Ledger, May 6, 2007 (2007 WLNR 8594454)

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In this article, UNHCR is on record as saying Mr. Hari was "one of a tiny handful" of Darfuris given refugee status, and particularly, that Mr. Hari "may be the only Darfurian refugee resettled to the United States in 2006." While Mr. Donohue's dates were off (the violence began in 2003, and Mr. Hari was resettled March 15, 2007), his quote from UNHCR was part of the basis of the number. We have not been able to find any public statement from UNHCR withdrawing this estimate at State's behest.

2. Nicholas D. Kristof, The Witness Next Door, The New York Times, May 14, 2007 (republished in the International Herald Tribune, link below) http://www.iht.com/protected/articles/2007/05/14/opinion/edkristof.php

Now that State has created an unprecedented program to keep track of the number, we strongly urge Congress ensure regularized reporting on it, and to inquire further as to State's methodology, as it is so far disconnected from the experiences of NGOs and resettlement agencies on the ground. Specifically Congress should request the following additional criteria for the WRAPS search that State conducted:

1. What overseas U.S. office approved the applications of each refugee?

2. What year did the refugee leave the Darfur region?

3. Given State's public commitment to resettle a greater number of Darfuri refugees, what quantitative methodology did State have in place prior to the introduction of H.R. 1290 that would track the numbers of Darfuris resettled, and provide accurate data on whether these numbers met State's goals?

4. What, if any, future plans does State have to track the numbers of Darfuris resettled out of the region?

Surely, it would have been more prudent to use the phrase "a handful" rather than an exact figure. However, in the context of a displacement of over 2.6 million, 350 is truly still "a handful."

Like my attorney, I am thankful that as a result of the Resolution Congressman Berman and his co-sponsors introduced, the State Department has apparently begun taking some minimal steps to track the numbers of Darfuris resettled in the United States.

I hope that the Senate will take similar steps to help the Department of State live up to its commitment to create a resettlement program and secure security and freedom for the most vulnerable populations of Darfuri refugees and internally displaced persons.

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Please accept this letter as an addendum to my testimony. I thank you again for inviting me to share my experiences of the genocide in Darfur with the Subcommittee. I look forward to continuing to work together to bring about peace in my homeland.

Sincerely,

/s/
Daoud Hari

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Statement of Human Rights First

United States Senate Committee on the Judiciary,
Subcommittee on Human Rights and the Law
Hearing Examining Accountability for Crimes against Humanity

June 24, 2008

Human Rights First applauds the Senate Judiciary Subcommittee on Human Rights and the Law for holding a hearing on the important issue of accountability for crimes against humanity.

For over 30 years, Human Rights First has worked to promote laws and policies that advance universal rights and freedoms, and to protect people at risk and defend the dignity of each individual through respect for human rights and the rule of law. Our Crimes against Humanity Program is dedicated to preventing and eliminating crimes against humanity, war crimes, and genocide by challenging and holding accountable perpetrators and their enablers.

The United States has been at the forefront of the global struggle to bring to justice those who commit the worst crimes. In the wake of the Holocaust, the United States was instrumental in setting up twin pillars of genocide prevention and restorative justice: the Genocide Convention and the Nuremberg Tribunal. Since that time, whenever innocent civilian populations have suffered at the hands of abusive regimes—in Bosnia, Rwanda, Cambodia, Sierra Leone, Iraq or Darfur, among others—the United States has led the charge for justice and accountability for the victims of war crimes, crimes against humanity and genocide, whether through national justice systems or through the creation of special tribunals.

This exceptional commitment has resulted in major advances in international justice. It is now time for the United States to turn its gaze inward. Under our federal criminal code, the United States may not prosecute in its own courts those on its soil who have perpetrated some of the world's worst crimes. This omission is at odds with the longstanding tradition of U.S. support for justice and accountability abroad. Importantly, it also puts our country at risk of unwittingly providing safe heaven to criminals who flee the sites of their crimes to avoid prosecution at home. We must close this impunity gap.

In the last century, the world saw members of the Nazi regime try to escape justice by hiding in South American and other countries. Today's war criminals and perpetrators of genocide are no different: they hide in third countries as soon as their reign of terror ends. The globalization of movement makes no country safe from them. For example, Rwandan and Serb genocidaires have been found and arrested in various European countries and as far from home as Canada and Australia.

The United States is no exception to this phenomenon. In 2006, Chuckie Taylor—the son of Liberia's former president, Charles Taylor—who is suspected of torturing and

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executing scores of opponents in Liberia on behalf of his father, was discovered in Florida living under a false identity. The sole reason Chuckie Taylor is today awaiting trial in a U.S. court for crimes committed in Liberia is that federal law gives U.S. courts jurisdiction to prosecute acts of torture committed outside the territory of the United States when the alleged offender is on the territory of the United States, regardless of his nationality or of the nationality of the victim. (Crimes and Criminal Procedure, Chapter 113c of Title 18, especially 18 U.S.C. § 2340A.)

The U.S. Congress took an important step toward closing the impunity gap when it passed the Genocide Accountability Act last year, adding genocide to the list of crimes that can be prosecuted in the United States even if they have been committed abroad. Human Rights First and other NGOs supported the efforts of the Chairman, the Ranking Member and the members of this subcommittee to create, introduce and pass this legislation. Today, we urge the members of this subcommittee to close the impunity gap even further by advancing a bill providing our courts with the means to prosecute and punish those who commit crimes against humanity and then seek refuge in the United States.

Crimes against humanity are those directed against a civilian population in a widespread or systematic manner. Such crimes shock the conscience: campaigns of murder and mutilation of civilians like that led by Charles Taylor in Sierra Leone; the systematic rape suffered by women in Burmese ethnic areas, the Democratic Republic of the Congo, or Darfur; and ethnic cleansing in Kosovo. These crimes may, under certain circumstance, also constitute acts of genocide. They may well look like genocide to the compassionate observer. Under law, however, they are different from genocide, with their own specific constitutive elements. Separate legislation is needed to provide U.S. courts with jurisdiction to prosecute their perpetrators.

As defined by the Federal Criminal Code (18 U.S.C. § 1091), attacks against a national, ethnic, racial, or religious group constitute acts of genocide only if they are committed with "genocidal intent"—that is, with the specific intent to destroy that group because of its very nature. Genocide does not cover attacks—no matter how heinous—that do not specifically seek to destroy that group per se. Nor does it cover attacks against a civilian population as a whole, regardless of the scale and the violence of those attacks. When the Zimbabwean government unleashes its militias against opposition supporters in a systematic campaign of terror, for instance, it is most likely committing crimes against humanity but not genocide. Under current U.S. law, if Robert Mugabe or other high-level Zimbabwean officials were to move to the U.S. territory after a change of government, they could not be prosecuted for these crimes in a U.S. court.

Crimes against humanity legislation is also necessary because the related but distinct crime of genocide has proven very difficult to establish in a court of law. Both national and international tribunals have been reluctant to infer "genocidal intent" from a pattern of crimes. Rather, they have required that "genocidal intent" be proved by the kind of hard evidence—written orders or other recorded communications—very rarely left behind by perpetrators. Proving crimes against humanity, on the other hand, does not

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require evidence of specific intent, genocidal or otherwise. Many people who commit genocide simultaneously commit crimes against humanity; because prosecutors are often unable, for technical reasons, to prove the crime of genocide, many of them have chosen to concentrate on crimes against humanity rather than on genocide in order to ensure that perpetrators are held to account for at least some of their heinous crimes.

The International Tribunal for the Former Yugoslavia (ICTY) provides a case in point. There is no doubt for any lawyer that genocide was committed in Bosnia. Despite the massive resources dedicated to investigations over more than fifteen years, the Prosecutor of the ICTY was able to find "hard" evidence of genocidal intent only in relation to the massacres committed in Srebrenica. For most of the cases relating to the rest of Bosnia, he therefore decided to focus on charges of crimes against humanity rather than charges of genocide. By so doing, he ensured that those responsible for the worst crimes were properly sentenced for some of their crimes and did not walk free. In situations in which genocide is too difficult to prove for technical reasons, it is important to be able to achieve accountability for serious crimes through prosecutions for crimes against humanity.

In his opening statement to the Nuremberg Tribunal, Justice Robert Jackson, Chief Prosecutor for the United States on leave from the U.S. Supreme Court, declared, "The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched." By introducing and supporting legislation necessary to prosecute those who commit the full range of atrocious crimes—including crimes against humanity as well as genocide—the United States Senate will come closer to realizing this promise of justice for all.

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"From Nuremberg to Darfur: Accountability for Crimes Against Humanity"

Hearing before the Senate Judiciary Subcommittee on Human Rights and the Law, Tuesday, June 24, 2008

Statement for the record submitted by Elise Keppler, International Justice Program senior counsel at Human Rights Watch

Human Rights Watch appreciates the invitation to submit a statement for the record on this important subject. Justice for serious crimes under international law – which include genocide, crimes against humanity, war crimes and torture – is crucial. Accountability brings redress to the victims and signals that heinous abuses will not be tolerated.

Since its creation, this subcommittee has taken important steps to combat impunity for serious crimes. This includes the subcommittee's hearing last November on avoiding safe haven for perpetrators of human rights violations in the United States. We further welcome that members of this subcommittee have proposed bills to ensure justice for these crimes, such as the Genocide Accountability Act of 2007.

While federal law currently makes it a crime to commit genocide, war crimes, and torture, as discussed below, crimes against humanity are not expressly criminalized. We believe it is vital that members of this subcommittee take up efforts to pass legislation to close this loophole and also to ensure that the Departments of Justice and Homeland Security have adequate resources and capacity to investigate and prosecute crimes against humanity when they have been committed.

The need to criminalize crimes against humanity in the United States

Major international law commentaries explain that crimes against humanity are crimes – which either by their seriousness and savagery, or by their magnitude, or because they were part of a system intended to spread terror – shock the conscience of humanity. Crimes against humanity have been defined under international law as unlawful acts committed as part of a widespread or systematic attack against a civilian population. The acts that constitute crimes against humanity include murder, extermination, enslavement, deportation, arbitrary detention,

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torture, rape, persecution on political, racial and religious grounds, and other inhumane acts.

International and hybrid international-national criminal tribunals, including those supported by the United States – such as the International Criminal Tribunals for the Former Yugoslavia and Rwanda – prosecute crimes against humanity. Nevertheless, such courts cannot be depended on to address impunity in every situation: they have limited resources and mandates restricted to specific periods and conflicts. At the same time, national courts in the places where heinous abuses are committed are often unable or unwilling to prosecute.

It is thus vital that the United States is prepared to prosecute crimes against humanity. We believe this requires new legislation. Some might ask whether this is really necessary as many of the underlying offenses are already crimes in the United States. However, existing law is unlikely to have the appropriate jurisdictional reach to ensure the United States does not operate as a safe haven for perpetrators from abroad. It also does not reflect the breadth and gravity of the underlying offenses when they are committed as part of a widespread or systematic attack against a civilian population. Moreover, the underlying offenses may be subject to statutes of limitations, which should not apply when it comes to international crimes.

With regard to the jurisdictional reach, it is crucial that crimes against humanity be prosecutable regardless of where the crime was committed and whether the crimes were allegedly committed by a U.S. national. This is an important component to existing federal law on other serious crimes, such as torture and genocide. Specifically, these laws – thanks in part to amendments to the crime of genocide proposed by members of this subcommittee – make the crimes punishable regardless of the nationality of the offender or the victim and the location of the crime, as long as the alleged offender is present in the United States.

Another important issue is the elements of the crime. In this area, the international criminal tribunals for the former Yugoslavia and Rwanda have developed extensive experience in the prosecution of crimes against humanity and have made a unique contribution to the development of international law in this field. The elements of crimes against humanity in any U.S. legislation should thus reflect the jurisprudence of the international tribunals. It may also be valuable to draw from the definition of crimes against humanity under the Rome Statute of the International Criminal Court, which provides an up to date articulation of the crime under international law.

We would like to highlight that the jurisprudence of the tribunals is furthermore clear that crimes against humanity occur when the crimes are either widespread or systematic, and that it is not necessary that both elements exist together. Widespread connotes the scale on which the conduct is carried out, while systematic relates to the level of planning or organization. Systematic has been defined by the tribunals as thoroughly organized and following a regular pattern

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on the basis of a common policy. While a systematic attack will generally involve large-scale offenses, this is not required. Nevertheless, prosecuting the underlying offenses where they are of a gravity reflected by their commission in an organized nature is vital. Systematic is not envisioned to apply to ordinary domestic crimes.

Another important element to crimes against humanity is recognition that criminal liability can exist on the basis of what is known as command responsibility. This arises when leaders – those in positions of command – knew or should have known about the commission of serious crimes. This basis of liability has been integral to successful cases in international criminal tribunals against leaders who bear responsibility for the crimes but are often physically far removed from the scenes of crimes. Human Rights Watch believes that individuals can already be prosecuted in the United States on the basis of command responsibility: the basis of liability is expressly recognized in the U.S. military code, has been upheld by the U.S. Supreme Court in cases brought after World War II, and has been recognized in several civil cases in federal courts involving human rights violations. Nevertheless, we believe that prosecutors may benefit from an explicit and direct recognition of this basis of criminal liability for human rights violations. Illustrative of how important it is to ensure that there is a clear legal basis for a perpetrator to be held liable on the basis of command responsibility, is a recent decision of the International Criminal Tribunal for Rwanda which refused to transfer a war crimes case to Rwanda, as there was no explicit basis for command responsibility liability in Rwandan law.

Ensuring laws on serious crimes are applied
While making crimes against humanity punishable in the United States is an essential first step, ultimately the key is whether the law will be applied. In this regard, we welcome the Department of Justice's first ever case under the extraterritorial torture statute that was initiated on December 6, 2006 against Charles "Chuckie" Taylor, Jr., the son of the former Liberian president Charles Taylor. The charges relate to Taylor, Jr.'s role in allegedly committing torture while head of a security unit under his father's presidency in Liberia. Notably, the torture law had been in effect for more than ten years before the first case under it was brought. Similarly, prosecutions have not to our knowledge been initiated for genocide or war crimes.

In recent years, the Departments of Justice and Homeland Security have taken important steps to enhance efforts to prosecute human rights violations committed abroad. Such steps include the creation of an ad hoc interagency working group to increase coordination among the many agencies involved in avoiding safe haven for human rights violators in the United States. The Department of Justice also has a section, the Domestic Security Section, which focuses on investigating and prosecuting human rights violations committed abroad. Designating primary responsibility for such cases within one section is especially valuable. Research by Human Rights Watch on Western European practice suggests that concentration of relevant expertise in specialized units is one of the most important elements in the successful prosecution of these cases.

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Given such efforts, it is in some respects surprising that there has been only a single U.S. prosecution for torture committed abroad. According to U.S. authorities, a number of investigations have been initiated and while criminal charges were not brought, immigration charges were made. The dearth of cases is due at least in part to the significant challenges of investigation and prosecution of these types of crimes. Analysis of similar cases in Western Europe by Human Rights Watch suggests that such cases involve major difficulties caused by a combination of factors, including: language barriers; complex and unfamiliar political and historical contexts; the need for evidence that is tough to track down and to obtain access to; the importance of conducting extraterritorial investigations to identify evidence and witnesses; the need to ensure that witnesses who may face serious threats if they become involved in a prosecution are protected; and having to prove crimes that may never have been previously adjudicated.

A number of the challenges to prosecuting human rights violations committed abroad have been expressly acknowledged by U.S. officials. How best to overcome them, however, needs increased attention. One obvious critical element is political will to ensure adequate resources to conduct effective investigations where the complexities described above exist. Support also is needed to facilitate exchange of information and best practices with practitioners in other countries.

Congress is well placed to intensify scrutiny of the challenges and to strengthen law and practice to surmount them. This is essential if perpetrators of heinous abuses are to be held to account and if the case against Chuckie Taylor is to be more than an anomaly in U.S. practice. We look forward to further efforts by this subcommittee to ensure that crimes against humanity constitute an offense in the United States and that the necessary capacity exists to ensure prosecutions of this terrible crime.

Thank you.

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Statement of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Committee on the Judiciary,
On "From Nuremburg to Darfur: Accountability for Crimes Against Humanity"
June 24, 2008

I am very pleased that the Judiciary Committee's Subcommittee on Human Rights and the Law is convening today's hearing on the crucial issue of holding people accountable for crimes against humanity. I thank Senator Durbin for chairing it, and the witnesses for being here today.

I was proud to work with Senator Durbin in creating the Human Rights and the Law Subcommittee, which is working on important and difficult legal issues that have increasingly been a focus of the Judiciary Committee. I congratulate Chairman Durbin and Ranking Member Coburn for the significant work they have already done. The Subcommittee's work has helped take steps to correct the damaging policies established by this administration over the last six years. The United States must reclaim its historic role as a beacon to the world on issues of human rights.

More than five years have passed since the government of Sudan launched its campaign of destruction upon the civilian population of Darfur. The scale of atrocities occurring in Darfur is appalling, and for too long the international community has been doing too little, hoping that somehow the situation would improve. I have no illusions about the difficulties of ending this conflict, but the efforts that have been made so far have been woefully inadequate. The situation in Darfur calls for far more intensive, sustained, and high-level attention than the Bush administration and other countries have provided thus far. Urgent and immediate action is essential to save the people of Darfur from further catastrophe.

I was pleased to join with Chairman Durbin, Senator Coburn, and Senator Cornyn to introduce the bipartisan Genocide Accountability Act that was signed into law by the President last December. This law closed a loophole that had allowed those who commit or incite genocide to seek refuge in our country without fear of prosecution for their actions. It was a critical first step to showing the international community that the United States will not tolerate genocide and that those who commit these atrocities must be held accountable for their actions. It is important for the United States to make clear that there is no safe haven for those who commit brutal crimes against humanity.

Unfortunately, genocide is only one of the horrific crimes against humanity that the people of Darfur have endured. Hundreds of thousands of Sudanese have faced rape, enslavement, forced relocation, and systematic brutality. We need to determine what more can be done in the United States to protect victims of crimes against humanity and hold those responsible accountable.

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I welcome our distinguished panel of witnesses including Olympic Gold and Silver medalist Joey Cheek. I had the pleasure of meeting him last year here on Capitol Hill. I recall his great dedication to the athlete-driven international humanitarian organization, Right to Play. Since then, he has become the president of Team Darfur, a partnership of international athletes raising awareness about the conflict in Darfur, and working towards its resolution.

I also welcome Daoud Hari, an author and resource to journalists worldwide who is one of only five – only five – Darfuris who has been granted refuge in the U.S. since the genocide began, and the rest of this impressive panel. I look forward to hearing your testimony and learning what more we can do in our efforts against crimes against humanity.

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Testimony of
Pamela Merchant
Executive Director
The Center for Justice & Accountability

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

From Nuremberg to Darfur: Accountability for Crimes Against Humanity

June 24, 2008

Chairman Durbin, Ranking Member Coburn, and Members of the Subcommittee; thank you for inviting the Center for Justice and Accountability (CJA) to submit written testimony on the extraordinarily important issue of accountability for crimes against humanity. I am the Executive Director of CJA and a former federal prosecutor.

CJA is a nonprofit legal organization dedicated to deterring torture and other severe human rights abuses and to seeking justice. We represent survivors of torture and other severe human rights abuses in cases against individual human rights abusers in *civil* litigation using the Alien Tort Statute and the Torture Victim Protection Act. In the past ten years, we have brought cases in the U.S. against human rights abusers from Bosnia, Chile, China, El Salvador, Haiti, Honduras, Indonesia, Peru and Somalia. We have successfully sought civil redress for crimes against humanity and indeed brought the first case to do so. We are, therefore, in a unique position to offer insights on accountability for crimes against humanity.

One of our clients, Dr. Juan Romagoza, and I had the great privilege of testifying before this historic Subcommittee last November on a panel entitled, *No Safe Haven:* Accountability for Human Rights Violators in the United States. In those proceedings, among other things, the Subcommittee explored gaps in U.S. federal law that currently prevent the *criminal* prosecution of some of the more egregious human rights abusers who have sought safe haven here, including the fact that the U.S. lacks criminal jurisdiction to prosecute the majority of acts that constitute crimes against humanity.

CJA applauds the leadership of Chairman Durbin and this Subcommittee by holding the first Congressional hearing on crimes against humanity. CJA also applauds the Subcommittee's leadership in closing the gaps in the U.S. criminal code through the introduction and passage of the Genocide Accountability Act of 2007 and the introduction of the Child Soldiers Accountability Act and the Trafficking in Persons Accountability Act.

In this testimony, CJA will briefly summarize the gaps in the current criminal human rights statutory framework and review instances where crimes against humanity has been used successfully in the civil context to achieve justice for survivors of human rights abuses.

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Current U.S. Human Rights Law

Current U.S. law provides for the criminal prosecution of perpetrators who commit torture, genocide or war crimes overseas and who have sought safe haven here. The torture statute[1] provides for the criminal prosecution of any person who commits torture outside of the U.S. as long as the perpetrator is within U.S. jurisdiction *and* the torture was committed after the date the statute was enacted. Under the recently enacted genocide statute, a perpetrator may be prosecuted for the "specific intent to destroy in whole or in substantial part, a national, ethnic, racial or religious group."[2] The war crimes statute provides for the prosecution of those who commit war crimes as long as the victim or the perpetrator is a member of the U.S. armed forces or is a U.S. national.[3]

As this Subcommittee is well aware, there is no independent basis for prosecuting crimes against humanity, war crimes or extrajudicial killings committed by foreign nationals outside the United States. As a result, our government's ability to hold accountable those human rights abusers who seek safe haven here is very limited compared to our counterparts around the world.

The Need for Criminal Human Rights Prosecutions

It is estimated that more than 400,000 survivors of politically-motivated torture currently reside in the United States.[4] Every day these survivors strive to become self-sufficient and productive members of their new communities while struggling to reclaim the strength and vitality that were stolen from them by brutal regimes. It is also estimated that thousands of human rights abusers have found safe haven in the United States, including more than one thousand with substantial responsibility for heinous atrocities.[5] These abusers often live in the same immigrant communities as their victims, causing extreme anxiety and undermining justice and accountability movements in the countries where the abuses occurred.

CJA has represented dozens of survivors of torture, crimes against humanity and extrajudicial killing in civil litigation against human rights abusers who have found safe haven in the United States. While our clients have received great satisfaction in receiving civil judgments against their perpetrators, it is clearly not enough. Criminal prosecutions are the most important form of accountability for victims of human rights abuses. The strongest message that the U.S. can send to human rights abusers around the world is that we will criminally prosecute them here when their home country will not.

To our knowledge, since World War II, the federal government has brought only one criminal human rights case against a human rights abuser who has sought safe haven here.[6] The vast majority of human rights enforcement efforts in this country are removals which result from prosecuting abusers for immigration fraud – for lying about participation in past crimes when they entered the United States. Often these human rights abusers are returned to their home

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[1] 18 U.S.C. §2340A. The date of enactment was enacted April 30, 1994.
[2] 18 U.S.C. §1091.
[3] 18 U.S.C. §2441.
[4] U.S. Department of Health and Human Services, Office of Refugee Resettlement. *Services for Survivors of Torture, available at* http://www.acf.hhs.gov/programs/orr/programs/services_survivors_torture.htm.
[5] Amnesty International, USA: A Safe Haven for Torturers, 2001.
[6] In December 2006, Chuckie Taylor, Charles Taylor's son, was indicted under the federal torture statute, 18 U.S.C. §2340A in the Southern District of Florida. *U.S. v. Roy Belfast* (a.k.a. Chuckie Taylor), S. Dist. Fla No. 06-20758-CR-ALTONAGA (2006). The case is expected to go to trial this year and is the first and only case brought under the torture statute since it was enacted in 1994.

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countries where they either become repeat offenders or continue to live freely without consequence.

As a former prosecutor, it is clear to me that an important factor in the lack of criminal prosecutions is the limited criminal law framework. Enacting a law that would allow criminal prosecution of human rights abusers responsible for crimes against humanity would be an important next step in closing that gap.

Crimes Against Humanity

The concept of a crime against humanity dates back to the Nuremberg trials where it was first codified as a basis for prosecuting German leaders for massive abuses committed against their own citizens. Crimes against humanity are a constellation of acts made criminal under international law when they are committed in the context of a widespread or systematic attack against any civilian population. This attack can be committed against a civilian population defined along many dimensions: language, race, geography, political opinion, ethnicity or religion.[7] In contrast, genocide is the destruction, in whole or in substantial part, of a distinct people, defined by nationality, ethnicity, race, or religion.

Enacting a crimes against humanity law would give an invaluable tool to law enforcement and would bring the U.S. criminal code into accordance with modern international criminal law norms.[8]

The Importance of Crimes Against Humanity Law in Future Prosecutions

In our November 2007 testimony to this Subcommittee, we strongly encouraged the government to make the prosecution of human rights abusers for human rights crimes a priority. The enactment of a crimes against humanity law is a critical step towards making human rights prosecutions a reality in the United States.

A prosecution for crimes against humanity is the most important vehicle for holding human rights abusers accountable for *widespread or systematic* attacks directed against civilians. A crimes against humanity charge addresses the severity of human rights abuses that are carried out on a grand scale -- such as the ongoing abuses in Darfur, Burma and Zimbabwe. While prosecuting perpetrators like Chuckie Taylor for individual incidents of torture is an important first step, it is in initiating prosecutions for crimes against humanity that the U.S. government will

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[7] More specifically, crimes against humanity must be committed as part of a *widespread or systematic* attack directed against a civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attacks, and which constitutes the *multiple* commission of any of the following acts: murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment, torture, rape, sexual slavery, persecution against any identifiable group or collectivity, enforced disappearances, apartheid, or other inhumane acts of a similar character intentionally causing great suffering or serious injury. Stephens, *International Human Rights Litigation in U.S. Courts* (2d ed. 2008), 161-164; *See generally,* Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COL. J. OF TRAN'L L. 787 (1999); Bassiouni, *Crimes against Humanity in International Criminal Law* (2d ed. 1999); Aceves and Hoffman, *Pursuing Crimes Against Humanity in the United States: The Need for a Comprehensive Liability Regime,* in *Justice for Crimes Against Humanity* (2003), 161-172.

[8] The limited reach of our criminal code stands in stark contrast to many of our allies who have enacted crimes against humanity laws including Argentina, Australia, Canada, Germany, The Netherlands, New Zealand, South Africa, Spain, and the United Kingdom.

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see the most impact and reward in its human rights efforts. In order to achieve true accountability, the punishment must fit the crime.

Crimes against humanity prosecutions have the most impact on survivor communities around the world – a fact that has proven to be true in our civil cases. For example, our two cases against former Peruvian military officials responsible for the Accomarca Massacre would be incomplete without including allegations and claims of crimes against humanity. While it is no doubt important that the two plaintiffs in the case receive justice for the torture and extrajudicial killing of their immediate family members, the crimes against humanity claim makes the case an accountability vehicle on a larger scale. By bringing crimes against humanity claims, the case acknowledges *all* the victims and their relatives who were affected by the abuses initiated by the perpetrators. The level of collective ownership of the case and the impact it can have in the home country and around the world is therefore exponentially increased.

Moreover, charging crimes against humanity will send a clear signal to the international community that we are not "under-prosecuting" perpetrators who commit large scale, systematic abuses. To prosecute a perpetrator without addressing his or her role in the overall pattern of abuses and repression sends a message of indifference. It also sends a mixed message about our overall commitment to human rights, the sanctity of life, and each individual's right to freedom from state-sponsored abuses. Again, the punishment must fit the crime.

Crimes Against Humanity Claims in U.S. Civil Cases

In contrast to the gaps in our criminal code, the United States has a relatively well developed *civil* liability regime for punishing serious human rights abusers using the Alien Tort Statute and the Torture Victim Protection Act.[9] Using those laws, CJA has brought successful civil cases for crimes against humanity against numerous human rights abusers who have all sought safe haven in the United States.[10]

The following are three examples of successful crimes against humanity cases brought by CJA against human rights abusers who came to the United States. The following individuals, who were all found liable for crimes against humanity in civil cases brought by CJA, would likely escape criminal prosecution due to gaps in the federal law.

Col. Carl Dorélien and the Raboteau Massacre

Colonel Dorélien was a member of the High Command of the Haitian Armed Forces during the military dictatorship in Haiti from 1991 to 1994. Dorélien's presence in the U.S. became widely known after he won $3.2 million in the Florida state lottery in 1997. When

[9] 28 U.S.C. §1350; 28 U.S.C. (note).

[10] *See, e.g., Cabello v. Fernandez-Larios,* 402 F 3d 1148, 1158 1161 (11th Cir. 2005)(upheld jury verdict for crimes against humanity in connection with Pinochet's "Caravan of Death" in Chile); *Doe v. Saravia,* 348 F. Supp. 2d 1112, 1156-57 (E.D. Cal. 2004)(assassination of Salvadoran Archbishop Oscar Romero); *Mehinovic v. Vuckovic,* 198 F. Supp. 2d 1322, 1354 (N.D. Ga. 2002) (first crimes against humanity judgment in the U.S. in connection with ethnic cleansing in Bosnia); *Chavez v. Carranza,* W.D. Tenn. No. 03-2932 M1/P (Nov. 18, 2005)(jury verdict for crimes against humanity against former Salvadoran Vice Minister of Defense); *Jean v. Dorelien,* S.D. Fla. No. 03-20161 CIV-KING (February 23, 2007)(jury verdict for crimes against humanity against Haitian Colonel).

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democracy was restored to Haiti, Dorélien, along with many other members of the Haitian military, fled to the U.S. where they lived with impunity.[11]

The military dictatorship in Haiti was characterized by widespread state-sponsored human rights violations, including abuses committed by the military and death squads. Human rights reports implicate the military in extrajudicial killings, disappearances, torture, and arbitrary arrests and detention. Several thousand Haitians were killed during this period, and tens of thousands more fled the country.

In 1993, CJA client Lexiuste Cajuste was arbitrarily detained and severely tortured by Haitian military forces under Dorélien's command because of his role as a union organizer and pro-democracy activist. Under international pressure, Cajuste was finally released and fled to the United States. Miraculously, he survived the beatings but, fourteen years after the ordeal, still suffers severe physical disabilities relating to his torture.

CJA client Marie Jeanne Jean lost her husband Michel Pierre in the 1994 Raboteau massacre. On April 22, 1994, military and paramilitary forces gunned down Michel Pierre during the attack against civilians in the impoverished seaside neighborhood of Raboteau in the city of Gonaives. Military and paramilitary units invaded Raboteau, terrorizing the community and killing at least two dozen and possibly as many as one hundred unarmed civilians. Many of those killed were shot in boats and fell or were later thrown into the ocean, thus making it impossible to know the total death toll. Some of the bodies -- mutilated by their attackers or by sharks -- were washed back to shore. More than fifty homes were destroyed.

Mr. Cajuste, Ms. Jean and Ms. Jean's two minor children brought crimes against humanity and extrajudicial killing claims against Dorélien in 2003. After CJA filed its suit, Dorélien was deported to Haiti on immigration charges and was placed in detention in Port au Prince. A few months later, during the 2004 uprising that removed Aristide from power, Dorélien was released from prison. He remains at large.

On February 23, 2007, a federal jury in Miami found Colonel Carl Dorélien liable for the extrajudicial killing and crimes against humanity claims.[12]

A better result clearly would have been the criminal prosecution of Dorélien in the U.S. for human rights abuses. Unfortunately, our current laws would not reach Dorélien. The torture act only applies to torture committed after the date it was enacted which was April 30, 1994.[13] The genocide act would not apply because the Raboteau massacre was directed at a community for their political beliefs (pro democracy activists), not because of their "national, ethnic, racial or religious" identity.

Fernández Larios and the Caravan of Death

The first civil jury verdict in a crimes against humanity case was brought against former Chilean Army and secret service officer Armando Fernández Larios. *Cabello v. Fernandez-Larios.* Fernández Larios also served as one of the members of the "Caravan of Death." The

[11] In addition to Col. Dorélien, Jean-Claude Duperval (who worked openly for Walt Disney World Resort for three years), and Herbert Valmond (who worked as a pastor in Tampa, Florida) also fled to the U.S. They were both deported to Haiti where they continue to evade prosecution.
[12] *Jean v. Dorelien,* 03-20161-Civ/King/Garber (SD Fla. February 23, 2007).
[13] 18 U.S.C. §2340A.

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Caravan of Death was a military death squad responsible for killing 75 civilian political prisoners after the Pinochet-led coup in 1973. The members traveled from prison to prison in a helicopter, inspecting military garrisons and then ordering — or carrying out themselves — the execution of the detainees, the murders being committed with small arms and bladed weapons. The victims were then buried in unmarked graves. It is estimated that over 3,000 civilians were killed during the Pinochet junta by the military and its death squads. Fernández Larios came to the U.S. in 1987 and lives in Miami, Florida.[14]

Winston Cabello was a well-regarded regional planning official in the ousted government of President Salvador Allende. Cabello was arrested after the coup in September 1973 and held for five weeks without charge. On October 16, 1973, Cabello was taken from the garrison by members of the Caravan of Death, including Fernández Larios, and killed along with twelve other civilian prisoners also detained after the coup. Winston was 28 years old at the time.

CJA clients Zita Cabello Barrueto, Karin Moriarty, Aldo Cabello, and Elsa Cabello, are the sisters, brother, and mother of Winston Cabello. They came to the U.S. soon after Winston was killed and are now U.S. citizens.

Almost 30 years later, in September 2003, a Florida jury found Fernández Larios liable for torture, crimes against humanity, and extra judicial killing for his role as a member of the "Caravan of Death." The jury awarded four million in damages to our clients. The trial marked the first time a member of the Caravan of Death has stood trial for *any* of the killings perpetrated during its journey, as well as the first jury verdict for crimes against humanity in the United States.[15] The Eleventh Circuit upheld the jury verdict for crimes against humanity based on evidence that Cabello's killing was part of a pattern of "politically motivated killings."[16]

Once again, the atrocities that Fernández Larios committed through his participation in the Caravan of Death would not have been actionable under existing criminal law. The victims of the Caravan of Death were targeted for their political beliefs, not because they were part of a distinct ethnic, racial or religious group as would be required to establish a genocide claim.

Accomarca Massacre

The Accomarca Massacre was a military operation which resulted in the death of 69 civilians in a rural area of Peru in 1985. From 1980 to 2000, the government of Peru was engaged in a civil war against insurgent groups, including the Maoist Sendero Luminoso (Shining Path). Throughout that time, the Peruvian Army and other government forces were responsible for widespread and systematic human rights abuses against the civilian population of Peru. During the 1980s, the Army carried out massacres, disappearances and torture in the Andean highlands, and particularly in the department of Ayacucho. According to Peru's Commission for Truth and Reconciliation, 26,259 people died or disappeared in the department of Ayacucho during the civil war.

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[14] In 1987 Fernández Larios reached an agreement with U.S. federal prosecutors and pleaded guilty to being an accessory to the 1976 car-bomb assassination of former Chilean ambassador Orlando Letelier and his American assistant Ronni Moffett in Washington, DC.

[15] Criminal charges against General Pinochet in Spain and in Chile were based on Pinochet's alleged role in ordering the killings perpetrated by the Caravan. However, Pinochet escaped liability after being found mentally unfit to stand trial by the Chilean courts.

[16] *Cabello v. Fernandez-Larios,* 402 F.3d 1148, 1161 (11th Cir. 2005) (crimes against humanity verdict upheld).

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CJA's clients, Teófila Ochoa and Cirila Pulido, were 12 years old at the time of the massacre and survived by hiding from the soldiers. Teófila Ochoa's mother, four brothers and a sister were killed. Cirila Pulido's mother and brother were killed. The two officers who commanded the military units involved in the massacre, Telmo Hurtado Hurtado and Juan Rivera Rondón, both reside in the United States. They have been charged with crimes against humanity, war crimes and extrajudicial killing in the civil cases filed on behalf of our clients.

Despite the severity of the crimes they committed in Peru, both defendants ended up facing relatively minor immigration fraud charges in the U.S., which do not directly concern the killings at Accomarca.[17] Once again, with better laws, these defendants could have been charged and held accountable for their role in killing over 69 civilians -- primarily women and children.

Finally, as this Subcommittee is also aware, the Salvadoran Generals who were found responsible for the torture of Dr. Juan Romagoza, also could have been charged with crimes against humanity in connection with the widespread and systematic abuses committed by the Salvadoran Army against its civilian population. Generals Garcia and Vides Casanova currently live in Florida.[18] It is clear that one of the reasons they were never prosecuted criminally is because the Department of Justice does not have sufficient tools.

We urge the Subcommittee to submit crimes against humanity legislation so that survivors, such as Dr. Juan Romagoza, will have justice -- and that perpetrators -- such as Generals Garcia and Vides Casanova -- will be held accountable in a court of law.

Thank you very much.

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[17] Captain Rivera Rondón came to the U.S. in the early 1990s and owns a home in Montgomery County, Maryland. He is currently detained on immigration charges in, Maryland. Major Hurtado came to the U.S. in 2002 after an amnesty law protecting him from prosecution in Peru was nullified. He was sentenced to six months after pleading guilty to two counts of immigration fraud and is being detained in Florida.

[18] From 1980 to 1992 over 75,000 civilians were killed, and tens of thousands of others suffered from other serious human rights abuses at the hands of Salvadoran military forces. *See*, U.N. Security Council, *Report of the United Nations Truth Commission on El Salvador*, § III (April 1, 1993).

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Statement of Kate Nahapetian
Government Affairs Director of the Armenian National Committee of America

Senate Committee on the Judiciary
Subcommittee on Human Rights and the Law
"From Nuremberg to Darfur: Accountability for Crimes Against Humanity"
June 24, 2008

I would like to begin my remarks today by sharing with you - Chairman Durbin, Ranking Member Coburn, and all distinguished members of this vital Subcommittee – the deep appreciation of the Armenian National Committee of America and all Armenian Americans for your leadership in organizing this hearing.

We are gratified, as a community that has both witnessed firsthand the brutal impact of genocide and tragically been forced to endure its state-sponsored denial for nearly a century, to have this opportunity to offer our insights and devote our energies to the progress of this panel toward our common aim of preventing genocide and crimes against humanity by ensuring accountability for these crimes.

Today's hearing, "From Nuremberg to Darfur: Accountability for Crimes Against Humanity," reflects the very best in both the humanitarian tradition of the American people as well as our impressive ability, as a nation, to summon the will to translate these noble aspirations into practical action. In this case, your panel, by exploring ways to demand greater accountability under U.S. law for those who perpetrate atrocities upon their fellow human beings, is making a tremendous contribution to the genocide prevention movement.

As you recall, we were invited last February to offer testimony at the inaugural hearing of your panel. I will today add to our comments by underscoring our view that the failure of the international community, over the course of the past century, to confront and punish genocide and crimes against humanity has been among the foremost factors in creating the environment of impunity that allows genocide and crimes against humanity to continue to be committed in Darfur today.

This failure, as members of this panel know, holds special meaning for us as Armenians, descendents of those who bore witness to the 20th Century's first genocide. We will forever 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.

In fact, the term "crimes against humanity" was first officially used by governments in a joint declaration by the Allied Powers, Great Britain, France, and Russia, in May 1915 to condemn the Turkish government for the massacre and annihilation of the Armenian race. In that declaration, the Allied Powers vowed to prosecute those responsible. Sadly, the pledge to hold those responsible accountable was never fulfilled, which paved the way for the Turkish government's now over 90 year campaign of genocide denial. As a

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community, we know very well the price that is paid, when there is no accountability for crimes against humanity.

In the months since we testified, the Armenian Genocide Resolution was very nearly adopted by the U.S. House of Representatives, only to be blocked at the last moment, in October of last year, by a series of increasingly menacing threats by Turkey to obstruct our supply and support for our forces in Iraq should American legislators dare to speak honestly about this crime against humanity.

In our efforts to ensure accountability for crimes against humanity, we must first reject any efforts – by any foreign nation – to impose a gag-rule on the U.S. government's condemnation of mass atrocities, crimes against humanity, and genocide. Rather than enabling Turkey's denials by silencing voices for human rights, the Administration should be working openly and aggressively to end Turkey's multi-million dollar campaign of lies.

* The U.S. government should work to end Turkey's 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.

* The U.S. government should work to end Turkey's 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.

* And, perhaps most importantly for the work of this panel today, the U.S. government should work to end Turkey's denial because it sets a dangerous precedent - a real life example of genocide committed without accountability - that makes future genocides more likely by emboldening potential perpetrators with the knowledge that, with sufficient political leverage, their crimes can be committed without condemnation or consequence.

Sadly, the Turkish government is able to maintain its denial, against all evidence and the tide of international opinion, in large part due to our own White House and State Department's refusal to speak with moral clarity about the Armenian Genocide, a failing put on display before the international community, in recent months, by its heavy-handed arm-twisting of Congress to prevent the adoption of legislation simply condemning and commemorating this crime.

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Our continued acquiescence to Turkey's threats has real world consequences for our efforts to end the atrocities in Darfur today. As the United States and much of the world tries to isolate Sudan for the genocide in Darfur, Turkey has recently increased its economic and military ties to the genocidal regime in Sudan and welcomed President Omar al-Bashir to Turkey this January for an official state visit. In addition, Turkish officials have denied the genocide in Darfur and Sudanese officials are using the same arguments to deny the genocide in Darfur as Turkey uses to deny the Armenian Genocide.

We are gratified, however, that this Subcommittee has been so diligent in its efforts to end impunity for genocide and both presidential candidates Senator Barack Obama and Senator John McCain have condemned the Sudanese government for the genocide in Darfur. Moreover, we agree with Senator Obama that to end genocide, you must first acknowledge past instances of genocide. In a January statement, and several instances since then, he has voiced his "firmly held conviction that the Armenian Genocide is not an allegation, a personal opinion, or a point of view, but rather a widely documented fact supported by an overwhelming body of historical evidence. The facts are undeniable. . . America deserves a leader who speaks truthfully about the Armenian Genocide and responds forcefully to all genocides."

In closing, I would like to stress, once again, that, although the Armenian Genocide began in 1915, it continues today through Turkey's state-sponsored campaign of denial, which fuels the environment of impunity that allows the ongoing cycle of genocide.

Thank you very much for this opportunity to share our thoughts with the Subcommittee. We look forward to working with you to ensure there is accountability for crimes against humanity in U.S. law.

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

From Nuremberg to Darfur:
Accountability for Crimes against Humanity

June 24, 2008

Testimony of Diane Orentlicher
Professor of Law, American University
Special Counsel, Open Society Justice Initiative

Mr. Chairman, Ranking Member Coburn and distinguished members of this subcommittee, it is an honor to provide testimony before this body. Since its creation one and a half years ago, this subcommittee has provided extraordinary leadership and has already achieved important results. With many others, I was heartened in particular by this subcommittee's leadership in introducing the Genocide Accountability Act of 2007 and ensuring its enactment into law. When it became part of our law last December, the Genocide Accountability Act went a long way toward enabling the United States to play its full part in ensuring that those who consider committing genocidal violence think again before they act, knowing that the space for impunity is shrinking.

As important as this landmark achievement is, the Genocide Accountability Act of 2007 does not by itself fully discharge our nation's historic commitment to ensure that there is no safe haven for those who commit crimes of such surpassing gravity and scale as to engage the conscience of humanity: It is not yet explicitly a crime under United States law to commit crimes against humanity. I believe that if Americans understood what this means, they would be surprised and concerned. I say this for two principal reasons: First, some of the most atrocious crimes committed in recent history constitute crimes against humanity but *not*, as many believe, genocide—the crime that is widely but inaccurately thought to be synonymous with episodes of mass extermination and which already is a federal crime. Second, the history of global efforts to punish crimes against humanity is inseparable from American leadership. The challenge today is to catch up with our own legacy in this area.

And so I urge this subcommittee to provide the same leadership in making crimes against humanity a federal crime that it has provided in addressing other key gaps in U.S. protection when it introduced the Genocide Accountability Act of 2007 and, more recently, the Child Soldiers Accountability Act and the Trafficking in Persons Accountability Act.

Crimes against Humanity

Before I elaborate, it may be helpful briefly to describe what crimes against humanity are. Along with genocide and war crimes, crimes against humanity are among the most

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serious crimes under international law. In brief, crimes against humanity consist of certain inhumane acts, such as enslavement, extermination, rape and other forms of torture, *when committed as part of a widespread or systematic attack against a civilian population.* Usually this last requirement is met when there has been a protracted attack against civilians, such as the three and one-half year campaign of ethnic violence in Bosnia-Herzegovina during the 1990s. But those who perished in the World Trade Center on a single day in September 2001 were also victims of a crime against humanity.

Although they were linked to a context of interstate war in the charter of the Nuremberg tribunal, crimes against humanity can be committed in peacetime as well as during armed conflict. When the Nuremberg tribunal rendered judgment against major Nazi war criminals, the offenses we most associate with the Holocaust were judged to constitute crimes against humanity.

While a genocide such as that which occurred in Rwanda in 1994 would also entail the commission of crimes against humanity, the reverse is not necessarily true. Under the authoritative definition set forth in the 1948 Convention for the Prevention and Punishment of the Crime of Genocide, *genocide* is narrowly defined as certain acts, such as killing members of a protected group, when committed with the specific intent of destroying, in whole or in substantial part,[1] a national, ethnic, racial or religious group as such. Atrocities committed without this intent do not qualify as genocide, no matter how brutal or extensive.

The specific intent requirement of group destruction is dauntingly difficult to establish. As the International Court of Justice noted in a judgment issued last year, "It is not enough to establish, for instance . . ., that deliberate unlawful killings of members of [a protected] group have occurred"—even, I would add, when they have occurred on a heart-stopping scale. It is not even enough, the Court continued, "that the members of the group are targeted because they belong to that group . . . ." Instead, the acts that potentially qualify as acts of genocide "must be done with intent to destroy the group as such in whole or in part"[2] to constitute genocide. Thus mass atrocities that target members of, say, a religious group and claim even thousands of victims do not qualify as genocide unless committed with the specific aim of destroying at least a substantial part of the group "as such."

Crimes against Humanity and American Leadership

The United States played a leading role in ensuring that crimes against humanity committed by the Nazis could be punished. The phrase had been used before Nuremberg but the crime was not prosecuted until the Allies used this charge against Nazi war criminals.[3] How this crime entered the lexicon of postwar justice is instructive, for it demonstrates that if crimes against humanity did not already exist as a punishable offense, we would find when faced with extraordinary depravity that we have no choice but to establish and enforce this crime.

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In 1944 Henry Stimson, then United States Secretary of War, asked Colonel Murray Bernays to prepare a memorandum on how to punish Nazi criminals after the Second World War ended. In his memorandum, Colonel Bernays wrote that many of the worst atrocities committed by Nazi Germany could not be classified as war crimes—and yet, he wrote, it would be intolerable "to let these brutalities go unpunished."[4] That same year, the United States representative to the Legal Committee of the United Nations War Crimes Commission—a body constituted by the Allied nations in 1943—raised the atrocities then underway. He argued that Nazi crimes against German Jews and Catholics demanded application of the "laws of humanity" and urged that "crimes committed against stateless persons or against any persons because of their race or religion" represented "crimes against humanity" that were "justiciable by the United Nations or their agencies as war crimes."[5]

In June 1945, Justice Jackson, the chief U.S. prosecutor at Nuremberg, proposed in a report to the President that the Nuremberg Charter include a charge of "Atrocities and offences, including atrocities and persecutions on racial or religious grounds ...."[6] The final text of this crime evolved somewhat, so that the Nuremberg Charter defined crimes against humanity as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connexion with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."[7]

Crimes against *Humanity*

The name of this crime is richly evocative of its meaning—and of the moral responsibility that crimes against humanity engage everywhere when they occur anywhere.[8] A postwar judgment by a U.S. military tribunal in Nuremberg made the point eloquently. In a case concerning the *Einsatzgruppen*—the Nazis' mobile extermination units—the American tribunal noted that the defendants before it were charged with crimes against humanity: "Not crimes against any specified country, but against humanity." The tribunal continued: "Those who are indicted . . . are answering to humanity itself," and, it warned, "the court of humanity . . . will never adjourn."[9]

The Jerusalem District Court sounded a similar theme when it explained in its 1961 judgment why it possessed legal authority to try Adolf Eichmann for his role in organizing the transport of Jews to death camps during World War II. Eichmann had been charged with, among other offenses, crimes against humanity, which were made punishable by an Israeli law enacted in 1950. The Israeli Court noted that "[t]he abhorrent crimes defined in this Law ..., which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself ...."[10]

It is also important to emphasize that crimes against humanity are *crimes*. The United States and other Allied nations who convened the Nuremberg tribunal recognized that our only hope of preventing future atrocities of staggering scope was to ensure that those who

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violate the basic code of humanity face the bar of justice. Perhaps Sir Hartley Shawcross said it best in his closing argument at Nuremberg: "The Charter of this Tribunal," Sir Hartley told the judges, "gives warning for the future—I say, and repeat again, gives warning for the future, to dictators and tyrants masquerading as a State that if, in order to strengthen or further their crimes against the community of nations they debase the sanctity of man in their own countries, they act at their peril, for they affront the International Law of mankind."[11]

Contemporary Crimes against Humanity

Crimes against humanity have in recent years once again figured prominently in efforts to bring to justice those responsible for crimes of exceptional savagery and scale. This crime was included in the statutes of two tribunals created in the early 1990s with strong United States leadership, the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY/R), respectively. More recently, it has been included in the jurisdiction of other international or hybrid courts established to respond to atrocities so barbaric and extensive as to warrant the creation of a special tribunal, such as the court created to try those who bear major responsibility for atrocities committed in Sierra Leone's infamously savage civil war. Indeed, the highest charge leveled by the Special Court for Sierra Leone against Liberia's former leader—Charles Taylor—for notorious atrocities committed in Sierra Leone is crimes against humanity.

Some infamous episodes of violence prosecuted before these tribunals either were not charged as, or were not judged to be, genocide; instead, the charge that best fit the nature of the crimes was that of crimes against humanity. For example, Stanislav Galić, who received the highest sentence possible for his leadership role in the three and one-half years-long siege of Sarajevo in the 1990s,[12] was convicted by the ICTY of crimes against humanity and war crimes. Despite the extreme nature of his crimes, Galić was not even charged with genocide. When an ICTY Trial Chamber convicted Bosnian Serb leader Momčilo Krajišnik—one of the most senior defendants convicted by the ICTY—for his leading role in the campaign of ethnic cleansing that raged across and ravaged Bosnia-Herzegovina during the same period, it found him guilty of crimes against humanity but not genocide (although in his case the prosecutors charged genocide).

These cases remind us how challenging it can be to prove a charge of genocide even when members of an ethnic or religious group are targeted for atrocious crimes on a massive scale. For example in the *Krajišnik* case an ICTY Trial Chamber found the defendant responsible for "the killing, through murder or extermination, of approximately 3,000 Bosnian Muslims and Bosnian Croats" in 30 Bosnian municipalities during the period of the indictment.[13] It even found that "the perpetrators of the killings chose their victims on the basis of their Muslim and Croat identity."[14] Yet it did not find that the prosecutor had met the heavy burden of proving beyond a reasonable doubt that "any of these acts were committed with the intent to destroy, in part, the Bosnian-Muslim or Bosnian-Croat ethnic group, as such."[15] These crimes were, however, judged to be among the most serious crimes known to humankind: crimes against humanity.

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Some of the signal achievements of the ICTY in rendering justice for victims of sexual violence have centered on the charge of crimes against humanity. As my colleague Kelly Askin testified before this subcommittee in April 2008, a landmark judgment rendered by an ICTY Trial Chamber in February 2001 found two of the defendants guilty of the crime against humanity of enslavement because they had held young women captive for several months, repeatedly raped the victims during this period and in other ways exercised powers of ownership over the captive women. Tragically underscoring the victims' debasing treatment as human chattel, one of the defendants sold two women who had already been held captive as sexual slaves to Montenegrin soldiers for 500 Deutschmarks each (and, according to one witness, for a truckload of washing powder).

These examples reflect a broader point: When we look back on the trials that have taken place in contemporary war crimes tribunals, the charge that has been central to most of these cases with the exception of those prosecuted before the ICTR has been that of crimes against humanity.[16] This pattern reminds us that when we confront radical evil, the offense that best captures the depravity of the criminal conduct may be that of crimes against humanity.

Crimes against Humanity and U.S. law

Today, crimes against humanity can be prosecuted in many countries, not just before international courts. Yet despite the United States' leading role in ensuring that this crime could be prosecuted at Nuremberg and in other tribunals, United States law does not yet proscribe crimes against humanity as such in its criminal code.

At the outset of my testimony I said that I thought many Americans would be astonished if they knew this and understood what it means. What it means is that some of the most horrific atrocities we have witnessed in recent decades—crimes that cry out for justice—could not be prosecuted properly if at all in the United States if the perpetrators were found in our midst.

If asked to identify the worst atrocities committed in the second half of the twentieth century, most if not everyone would include in their short list the crimes committed under the murderous regime of the Khmer Rouge. During its reign, perhaps a fifth of Cambodia's population—one and a half million people—are thought to have been executed outright or to have died as a result of Khmer Rouge policies that made survival impossible. In the popular imagination, the only word capable of capturing this violence is genocide. Yet the prosecutors of a special court created to bring surviving leaders of the Khmer Rouge to justice—the Extraordinary Chambers in the Courts of Cambodia—have not yet filed genocide charges against the five suspects they have already charged, even though those charged include some of the most notorious Khmer Rouge leaders other than the late Pol Pot. Instead, the most serious charge laid against the five suspects is crimes against humanity. This might change as the prosecutors in Cambodia continue their investigations and add further charges. Even so, the fact that they did not believe they could support genocide charges in their historic first indictments indicates how

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rarely the charge of genocide fits crimes even as surpassing in cruelty and scale as those committed by the Khmer Rouge.

Today, individuals of conscience are rightly focused on ending atrocities still underway in the Darfur region of Sudan. While the United States government has declared those crimes a genocide, it is not clear whether the international court charged with prosecuting those responsible for the Darfur atrocities will bring this charge, much less make it stick. In his first indictments for Darfur atrocities, the Prosecutor of the International Criminal Court did not include genocide charges. The charge that best captured the criminality the Prosecutor believed that he could prove in court (at least at the time he brought his first set of charges) was crimes against humanity. This could change—new indictments will be announced next month—but the basic point will not: When we think about the most extreme episodes of inhumanity our minds can conjure, the offense that captures their criminality best has often been that of crimes against humanity.

Conclusion

Particularly in view of its historic role in ensuring that crimes against the basic code of humanity can be punished appropriately, the United States should be in a position to institute criminal proceedings if someone responsible for a crime of such exceptional magnitude and cruelty were in United States territory and could not be prosecuted in a more appropriate jurisdiction. And so I urge this subcommittee to produce legislation making crimes against humanity a federal crime and establishing jurisdiction to prosecute such crimes not only when they occur in our territory, as happened on 9/11, but also when crimes against humanity occur abroad and the perpetrators seek haven in the United States.

In this way the United States would, to paraphrase Sir Hartley Shawcross, give warning for the future to those who would debase the sanctity of humanity that they act at their peril. And for victims of surpassing evil, the United States would be in a position to secure some measure of justice for the suffering they endured—and which we can hardly begin to fathom.

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[1] Although the Convention uses the phrase "in whole or in part," the words "in part" have been interpreted to mean "in substantial part." See, for example, Prosecutor v. Radislav Krstić, Case No. IT-98-33-A, Appeal Judgment, ¶ 8, April 19, 2004.

[2] 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, ¶187, Feb. 26, 2007.

[3] In May 1915, the French, British and Russian governments made a declaration denouncing Turkey's massacres of Armenians at the beginning of the First World War as "crimes against humanity and civilization" for which members of the Turkish government would be held responsible, together with its agents implicated in the massacres. *History of the United Nations War Crimes Commission and the Development of the Laws of War*, p. 35 (1948). But while the first peace treaty with Turkey included a provision contemplating such prosecutions, it was not ratified and was replaced by a treaty that made no provision for punishment; to the contrary, it was accompanied by a Declaration of Amnesty. Id., p. 45.

[4] Antonio Cassese, *Violence and Law in the Modern Age*, pp. 108-09 (1988).

[5] *History of the United Nations War Crimes Commission and the Development of the Laws of War*, p. 175 (1948).

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[6] Quoted in Egon Schwelb, "Crimes Against Humanity," 23 *Brit. Y.B. Int'l L.* 178, p. 207 (1946).
[7] Charter of the International Military Tribunal, art. 6(c), concluded at London, Aug. 8, 1945; entered into force, Aug. 8, 1945; 8 UNTS 279
[8] Beyond this, *crimes against humanity* captures the assault on basic principles of humane behavior that the crime entails by its very nature. An important source of inspiration for the term *crimes against humanity* was the Martens clause, which was included in the preambles to both the 1899 and 1907 Hague Conventions. The version appearing in the 1907 convention provides:

> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerent remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.[8]

(Hague) Convention (No. IV) Respecting the Laws and Customs of War on Land, with Annex Regulations, Oct. 18, 1907; 36 Stat. 2277; TS 539; 1 Bevans 631. As a leading scholar (and current U.S. judge on the ICTY) has noted, the aim of this clause "is to substitute principles of humanity for the unlimited discretion of the military commander" in situations not yet covered by the codified laws of war. Theodor Meron, "Francis Lieber's Code and Principles of Humanity," *Colum. J. Transnat'l L.* 269, p. 281 (1977).
[9] United States v. Otto Ohlendorf et al., IV Trials of War Criminals before Nuernberg Military Tribunals under Control Council Law No. 10, 411, pp. 497-499 (1950).
[10] Attorney Gen. of Israel v. Eichmann, reprinted in 36 I.L.R. 18, ¶ 12 (at p. 26) (Isr. Dist. Ct.—Jerusalem 1961), aff'd, 36 I.L.R. 277 (Isr. Sup. Ct. 1962).
[11] Speeches of the Chief Prosecutors at the close of the case against the individual defendants, published under the authority of H.M. Attorney-General by H.M. Stationery Office (CMD. 6964), p. 63.
[12] Galić commanded the Bosnian Serb army unit responsible for the Sarajevo siege for two of the three and one-half years of the siege.
[13] Prosecutor v. Momčilo Krajišnik, Case IT-00-39-T, Trial Judgment, ¶¶1143, 717 & 792; Sept. 27, 2006.
[14] Id., ¶ 793.
[15] Id., ¶ 867.
[16] The central charge before the ICTR, which was created in response to the 1994 genocide in Rwanda, has been that of genocide.

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Testimony

Gayle E. Smith

Co-Founder, the ENOUGH Project

Senior Fellow, Center for American Progress

Senate Judiciary Committee Subcommittee on Human Rights and the Law

"From Nuremberg to Darfur: Accountability for Crimes Against Humanity"

June 24, 2008

Senator Durbin, Senator Coburn and members of the Committee, I am honored to testify here today and thank you for your continued efforts to stand for justice for the victims of genocide and crimes against humanity. I am testifying here in my capacity as a Senior Fellow at the Center for American Progress and as co-founder of ENOUGH, the project to end genocide and crimes against humanity.

In this country, arson is a crime. In this country, child abuse is a crime. And in this country, rape is a crime.

A crime against humanity is one that takes these violations and amplifies them, targeting not just individuals, but entire communities and peoples. A crime against humanity is one that offends our common dignity because it is driven by the deliberate decision to deny people their fundamental rights and abuse their basic dignity. A crime against humanity is an act committed not by a bad apple, or an individual criminal, or reckless undirected youth – it is one that is committed by groups or governments with the power to inflict widespread and systematic abuses that defy our collective imagination.

But a crime against humanity is not an abstraction. In our world, today, as we gather for this hearing, it is the forced displacement of and armed attacks upon hundreds of thousands of men, women and children in Darfur at the hands of armed militia directed and sustained by Sudan's government. It is the widespread abuse of thousands of children in northern Uganda, forced by a raging warlord to kill their relatives and then, having passed the point of no return, to join hands with their oppressors. It is the epidemic of rape – most of it deliberate, much of it orchestrated - in the eastern reaches of the Democratic Republic of the Congo.

It is my sincere hope that this Committee will, as it has done in the case of the Durbin-Coburn Genocide Accountability Act of 2007, propose legislation that will make

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crimes against humanity a violation of U.S. law, for two reasons. First, in so doing we can send a clear signal to the world that we recognize these crimes as violations of our common humanity. Second, by taking this step we can reinforce the importance and impact of accountability.

We have seen some but insufficient progress in worldwide efforts to hold the perpetrators of genocide and crimes against humanity to account. More and more countries, among them emerging democracies in Africa, are dispatching the perpetrators of Rwanda's genocide to the tribunal in Arusha. We have seen the prosecution of the perpetrators of crimes against humanity in the former Yugoslavia. The American prosecutor David Crane took the unprecedented if too little noticed step of indicting a sitting head of state, former President Charles Taylor of Liberia, for his crimes in Sierra Leone, thus holding accountable one of the worst of the world's perpetrators of crimes against humanity.

Referrals by the United Nations Security Council to and actions by the International Criminal Court have seen the indictments of perpetrators in Sudan, Uganda and the Democratic Republic of the Congo. And just last week, the Security Council issued a statement, significant for the fact that it reflected the unanimous support of the Council, that demanded that the Government of Sudan turn over to the Court the indictees that not only remain free, but have been given positions of prominence in that government.

To be truly effective, the international community must fashion an unbreakable chain of accountability – one that ensures that the perpetrators of genocide and crimes against humanity can neither seek nor secure safe haven in any country on earth. To be truly effective, the international community must also ensure that its stated support for accountability is backed by meaningful pressure on those who attempt to evade it.

The tragic reality of today's world is that though we have made progress towards these ends, we are still witnessing but not halting ongoing crimes against humanity, in part because the international community has failed to send a strong and unanimous signal that those who commit crimes against humanity will be held to account.

Mr. Chairman and members of the Committee, one of the reasons we are today discussing the crisis in Darfur – one that began over five years ago and has been defined as genocide by both the U.S. Congress and the President of the United States, but one which continues to escalate – is because the perpetrators are not being held accountable for their actions. In the absence of any evidence to the contrary, the perpetrators of genocide and crimes against humanity in Darfur believe that they will pay no price for their actions. In the absence of any evidence to the contrary, their victims believe, and rightly so, that the world's most powerful countries have abandoned them.

Ending genocide and crimes against humanity in Darfur requires that we attack on multiple fronts. First, we desperately need a sustained peace process, backed by robust and persistent diplomacy and reinforced by the pressures and incentives that can motivate

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the parties to act. Second, we need to protect the civilians that still, five years in, are awaiting a viable and effective peacekeeping mission that can keep their attackers at bay.

Third, and for today and for tomorrow, we need to hold the perpetrators of genocide and crimes against humanity to account - to inform their calculations, to make clear that their actions have consequences, and also to send a clear and unambiguous signal that the international community will hold to account those who violate our common humanity.

The United States should do everything in its power to ensure that accountability is both pursued and achieved when crimes against humanity occur, and for several reasons. First, it is the right thing to do. By championing the cause of accountability, we send a signal to the international community that the United States stands for justice and reinforce the moral foundations from which we lead.

Second, our full and unwavering support for and pursuit of accountability strengthens both the architecture for and potency of the rule of law on the world stage, and enhances our ability to close the net on those who seek refuge from justice.

Third, it is in our national interests. If unchallenged, the violence that defines crimes against humanity feeds on itself: conflicts spread, institutions crumble, economies decline and young people are taught the dangerous lesson that violence is a more potent tool for change than is hope.

Consider Darfur, a crisis that was contained in western Sudan when it first erupted but has now spread to Chad and has also undermined the fragile peace in Southern Sudan. Look at the Democratic Republic of the Congo, where the echoes of the Rwandan genocide still resonate, and where the unchecked cycle of impunity has contributed to an environment where rape is both rampant and tolerated. The United States can afford neither the instability that arises nor the human and economic losses that occur when crimes against humanity go untended.

Fourth, accountability is the sledgehammer with which we can shatter the vicious cycle of impunity. It is a tool that enhances our ability to bring crimes against humanity to an end and to prevent their recurrence in the future. Though we are focusing on Darfur today, we should recall that Sudan is a country that has been at war throughout the 19-year tenure of the current government. It is a country ridden by a pattern of crimes against humanity – first in the South, and now in Darfur. A peace process might end the conflict in Darfur, and a viable peacekeeping mission might afford Darfur's people the protection they need and deserve. But only the comprehensive application of accountability will break the pattern of violence and abuse that has dominated Sudan for decades.

Enacting legislation that would make crimes against humanity a violation of U.S. law will not end the genocide in Darfur. It will, however, add another link to the chain of accountability. Ensuring that those who commit crimes against humanity are in violation

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of U.S. law is in our national interests, and clearly in the interests of the victims who have few if any protectors or defenders.

There are those who argue that accountability is important, but sometimes inconvenient. Prominent analysts of Sudan have, for example, suggested that the recent suggestion by the ICC's Chief Prosecutor Luis Moreno Ocampo that the Sudanese state may be complicit in crimes against humanity is both political and dangerous. As to the politics, it is my strong belief that these critics are wrong. Though the role of the ICC remains a matter of debate in the United States, we would be well-served to follow the Court's example and ensure, as the Special Prosecutor has done, that the prosecution of crimes against humanity is driven strictly by the evidence and consistent with clear legal definitions of these crimes.

Proponents of the "dangerous" argument posit that suggesting that the Sudanese state is in some manner responsible for crimes against humanity risks fueling the regime's intransigence, thus undermining the peace process and making resolution of the Darfur crisis more difficult.

To those critics I would say this. For over five years, the international community has given the Government of Sudan a free pass, and while we have secured indictments and demanded Khartoum's compliance, we have exacted no cost for that Government's steadfast refusal to take responsibility – to be accountable – for its actions. The government in Khartoum continues to unleash its wrath on civilians, to obstruct the will of the International Criminal Court and the UN Security Council, and to hold the rule of law in contempt.

The men who lead that government may be ruthless, but they are also intelligent and calculating. And the evidence is in – they have altered their behavior only when they have faced meaningful pressure wielded by a united international community, whether in the case of their effort to get out from under multilateral sanctions imposed by the Security Council in the 1990s or to prevent being on the wrong side of America's "war on terror," or the resolution of the devastating war in Southern Sudan. This is a government that has proven itself capable of change only when its direct interests are challenged and they are afforded no alternative.

Today, they have an alternative. They have refused to facilitate or allow the full deployment of the UNAMID peacekeeping force. They have refused to hand over to the ICC those who have been indicted for war crimes or crimes against humanity. They have obstructed humanitarian operations. They have refused to restrain the *janjaweed* militia. They have attacked the civilians they claim to represent with a devastating impunity. And for as long as they know that they will not be held accountable, they will continue.

In closing, I would like to thank you, Mr. Chairman, and members of this Committee, for the leadership you have demonstrated. In the short lifetime of this Subcommittee, you have shed light on the world's most egregious violations of our

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common humanity, and taken measures to ensure that the rule of law trumps genocide and that those who perpetrate it are held to account.

It is my hope that you will continue on this path, and make crimes against humanity a violation of our laws here in the United States. In so doing, you will earn the strong support of a growing number of Americans who believe, as you do, that crimes against humanity violate not only their immediate victims, but also violate all who champion the cause of human dignity and believe in our common humanity. You will also, and perhaps most importantly, earn the unspoken but unwavering gratitude of those many millions of victims of crimes against humanity who look to the United States to champion the cause of justice.

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