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Mr. Chairman, Ranking Member Forbes, and distinguished members of this Subcommittee, it is an honor to appear before you. I am especially grateful for the opportunity to share my views about a subject that could hardly be more important and consequential—the role of the United States in combating genocide through the rule of law.

As a party to the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"), which the United States ratified in 1988, the United States has recognized that genocide is a crime under international law and has vowed to prevent and punish it.[1] Yet we have not always honored our commitment to prevent genocide when we have been in a position to act, and the principal law implementing our treaty obligation to punish genocide does not go as far as it should. In particular, it does not empower U.S. authorities to bring genocide charges against foreigners who are believed to have committed genocide abroad and have sought sanctuary in our country. My remarks this afternoon will focus on this gap, both because of its significant implications and because of the ease with which this problem can be fixed.

As a foundation for my remarks, I would like to place the significance of current U.S. legislation concerning genocide against the broader backdrop of our decades-long national struggle to confront this extraordinary crime.

As a nation, we have at times provided extraordinary leadership in confronting genocide and other mass atrocities—and, at critical times, we have faltered or failed when our consciences should have summoned us to respond to a real-time campaign of extermination.

In our failures, we have scarcely stood alone. Every genocide that has been allowed to take place—or to continue unchecked once under way—represents an indelible stain on global conscience. For every State that has the capacity to counter the consuming carnage constituting genocide has a responsibility to do what it can to stop it in its tracks.

Lemkin's Law—Making Genocide an International Crime

This point may seem morally obvious, but it was an uphill struggle even to make genocide a crime in international law, much less to assure implementation of that law. Raphael Lemkin, the Polish scholar who devised the word *genocide* and then campaigned relentlessness for a treaty outlawing it, thought it unthinkable that international law did not criminalize violence whose aim is to obliterate a human community, not because of something they had done but because of who they are—members of a religious community, an ethnic clan or a racial group. In fact, Lemkin realized, this all-too-familiar crime of annihilation did not even have a name that captured its unique depravity.

Lemkin gave the crime a name, fashioned from the Greek word *genos*, meaning race or tribe, and the Latin root for killing, *cide*. It took longer, however, to persuade

world leaders to outlaw genocide, although Lemkin campaigned relentlessly to make this happen. For Lemkin, it was essential to confront genocide through law—not an all-too-fragile code of conscience, but an enforceable law of humanity. Thus Lemkin would have been gratified by the premise implied by the name of this hearing, "Genocide and the Rule of Law."

Lemkin's tireless crusade culminated in 1948 when the fledgling United Nations General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide. But Lemkin did not live long enough to see his adoptive country, the United States, become a party to the treaty. Lemkin died in 1959, 29 years before the United States ratified the Genocide Convention.

The Genocide Convention

The Convention itself is brief, imposing just two principal duties: In its first article, the treaty confirms that genocide is a crime under international law which States parties undertake to both to *prevent* and to *punish*. Before the treaty elaborates on these two obligations, Article II sets forth what has become the authoritative definition of genocide under international law.

To those who are unfamiliar with this area of law, the treaty's definition of genocide may seem surprisingly narrow. To constitute genocide, a perpetrator must have committed at least one of five enumerated acts and must have done so with the very specific and narrow intent to destroy, in whole or in part, a national, ethnic, racial or religious group "as such." It is not enough that the perpetrator killed a large number of people who share, say, a common ethnic affiliation. Instead, the perpetrator must have intended through his acts to destroy the ethnic group itself, in its entirety or in substantial part.

The five acts constituting genocide when committed with genocidal intent are:

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

The Duty to Prevent Genocide

As noted earlier, the first duty imposed by the Genocide Convention is to prevent genocide. For countries that have ratified the treaty, including of course the United States, this means not only taking action to combat conditions that are conducive to genocide in their own societies, but also taking effective action to stop genocide when they see it taking place *beyond* their shores. In short, the Convention recognizes, *wherever* genocide occurs, it engages the responsibility of countries' *everywhere* to take action in their power to bring it to an end.

The Duty to Punish Genocide

The second duty assumed by parties to the Genocide Convention is to *punish* genocide when it occurs. The Convention provides not only that individuals committing genocide "shall be punished,"[2] but also that conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide "shall be punished." Of particular relevance to this hearing, the Convention requires States parties to enact legislation to give effect to the treaty, particularly by providing "effective penalties for persons guilty of genocide" or related acts, such as attempting to commit genocide.[3]

The two obligations imposed by the convention—to prevent and to punish genocide—are related, of course: If each country made good on its promise to punish genocide whenever it occurred, the scope for this horrific brand of carnage would be radically diminished.

United States Ratification and Implementation of the Genocide Convention

Once the United Nations adopted the Genocide Convention, it took the United States another forty years to ratify it. Congress paved the way for U.S. ratification in 1988 by enacting the Genocide Convention Implementation Act of 1987, known as the Proxmire Act for the Senator who (like Lemkin) tirelessly campaigned on behalf of the Genocide Convention—this time for U.S. ratification.

It is the duty to *punish* genocide that the United States sought to implement through the Proxmire Act. That act, codified in section 1091 of title 18 of the United States Code, makes it a federal crime to commit genocide; to attempt its commission; or to directly and public incite others to commit genocide when the offense is committed in the United States or the alleged offender is a U.S. national.

When read together with other provisions of the federal criminal code concerning conspiracy and complicity, the Proxmire Act for the most part fulfills the legislative obligations concerning punishment set forth in the Genocide Convention. In fact, by making genocide a crime when committed abroad by a U.S. national, the Proxmire Act goes farther than what is required by the explicit text of the treaty. Article VI of the Genocide Convention explicitly requires prosecution only by the State in which genocide occurs or by an international criminal court, while not excluding other venues for prosecution.

Gaps in U.S. Law

But if the Proxmire Act largely fulfilled the explicit legislative obligations relating to punishment imposed by the Genocide Convention, both the treaty itself and our implementing legislation have become anachronistic in light of broader developments in international criminal law during the past two decades. More important, our legal framework is not sufficient to ensure punishment of individuals who commit genocide and then seek sanctuary in this country.

Let me first explain why the framework of prosecution reflected in current U.S. law is anachronistic. Specialized human rights treaties of more recent vintage than the Genocide Convention, such as the 1984 Convention against Torture and the 2006 Convention on Enforced Disappearance, require States parties to establish their criminal jurisdiction over persons suspected of committing the core treaty crime—torture, for example, or enforced disappearance—not only when the crime was committed in their own territories or by one of their nationals, but also when it was committed outside their territories, even when the victims were not their nationals, when the alleged perpetrator is in their territory and is not extradited for trial in another jurisdiction or transferred to an international tribunal.

States have long recognized that this option—that is, the ability to prosecute foreign nationals who have committed atrocious crimes abroad—must be available, not as a tool of first resort but instead one of last resort. For obvious reasons, this option must be available in situations where a person believed to have committed a crime of global concern enjoys impunity in the country where he or she committed her crimes and no other appropriate forum is available for prosecution. What has changed in recent decades is a markedly greater willingness by States to exercise jurisdiction in these situations. This change is reflected, among other ways, in the approach taken in the two treaties I just mentioned.

Several developments have led a significant number of countries to adopt or enforce legislation establishing jurisdiction over genocide, wherever committed, if the perpetrator is in their territory. The developments underlying this trend include,

tragically, the 1994 genocide in Rwanda and “ethnic cleansing” in the former Yugoslavia, which included the 1995 Srebrenica genocide. These and other recent episodes of mass atrocity gave rise to the creation of several international tribunals, starting in 1993. To our credit, the United States took the lead in establishing these tribunals and has provided crucial support to their operation.

The very establishment of these tribunals signaled a new international resolve to ensure that perpetrators of atrocious crimes would be prosecuted, and helped nurture an expectation that they would in fact face the bar of justice. Yet none of these tribunals would be able to prosecute more than a small fraction of perpetrators. In this setting, some countries began to prosecute perpetrators of mass atrocities, including genocide, who had sought haven in their territories.

In contrast, the United States cannot prosecute foreigners who have committed international crimes other than torture and various acts of terrorism and then seek sanctuary here. Remarkably, we can prosecute a foreigner for torture but not genocide. Thus, if we discover that a notorious alleged perpetrator of the 1994 genocide in Rwanda is living in the United States—and in fact this has happened—our genocide law does not allow federal prosecutors to bring genocide charges against the suspect; we can only deport him.

During the past eleven years, we have narrowed the impunity gap created by this loophole in our law, but we still have not done nearly enough. For example, a law enacted in 1996[4] permits the United States to transfer individuals indicted by either the International Criminal Tribunal for Rwanda or the International Criminal Tribunal for the former Yugoslavia, both of which have jurisdiction over genocide, to the relevant tribunal, and the United States has done so. But the Rwanda and Yugoslavia tribunals are in wind-up phase: they are no longer taking on new cases, and they never had the capacity to try more than a fraction of the atrocities that led to their creation.

In 2004, Congress took another important step by amending our immigration law to expand grounds for denying admission to and excluding aliens on human rights grounds.[5] Congress also directed the Attorney General, when considering appropriate action against aliens believed to be responsible for certain offences that include genocide, to give “consideration” to “the availability of criminal prosecution under the laws of the United States” or “of extradition . . . to a foreign jurisdiction that is prepared to undertake a prosecution” for the conduct that may underlie removal or denaturalization.[6] While this is an important acknowledgment that persons suspected of genocide should be prosecuted in an appropriate jurisdiction, the Attorney General’s options are unwisely limited.

As I have already noted, under current law the United States cannot prosecute a foreign national for genocide committed abroad, even if the victims included U.S. citizens. As for extradition to a foreign jurisdiction, in countries that have recently been scourged by genocide the judiciary is likely to be in shambles. Consider Rwanda. The Rwandan government estimates that over half a million people participated in the 1994 genocide and at one point had jailed some 130,000 suspects. Yet when the 1994 genocide was over, only eleven Rwandan lawyers reportedly survived. While estimates vary, at least 60,000 suspects are still believed to be in custody awaiting trial in Rwanda on charges relating to the 1994 genocide.

And so when the Attorney General is directed to consider options for prosecuting a genocidaire in our midst, his options may prove largely illusory.

The Genocide Accountability Act of 2007, which was adopted by unanimous consent in the Senate and has been introduced in the House, would fill the most significant gap in our law against genocide: It would make it possible for federal prosecutors to issue genocide indictments against foreign nationals who allegedly committed genocide abroad and then sought sanctuary here.

In doing so, the legislation would hardly break new legal ground, even under United States law. As a party to the 1984 Torture Convention, the United States enacted

legislation[7] enabling U.S. courts to exercise criminal jurisdiction when the alleged offender is a U.S. national or when he or she "is present in the United States, irrespective of the nationality of the victim or alleged perpetrator." Last December, the United States brought its first indictment under this law.

Nor would the Genocide Accountability Act of 2007 establish the United States as a forum of first resort for prosecuting *genocidaires* found in our territory. We would still be able to extradite a genocide suspect for trial abroad in a forum that may be more appropriate than the United States. But what the proposed law *would* do is enable U.S. prosecutors to ensure prosecution of those who have committed one of the most serious crimes imaginable when there is no realistic prospect of a fair prosecution in another forum. In doing so, we would strike a powerful blow against the impunity that encourages atrocious crimes.

Conclusion

Those who commit genocide count on our acquiescence, confident that they will not be held to account for crimes that we can scarcely bear to imagine. The Genocide Convention was intended above all to shatter the confidence of genocidaires, transforming our enabling passivity into mobilized action grounded in law. Yet the United States is now legally disabled from taking one of the more effective steps we could and should take to deal with genocidaires in our own midst—bringing them to justice. By passing the Genocide Accountability Act of 2007, Congress would make a major contribution in combating the impunity that sustains genocidaires.