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The Collective International Responsibility to Protect: The Case of Darfur

BRIDGET ARIMOND:^{*}

¶1 For our concluding panel for the conference, we are going to be continuing our inquiry into the collective international responsibility to protect. We will be moving our focus from Rwanda and looking instead at Darfur.

¶2 As the world commemorated the tenth anniversary last year of the massacre in Rwanda, the words of the mantra “never again,” of course, were repeated over and over.

¶3 Now, however, we are going to shift from looking at hindsight – which, as the truism goes, is 20/20 – and talk instead about our vision for what should be happening in the present and in the future in terms of a collective international responsibility to protect.

¶4 For this we are going to be looking at the situation in Darfur. We have four very distinguished speakers with us today. We will begin with Georgette Gagnon, who will make some brief introductory remarks and then show a six-minute video that she has brought with her today about Darfur. We will then hear from Ms. Gagnon and from our three other speakers and have an opportunity briefly to ask some questions and discussion from the audience.

¶5 So, I give you Georgette Gagnon with Human Rights Watch.

GEORGETTE GAGNON:^{**}

¶6 Good morning. We conduct on the ground fact-finding investigations into the most serious human rights crimes, genocide, war crimes, torture, and violence against innocent people in all regions of the world to expose human rights violations and to hold abusers accountable.

^{*} Professor Bridget Arimond joined Northwestern Law in 2003 as a Clinical Assistant Professor and Assistant Director of the Center for International Human Rights. Prior to joining the Northwestern faculty, she litigated class action and other systemic race and sex discrimination cases in US federal courts, including cases involving employment discrimination, defense of affirmative action programs, voting rights, and other equal protection issues. In addition to working in private practice, she has directed a women's rights program for low income women and girls at the Legal Assistance Foundation of Chicago, and has served as the City of Chicago's Special Deputy Corporation Counsel for Affirmative Action. Professor Arimond is an honors graduate of Stanford University and of Harvard Law School.

^{**} Georgette Gagnon is Deputy Director of the Africa Division of Human Rights Watch. She led the organization's most recent mission to Darfur and Khartoum. As a member of the Canadian Assessment Mission to Sudan and an advisor to the International Eminent Persons Group, Ms. Gagnon confronted human rights violations and problems of international business accountability in war-torn countries. She previously served as Director of Human Rights for the Organization for Security and Cooperation in Europe (OSCE) Mission to Bosnia and Herzegovina. Ms. Gagnon has also served in key roles in projects to strengthen human rights and the rule of law in China, India and Rwanda. In 2003 she received Canada's prestigious Walter S. Tarnopolsky Human Rights Award. Ms. Gagnon is a graduate of the University of Calgary, has a law degree from Osgoode Hall Law School of York University, and received her LL.M with Distinction in International Human Rights Law from the University of Essex in the United Kingdom in 1998.

¹ S.C. Res. 1556, U.N. Doc. S/RES/1556 (July 30, 2004).

¶7 In times of conflict, of mass atrocity, we provide real-time information about the situation while it is happening. We believe that sharp diligence, timely protest, and real accountability can prevent the human rights tragedies of the twentieth century from recurring.

¶8 We not only document atrocities, we advocate ending them. We put forward solutions or actions we believe can be taken now to mitigate human suffering and to provide accountability for atrocities and justice for the victims.

¶9 Human Rights Watch has been covering Sudan for thirteen years. Since conflict broke out in Darfur in Sudan's western region more than eighteen months ago between the central government in Khartoum and two Darfurian rebel groups, Human Rights Watch has been on the ground in rebel-held areas, on the Chad-Sudan border and in Khartoum and government-controlled areas.

¶10 We have interviewed hundreds of witnesses and victims of abuses in Darfur, government officials, and militia leaders, members and leaders of the rebel groups, representatives of international and local nongovernmental organizations and the African Union, and met many times with UN Security Council members and other governments. We have published several major reports on Darfur and put out numerous press releases, letters, and carried out extensive global advocacy.

¶11 I recently returned from a month in Darfur conducting our most recent investigation and you will now see a video we have prepared to show the world, to show you what is happening in Darfur. After the video I will give you an update on the situation there and the prospects for improvement. Thank you.

¶12 (The video was played at this time.)

GEORGETTE GAGNON:

¶13 Since that film was taken, the situation in Darfur today for civilians, particularly those from the same ethnic groups as the rebels, has not improved. For most, it has gotten worse. Some 2.3 million people, almost all of Darfur's population, has now been affected by the conflict through continuing attacks on villages, killings, rapes, looting, and destruction of property, and forced displacement by Sudanese government troops and their allied Janjaweed militia, or by the near total collapse of the region's economy.

¶14 The UN now estimates that 1.8 million people have been displaced. Most are now living in huge, squalid, displaced-persons camps in Darfur under government control and remain all but imprisoned there due to continuing violence in rural areas where they fled from. Protection for those civilians still in rural areas and outside the displaced camps remains almost nonexistent as a result of the continuing presence of the government-backed Janjaweed militias. In Darfur, I heard the same story from many displaced persons: "If we return, we will be killed."

¶15 When they did try to return to their homes, they were attacked, often several times. Women were raped or assaulted by these militias who continue to operate in spite of Sudanese government's pledges to reign them in, disarm them, and hold abusers to account. Of course, the longer the displaced people are in those camps, the more likely it is that ethnic cleansing will be consolidated in front of all of us. The total number of conflict-related civilian deaths is now estimated to be at least one hundred thousand.

¶16 Today, prospects for an imminent end to the atrocities in Darfur remain bleak. The Sudanese Government has neither improved protection for civilians nor ended the

impunity for crimes against humanity enjoyed by its own officials and allied militia leaders. And the international response so far has failed to stop the killings, protect civilians, or ensure accountability.

¶17 Despite a cease-fire agreement and other agreements brokered and monitored by the African Union (or AU) between the Sudanese government and the rebel groups, in December the government launched a major offensive with bombing of civilians and rebel targets in South Darfur. The rebels have also increasingly violated the cease fire.

¶18 AU-sponsored peace talks between the parties have made little progress. After lengthy negotiations, the Sudanese government consented to the deployment of 3,300 AU troops in Darfur by the end of 2004 with a mandate to observe the cease fire, report on violations only, and protect civilians whom they encounter under “imminent threat and in the immediate vicinity, within their resources and capability, it being understood that protection of civilians is the responsibility of the Government of Sudan.”

¶19 So far only 1,200 AU troops are in Darfur and logistical support has been a problem despite significant US and EU funding. Even the full contingent of 3,300 in an area the size of California is not nearly enough to do the job to protect civilians and provide security throughout Darfur.

¶20 It is important here to note Sudan’s other war in the south, a twenty-one year conflict between the Sudanese government and the main southern-based rebel group that was just settled by peace agreement on January 9th. This followed several years of intense negotiations. The conflict in Darfur, however, was not included in those negotiations, and there is no agreement that any of the 10,000 UN peacekeeping troops that are to be deployed to monitor the southern peace deal will go to Darfur.

¶21 So, today, we have a continuing human rights crisis in Darfur that is, in our view, a compelling example of the international community’s failure of will right now to prevent and redress the most heinous human rights crimes, a failure of our international responsibility to protect. Despite countless denunciations, three Security Council resolutions, and endless professions of concern that included a US proclamation that genocide has been committed in Darfur, little has been done to protect the people of Darfur.

¶22 In the face of overwhelming evidence, the Sudanese Government is unable or unwilling to protect its own citizens. Why has this happened? Why is this the case? There are many reasons. I will offer a few, and I am sure some of the other panelists will also offer some.

¶23 Once more, the Security Council has been hampered by its permanent members’ threatened parochial use of their veto. A veto that the UN’s High-Level Panel on Global Threats recommended should never be exercised in cases of genocide and large scale human rights abuses. China has been the main problem, showing more concern for protecting its lucrative oil contracts in Sudan – China is Sudan’s largest oil investor – than for protecting thousands of Darfurian lives. Russia, protecting its own valuable arms sales to Khartoum, has seconded this cold-hearted unresponsiveness.

¶24 These veto-carrying Security Council members have opposed targeted sanctions on, for example, Sudan’s oil industry, travel bans, and seizure of assets on the government’s ringleaders of the Darfur slaughter, or an arms embargo on the government, while other members have opposed tougher measures arguing that too much pressure on the Sudanese government would have threatened the peace talks with the

South. This prompted the US to tone down its Security Council proposals which then predictably turned into rather weak resolutions.

¶25 The result is the Sudanese government and its militia continue to commit atrocities leaving hundreds of thousands of Darfurians at the mercy and under the thumb of their killers. Not enough international pressure has been exerted on Khartoum to force it to end its crimes against humanity. We say the international community needs to do at least two things urgently to begin to end atrocities in Darfur.

¶26 First, there needs to be greater international protection. This can be provided only through a large UN-authorized military force that supplements the AU force under Chapter VII mandate with a clear mandate to protect Darfur's civilians, reverse ethnic cleansing, and create conditions of security to permit them to return home.

¶27 The second is to ensure that those responsible are prosecuted. The Sudanese government has done nothing to see justice done. It is clearly unwilling to hold perpetrators of atrocities to account. A Sudanese presidential inquiry into abuses last week disputed evidence of widespread and systematic abuses and, instead of prosecution, recommended the formation of a committee. International prosecution is needed to silence the denials of responsibility from Khartoum and to signal to the people of Darfur that the world no longer considers their death and forced displacement acceptable or, in the words of General Dallaire, that they count.

¶28 Today, the UN Commission of Inquiry for Darfur reports to the Secretary-General on its investigation into violations of international human rights and humanitarian law and allegations of genocide. The Security Council will have to decide whether to refer Darfur to the International Criminal Court, or ICC, since Sudan is not a party to the ICC statute.

¶29 Here, I note for you the High-Level Panel's recommendation that the Security Council should stand ready to use its authority to refer appropriate cases to the ICC. With its mandate to try those who bear the greatest responsibility for genocide, war crimes, and crimes against humanity and where national courts are unwilling or unable, the ICC was designed precisely for situations like Darfur. And we ask any Security Council members who for various reasons cannot support a referral of Darfur to abstain, not veto referral.

¶30 When I recently spoke with Sudanese leaders in Khartoum about possible ICC prosecution, they were visibly worried. In fact, several of them started to sweat big drops of water. These worldly officials are not eager to spend their dying days dodging arrest in the Sudanese desert. ICC involvement and the threat of prosecution would in our view have an immediate deterrent effect helping to save many lives.

¶31 It is the best and speediest option for justice for the people of Darfur, and it could, together with increased international protection, help prevent more Darfurians from losing their homes and livelihoods, spending more months, perhaps years, in awful displaced-persons' camps, and provide justice for the horrific crimes committed against the occupants of Darfur's mass graves.

¶32 Thank you.

BRIDGET ARIMOND:

¶33 Thank you, Georgette. I am going to turn now to Professor Paul Lemmens.

PAUL LEMMENS:

¶34 Okay. First of all, let me say that unlike the other speakers here at the table, I am not personally involved in this issue. I am not particularly familiar with the subject, but I will look at the Darfur problem as an outsider, with the recommendations of the High-Level Panel as a tool.

¶35 Before starting this, I should maybe also say that it strikes me that the Darfur problem receives much more attention in public opinion here in the United States than in Europe. Maybe it should deserve much more attention in Europe. There is some media attention, but less than for other crisis situations. And what is more, it is not really a political issue, as it has apparently been and still is in the United States. This is not to say that it is not an issue at all. All I want to say is that emotions do play an important role in issues of humanitarian interventions, and that in Europe we have not really reached that level of emotional involvement.

¶36 I am not going to say too much about what has been done at the level of the international community, in particular, the Security Council, to react to the Darfur crisis. We do not have the time for that. But let me highlight a few elements.

¶37 Having read all the relevant Security Council resolutions and statements that have been made, my impression is that during many months attempts have been made to come to arrangements with the Government of Sudan. And to recall the significant arrangement that was made on 3rd of July 2004 between the Government and the United Nations, where the Government of Sudan agreed to end impunity, to bring to justice those who had committed all those human rights violations, and to disarm the Janjaweed militia. It is an important agreement, but it has not been executed. And further action has then been taken when it became clear that the Government did not live up to its engagement.

¶38 There are two major resolutions of the Security Council: one of the 30th of July (no. 1556¹), the other of 18th of September (no. 1564²). In each of these resolutions there is, in particular, an insistence on the obligation of the Government of Sudan to disarm the Janjaweed militia, to arrest the people responsible, and to bring to justice their leaders. And in each of these resolutions, the Security Council also expresses its intention to consider further actions, including measures under Article 41 of the UN Charter, which are sanctions. The word “sanctions” is not used in the resolutions, but the reference to Article 41 is clear: these are sanctions which do not yet involve the use of force.

¶39 In the last resolution, the one of the 18th of September, the Security Council also asked the Secretary-General of the United Nations to set up the international commission of inquiry which has been mentioned, in order to investigate reports of violations of international humanitarian law and human rights law by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable. This commission has been set up in October under the chairmanship of Professor Cassese, former President of the International Criminal Tribunal for Yugoslavia. It has been said that the report is due exactly today, the 25th of January. I tried to check for any news before our meeting started, but I could not find anything yet.

² S.C. Res. 1564, U.N. Doc. S/RES/1564 (Sept. 18, 2004).

¶40 Now, having recalled these facts, could a more vigorous action have been taken, and should it now be taken? Is Darfur an illustration once more of the failure of the international community to react?

¶41 I will look at this primarily from the point of view of whether military force had to be used and whether it has to be used. No doubt that sanctions, including military actions, would have been lawful, and I can refer on this point to the report of the High-Level Panel, section 203. I think we discussed that already at length during our discussion of yesterday.

¶42 Would such action also have been legitimate? Would it have been a good idea to use military force in Darfur? The High-Level Panel sets forth five criteria in paragraph 207 of its report, and I will quickly go through each of them.

¶43 The first criterion is the seriousness of threat with respect to the situation of human rights. We all know –and we have seen it, as we watched the movie presented to us – that there have been large-scale killings. A number of several tens of thousand has been put forward. Millions – more than one million people have been internally displaced. This is very serious. Is it genocide? There is a lot of doubt in different circles whether this is genocide.

¶44 Médecins Sans Frontiers, who have been active in the field, have said, after the United States declared that there was genocide, that according to what they have seen, there is not really genocide. One can only speak of genocide where there is an intention to destroy a group, an ethnical group. The existence of such an intention is not so clear in this case. The EU is also hesitating very much to describe this as genocide. But whether or not the facts should be labeled “genocide” does not really matter. It is already serious enough, even without it being genocide.

¶45 Secondly, the proper purpose: would stopping the killings and the internal displacement be the primary purpose of a military action? There have been some rumors that there were also oil interests involved, but let us assume that the primary purpose in this case would indeed be to halt the serious violations of human rights.

¶46 Third criterion, the last resort criterion: has every non-military option been used? There have been a lot of negotiations with the Government. They have produced some results, but as I said, mainly on paper only. Sanctions, on the other hand, have never been effectively put in place. There have been threats to use sanctions, but a decision to take effective action has not been taken. That is certainly a missed opportunity, and I will come back to that.

¶47 Fourth criterion: proportional means; that is, the limitation of the action to the limit that is necessary. That criterion, at the moment is not very relevant since no action at all has been taken.

¶48 The fifth criterion is the most difficult one in this case. It concerns the balance of consequences: is there or would there be a reasonable chance of the military action being successful and what would be the negative consequences of such action?

¶49 On the one hand, what would be the chances of success of a military action? I am not in a position to assess that. But, what I know is that the Darfur region is a very big region, as big as California – we would say as big as France – with difficult transportation means. Certainly it must be easy for the militia and the rebel groups to continue to operate even if there are thousands of troops in the region. I am not sure whether one can say that success is reasonably guaranteed.

- ¶50 What about, on the other hand, the negative consequences of a military action? Georgette has pointed to a few elements that I also would like to mention here, from maybe a different point of view. It is clear that if sanctions and military action have not been imposed, this is because of, among other things, the ongoing peace process between the North and the South of Sudan.
- ¶51 Darfur is the West, but during twenty years, there was also a civil war going on between the North and the South. The international community has had good reasons, valid reasons, not to use military force, as it did not want to endanger the peace process by making it more difficult for the Sudanese Government to enter into a compromise with the rebels in the South.
- ¶52 And indeed, on the 9th of January of this year a comprehensive peace agreement has now been signed in Nairobi relating to the South. It does not apply to Darfur, but at least that other conflict seems to have come to an end. I note that the special representative of the Secretary-General of the United Nations, Mr. Pronk, has said that this agreement now offers a new opportunity. Further fighting in Darfur will make it difficult for the Government of Sudan, who also signed that agreement, to gain the international support needed for the implementation of the Nairobi agreement. On the other hand, the agreement also foresees that the rebels of the South, who were fighting the Government of Sudan, will enter into the Government of Sudan. That may also have an influence on the attitude that the enlarged Government will adopt with respect to Darfur.
- ¶53 The second element, as far as the negative consequences of military action would be concerned, is that Darfur is not only the problem of the Government of Sudan, but it has become a problem of the Muslim world. It is not merely an inter-Muslim conflict. The Arab League has stated that this is a problem that should be solved internally without intervention by the Western World. I think that, indeed, after Afghanistan, but certainly after Iraq, a new intervention in a Muslim country might just not be a good idea. And as Mr. Shattuck has said, the US has been unable to mobilize partners for such an intervention notably because of the Iraq trauma.
- ¶54 What is the conclusion on this point? The conclusion is not so easy. For the two reasons that I mentioned, I understand the hesitation on the part of the Security Council to enter Darfur, but objectively speaking, it is true that there was a failure from the point of view of the collective responsibility to protect. I am not sure that it has been a failure, thus far, not to use force. The consequences of such a force might indeed be worse than the advantages one could get from it. But it is undeniable that not all opportunities to impose sanctions have been used.
- ¶55 Let me end with a last point, specifically on one of the human rights issues: what should now be done with those who have committed serious violations of human rights in Darfur? I am thinking of the leaders of the Janjaweed militia, but also of those within the Government of Sudan who have condoned these actions and of certain leaders of the rebel groups.
- ¶56 This is the whole issue of impunity. It has to be addressed, because the Security Council resolutions made a really important point of this issue, and it would lose all of its credibility if it would be unable to take further action. It should assure that perpetrators can be brought to justice.

¶57 Theoretically speaking, there are four possibilities. The first one is that it is left to the national criminal system to deal with the criminals. That is what the Government of Sudan agreed to do, but apparently it is unwilling to do that, and one can understand the reasons why.

¶58 A second possibility is that of a mixed tribunal, mixed meaning partly national, partly international. Sierra Leone offers an example of such a mixed criminal tribunal, but this, requires the cooperation of the state involved and, again, this is an unrealistic solution.

¶59 A third option could be an ad hoc tribunal for Darfur. Theoretically, this would be possible, but the tribunal would have to be set up, and it would have to operate from zero. It would take time, precious time, before the tribunal would be able to act. Moreover, it would cost a lot and the efficiency would certainly not be assured.

¶60 And that brings us to the fourth option, the referral by the Security Council of the Darfur case to the International Criminal Court. Such a step would be in line with one of the recommendations of the High-Level Panel, which has said that “the Security Council should stand ready to use the authority it has under the Rome Statute to refer cases to the ICC.”

¶61 I think that Europe would certainly favor such a solution. We would not expect anything else. But we all know that the position of the United States with respect to the International Criminal Court is a different one. It is not for me, or for Europe, to make any recommendations on what attitude the United States could best adopt. This is a matter of internal policy.

¶62 I do not expect that the United States will openly vote in favor of a referral. But maybe the United States could abstain. If it would use its veto right, there would be a paradoxical situation: the very country that has most clearly stated that there was a genocide going on would then prevent the perpetrators being prosecuted before a court that would be able to try them.

¶63 I cannot imagine that the countries that are opposed to the present state of impunity, in particular the United States and the European states, would be unable to agree on the way to bring the perpetrators of the serious crimes to justice. Without such an agreement, the result would be that the state of impunity would continue. One does not need a lot of imagination to see how Russia and especially China would take advantage of such a situation: they could simply let the states favoring steps quarrel among themselves, and obtain what they want without having to come out for it. It would be more logical if China – and, to a lesser degree, also Russia – explicitly would be placed before its responsibility and before the choice of whether or not to use a veto right.

¶64 This is what I wanted to say about the Darfur case.

BRIDGET ARIMOND:

¶65 Thank you so much. If I can now ask Richard Williamson if we can go to your remarks. Thank you, Mr. Williamson.

RICHARD WILLIAMSON:

¶66 Thank you.

¶67 First, I am speaking from my personal perspective, and I want to again thank Professor Cassel for organizing this conference.

¶68 The presentation has been very interesting. I found especially interesting the observations of Canadian General Romeo Dallaire who served as United Nations Commander in Rwanda ten years ago during a time of hell.

¶69 In the context of Darfur, I would like to begin by making reference to Professor Benjamin Valentino's recent and important book, *Final Solutions: Mass Killing and Genocide in the 20th Century*. In this book, he has written that ethnic hatreds play a much smaller role in mass murder and genocide than most assume.³ He shows that the impetus for mass killings usually comes from a relatively small group of powerful leaders to counter threats to their power and to dissolve their most difficult problems.

¶70 In Sudan, for twenty years, a bloody civil war has raged between the Islamic government in Khartoum and the largely Christian rebels in the south. Over two million people have died due to this fighting and its consequences. Over the past few years, serious peace talks took place. As the framework of an agreement developed, there were some in the western Darfur region of Sudan who felt they were being disadvantaged.⁴ About eighteen months ago, a small rebel movement began.

¶71 Khartoum's response, because it was already spread thin due to the rebels in the south, was to arm a nomadic Arab militia known as the Janjaweed and encourage them to destroy villages and put down the small rebellion in Darfur.

¶72 It is well-documented that an attack of a village in Darfur was often proceeded by government helicopters shooting the village, which was followed by the Janjaweed on horseback and camels who came in, burned villages down, killed males, including babies, and raped women.

¶73 There is no question of an ethnic component, unquestionably initiated by those in Khartoum who wanted to hold on to their power in the face of rebellion in the south and initial agitation in Darfur to the west.

¶74 Let me say that the US has borne its share of responsibility for some of the terrible mass killings in the last seventy years. I do not mean my comments to try to suggest otherwise – in fact, Ambassador Shattuck detailed some of the US responsibilities to Rwanda as did the High-Level Panel in its report.

¶75 After World War II, when the world had learned the full horrors of the Holocaust, the international community said, "Never again."⁵

³ BENJAMIN A. VALENTINO, *FINAL SOLUTIONS: MASS KILLING AND GENOCIDE IN THE TWENTIETH CENTURY* (2004). *Accord* BILL BERKELEY, *THE GRAVES ARE NOT YET FULL: RACE, TRIBE AND POWER IN THE HEART OF AFRICA* (2001) (in which the author shows how "Africa's ruinous conflicts are not the product of age-old hatreds but of calculated tyranny"). *See also* ERIC D. WEITZ, *A CENTURY OF GENOCIDE: UTOPIAS OF RACE AND NATION* (2003); RUDOLPH RUMMEL, *DEATH BY GOVERNMENT* (1994); and *GENOCIDE IN THE TWENTIETH CENTURY: CRITICAL ESSAYS AND EYEWITNESS ACCOUNTS* (Samuel Totten et al., eds., 1995).

⁴ *See, e.g.*, Somini Sengupta, *War in Western Sudan Overshadows Peace in the South*, *NY TIMES*, Jan. 17, 2004, at A3; Chris Tomlinson, *Sudan, Rebels Finally Make Peace*, *CHI. SUN-TIMES*, Jan. 10, 2005, at 33.

⁵ *See, e.g.*, OMAR BARTOV, *MURDER IN OUR MIDST: THE HOLOCAUST, INDUSTRIAL KILLING AND REPRESENTATION* (1996); RICHARD BREITMAN, *THE ARCHITECT OF GENOCIDE: HIMMLER AND THE FINAL SOLUTION* (1991); CHRISTOPHER E. BROWNING, *ORDINARY MEN: RESERVE POLICE BATTALION 101 AND THE FINAL SOLUTION IN POLAND* (1992); DANIEL JONAH GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* (1996).

- ¶76 Then came the killing fields in Cambodia, and the international community said, “Never again.”⁶
- ¶77 And then came Rwanda. The mass murder was planned, as was discussed earlier. It was known. Yet, again the international community did nothing. And after 800,000 people (Tutsis and moderate Hutu) had been killed in a matter of ten weeks, mostly by machetes, neighbors killing neighbors, and the bodies were stacked high, the world said, “Never again.”⁷
- ¶78 Then came ethnic cleansing in Bosnia and Kosovo, and the world said, “Never again.”⁸ And now similar atrocities are being committed in Darfur, Sudan. The atrocities are horrific, and the international community’s response has been anemic.
- ¶79 Last March, President Bush publicly called for the Sudanese Government in Khartoum to reign in the Janjaweed and stop the razing of villages, the rape, and the murder.
- ¶80 More importantly, last April, Secretary-General Kofi Annan traveled to Geneva to give a speech to the United Nations Commission on Human Rights. Remember, it is the tenth anniversary of the Rwanda genocide. In his remarks, the Secretary-General called the atrocities in Darfur ethnic cleansing, and he called for action to put a stop to these evil acts.
- ¶81 Before the Commission on Human Rights had convened, I met with the President of the European Union, and we agreed on who would take the lead on this or that agenda item. The European Union indicated a desire to take the lead on the atrocities in Darfur. We were supportive, but we made clear our view that any resolution had to condemn the violence. It had to demand the atrocities end. It had to require free access for humanitarian aid to the victims. And it had to insure that international observers would be accepted in Sudan to monitor events on the ground. The European Union’s chair agreed.
- ¶82 However, over the next six weeks, as US delegations principally dealt with other questions, a series of negotiations went on between the African member states and the European Union Chair. Ten days before the conference was over, I was shown the language tentatively agreed to by the Africans and the E.U. President. I was alarmed. It did not condemn, did not call for international observers, and it did not demand an end to the killing. This language required no consultation with Washington. It fell so far short of any meaningful content that I immediately rejected it.
- ¶83 The dynamics that took over, I have seen it in other venues in the United Nations. Too great a premium was placed on consensus. In the effort to reach agreement, sometimes the consequences in the real world get lost.

⁶ See, e.g., THE CAMBODIAN AGONY (David A. Albin and Marlowe Hood, eds., 1990); ELIZABETH BECKER, WHEN THE WAR WAS OVER: THE VOICES OF CAMBODIA’S REVOLUTION AND ITS PEOPLE (1986); CHILDREN OF CAMBODIA’S KILLING FIELDS: MEMOIRS BY SURVIVORS (Dith Pran and Kim DePaul, eds., 1997); GENOCIDE AND DEMOCRACY IN CAMBODIA: THE KHMER ROUGE, THE UNITED NATIONS AND THE INTERNATIONAL COMMUNITY (Ben Kiernan, ed., 1993).

⁷ See, e.g., MICHAEL BARNETT, EYEWITNESS TO GENOCIDE: THE UNITED NATIONS AND RWANDA (2002); ALAN J. KUPERMAN, THE LIMITS OF HUMANITARIAN INTERVENTION: GENOCIDE IN RWANDA (2001); PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA (1998); SAMANTHA POWERS, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE (New York, N.Y.: Basic Books, 2002).

⁸ DAVID RIEFF, SLAUGHTERHOUSE: BOSNIA AND THE FAILURE OF THE WEST (1995).

¶84 On the second-to-the-last day of the conference, we were about to begin the session where we expected to vote on the robust resolution which satisfied our criteria and, I emphasize, also the criteria the European Union wanted.

¶85 Moments before the scheduled vote, some African delegations approached the Irish Ambassador, who was chairing the EU at the time. They caucused, and she agreed to compromise language that was far weaker than the text on which we were about to vote but showed some modest movement from the anemic language of the draft to which she had agreed earlier. Given the EU rules, her decision bound the other EU member states to that position.

¶86 Again, I do not think there was an evil intent, but this was due to the pressures and protocol to try to get consensus. Many of my colleagues, including the Irish Ambassador, implored me to consider the compromise language. They said to me, “Mr. Ambassador, you know how valuable consensus is in the United Nations. By agreeing with this new language the spirit of collegiality and cooperation in the Commission will be upheld. And, after all, this is the best we can do at this time.”

¶87 The US refused to go along. We reintroduced the stronger resolution, but it was defeated. The message to Khartoum was that, to the international community, the ethnic cleansing in Darfur was no big deal. And the killing continued.

¶88 In July, the United States took this matter to the UN Security Council and sought sanctions against Khartoum, or at least the threat of sanctions. Again, the international community failed. Certain permanent members of the Security Council with economic interests in Sudan – oil concessions and military sales – opposed any direct reference to sanctions. Also, African and Islamic members of the Security Council opposed sanctions. The result was another weak resolution and mixed message to Khartoum.

¶89 I think this raises disturbing questions about the role of the international community, because I never have heard a denial that these acts were going on, not even in discussions with the Sudanese foreign minister. I have never heard a denial of their brutality. Yet, ten years after Rwanda and when the UN General Assembly spent yesterday commemorating the freeing of Auschwitz, today it is expected that the report will say that genocide has not been satisfied in the atrocities in Darfur.

¶90 Secretary of State Colin Powell labeled the atrocities in Darfur genocide months ago.⁹ I doubt that the victims of Darfur care much about whether they are the victims of genocide or of ethnic cleansing. They certainly care that there is not a good faith effort to end it.

¶91 They only know the pain of great loss and suffering due to homes burned to the ground, men slaughtered, women raped, and the desperate life threatening conditions in which they live in IDP or refugee camps. And, they live the anguish of a painful and uncertain future.

¶92 The African Union has authorized thousands of troops to monitor the situation.¹⁰ The United States and some other donor countries are providing logistical and other

⁹ Steven R. Weisman, *Powell Says Rapes and Killings in Sudan Are Genocide*, NYTIMES, Sept. 10, 2004, at A3. See also Samantha Power, “It’s Not Enough to Call It Genocide,” TIME MAGAZINE, Oct. 4, 2004, at 63.

¹⁰ See Somini Sengupta, *African Union Strives to End Deadly Cycle in Darfur*, NYTIMES, Nov. 29, 2004, at A3.

support. Yet only a fraction of the authorized forces have been deployed. We must increase the international support to the African Union for this mission.

¶93 I still think it is unfortunate that we are not being more robust in pushing for sanctions on Khartoum.

¶94 And finally, I think the international community has a deep responsibility for restorative justice in Darfur and Sudan.

¶95 I can argue pro and con for the tribunal in Arusha or the special court in Sierra Leone, but the important thing is there should be a commitment to justice. It must be made clear to those engaged in evil acts and to others who might contemplate such despicable acts in the future that there is no impunity. Also, the victims must know their suffering is recognized, so they can find closure to move on to new lives.

¶96 Thank you.

BRIDGET ARIMOND:

¶97 Thank you, Mr. Williamson, for those remarks. We are going to move on to Professor David Scheffer.

DAVID SCHEFFER:***

¶98 I have several points to raise very quickly.

¶99 I want to return for a moment to the High-Level Threats report that I know you have had such good discussions about and try to relate that to the situation in Darfur. With respect to the recommendation and the discussion in the High-Level Threats report about the “responsibility to protect,” it was interesting for those of us who have been studying and looking at humanitarian intervention principles for so long, at how limited the application of this emerging principle actually was in the report, and the significance of that limited application for Darfur.

¶100 The “responsibility to protect” principle in the High-Level Threats report remains a principle that is exercisable only by the Security Council. It is not a principle that individual UN member states are invited to apply in addressing the situation in Darfur.

¶101 Thus it would be left to the political will of an institution – the Security Council – and its member state governments which would decide whether or not to embrace the “responsibility to protect” at any point in time, in any particular situation, and use the powers of the Security Council effectively to advance the principle.

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- ¶102 The “responsibility to protect” principle is one that is particularly relevant for Darfur. The principle is a challenge for the Security Council because it is invited by the report to use its existing authorities. So there is significant linkage in the report between what we all have long understood to be “threats to international peace and security” and the recognition of the emerging principle of “the responsibility to protect.”
- ¶103 The leap, of course, that must be taken is how to modify our thinking about Article 2(7) of the UN Charter, which is the “Do not tread on me” warning in the Charter unless there is a relevant Chapter VII enforcement resolution adopted by the Security Council.
- ¶104 The report is thus limited in its application of the “responsibility to protect” principle, but it is also rather ambitious in that it puts the challenge of humanitarian intervention directly into the forum of the Security Council, particularly the laps of the permanent members of the Security Council.
- ¶105 This very focused application of the principle of the “responsibility to protect” in the report forces us to examine its institutional application as well as the much more diverse application in either law or policy among 191 different governments around the world, each one of which might hold a uniquely different view about “the responsibility to protect” civilians at risk in Darfur.
- ¶106 As a subset to that point, one issue that lawyers would want to look at is whether, in the event there is a failure on the part of the Security Council to embrace the principle of the “responsibility to protect” for Darfur, another principle of law would emerge to confront the challenge. That alternative principle could be the principle of collective self-defense. Would it be possible for major powers to persuade the Government of Chad to invite the participation of those powers on the territory of Chad in order to stem the flow of refugees and deal with the refugee problem and the sources of that refugee problem as a threat to the sovereignty of Chad and to international peace and security?
- ¶107 That is the kind of legal stretch that many of us always are very concerned about, namely how to apply the principles of collective self-defense. But it certainly is a fall-back position in the event that we totally fail within the Security Council to act effectively ultimately in addressing the situation in Darfur.
- ¶108 The second point I would make regards the very important report from the Cassese Commission, which is scheduled for delivery to the UN Secretary-General today but will not be made public yet.
- ¶109 The international community has advanced far enough with respect to the issue of genocide – at least one hopes it has since the Rwandan genocide of 1994 – that we should not be waiting for the ultimate judgment of whether or not there is genocide in Darfur in order to strategize effective responses in the Security Council to the crisis.
- ¶110 The US Government certainly did not wait. It has been out front, and of course, Ambassador Richard Williamson has very adequately and effectively explained all of that. But, Assistant Secretary John Shattuck presumably explained earlier the errors that were made in 1994 regarding the use of the word “genocide.”
- ¶111 It should not be necessary to wait for the delivery of such a report for the Security Council to get on top of the situation and act very, very effectively.
- ¶112 It will be a sad commentary to the situation in Darfur if, when we look back years from now, we see that policymakers were waiting for the delivery of the Cassese report before taking definitive action to stop the atrocities that were occurring.

- ¶113 I have often articulated the view that we need to start understanding that what is occurring in Sudan are “atrocious crimes,” whether they be specific crimes of genocide, crimes against humanity, or war crimes.
- ¶114 In terms of the role of the US Government and what it does in response to such crimes, it does not matter whether anyone has defined the crime as “genocide.” That exercise can occur later in linking the acts of genocide with the criminal intent that must be established in order for a prosecutor to hold individuals accountable for the crime. But the Cassese Commission report should be helpful in moving the issue forward. I just want to sound the clarion call that we really do not have to wait one or two or three more weeks for the Security Council to have some greater assurance that there is a critical need to react effectively to the situation in Darfur.
- ¶115 The third point that I would make is that the High-Level Threats Report includes at least two major recommendations with respect to the role of the International Criminal Court.
- ¶116 The first recommendation is not directly relevant, but it certainly provides a context for the discussion. Recommendation No. 66 states that all UN Member states should join the 1949 Geneva Conventions, the Genocide Convention, as well as the Rome Statute of the International Criminal Court that will bring accountability for the violations of the conventions.¹¹
- ¶117 There is a clear and strong effort to get all nations on board as States Parties to the Rome Statute so that when we do discuss options with respect to the International Criminal Court, there is less debate about whether or not the ICC is a legitimate organization for nations to join.
- ¶118 Recommendation No. 12 of the High-Level Threats report is one that has already been mentioned in the discussion in this panel, and yet it is there front and center.
- ¶119 The Cassese Commission recommends that the Security Council should stand ready to use the authority it has under the Rome Statute for the ICC to refer situations involving genocide, serious war crimes, or crimes against humanity to the ICC.
- ¶120 I want to examine briefly how that could pragmatically unfold.
- ¶121 We do not need to revisit where the Bush Administration is on the ICC, but this would be one of those situations where if you were to look for an ideal situation that is least threatening to the United States and which the United States could gain most from in terms of allowing the ICC to operate effectively in an atrocity zone, it would be the Darfur situation.
- ¶122 Such a referral by the Security Council would be a Chapter VII enforcement properly tailored and conditioned for the circumstances. That was anticipated. It is not just a blank check for the ICC.
- ¶123 The Security Council resolution would establish the parameters of the ICC’s personal jurisdiction, of its territorial jurisdiction, and of its temporal jurisdiction with respect to its investigation of the Darfur situation.
- ¶124 The Security Council can tailor its referral under Chapter VII enforcement authority in a way that elicits support or acquiescence from every government sitting on the Security Council.

¹¹ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15-17, 1998, *Rome Statute of the International Criminal Court*, UN Doc. A/CONF.183/9* (July 17, 1998).

- ¶125 Those governments that have either expressed opposition to the ICC or are still deeply concerned about it obviously would have the option of abstaining on the resolution if it were to go forward in the Security Council.
- ¶126 That would be an honorable way for a reluctant government to handle the situation and still retain its political agenda with respect to the ICC.
- ¶127 If there is a referral by the Security Council, we need to recognize that Article 115 of the Rome Statute¹² does suggest an option of funding through the United Nations for some of the ICC's work with respect to this particular investigation.
- ¶128 That would be a concern, of course, to the US Government, and one way to get around that is to have some UN funding for the ICC, but to have it not on an assessed basis but on a voluntary basis.
- ¶129 A trust fund could be set up with General Assembly approval so that the United States would not have to bite that funding bullet which could also be a practical obstacle to supporting this kind of effort.
- ¶130 If the ICC were to accept the Darfur situation for investigation, there is a high likelihood that its capabilities would be exhausted.
- ¶131 In other words, it would have Uganda, the Democratic Republic of the Congo, and Sudan as officially adopted investigations fully occupying its limited resources.
- ¶132 The ICC already has budgetary problems. The idea that the ICC would be trying to figure out how to use its limited resources or somehow capturing US interests within its jurisdiction practically speaking would not be the case because the Court would be overwhelmed with three major investigations. Either the States Parties would have to appropriate an enormous amount of additional money for the ICC budget or the Court will just proceed with its three investigations.
- ¶133 The American Service Members Protection Act is the big qualifier in the United States with respect to the ICC. Yet the President could use his waiver authority under that law to provide US cooperation with the ICC on a Darfur investigation, which could be viewed as being in US interests to do so.
- ¶134 My final point is that even though we are all focused on the ICC in terms of the principle of accountability, the Bush Administration has been talking about alternative mechanisms, none of which, frankly, bear much pragmatic reality because of their cost, the long time it would take to set them up, the politics involved with so many different ad hoc options that would be on the table, all of which are terribly tough obstacles to surmount.
- ¶135 Even if there were an ICC investigation, there still would have to be a very dynamic second track to deal with the accountability and reconciliation issues associated with the large number of perpetrators and victims that would still have to be dealt with in some way, as the ICC would only investigate perpetrators at the leadership level.
- ¶136 The Darfur accountability challenge will exist for many years to come and various judicial and non-judicial mechanisms will need to be considered regardless of what happens on the ICC front. So many of those of us who have dealt with this type of issue know that the victims are not only concerned about the leaders who created the problem and launched the genocide, but they actually remain very focused on who actually committed the crime that so profoundly affected their lives.

¹² *Id.*

¶137 That is where all of these alternative mechanisms really come into play, and that is going to have to be another very strong element to any policy that develops with respect to Darfur.

¶138 Thank you very much.

BRIDGET ARIMOND:

¶139 Thank you, Professor David Scheffer. We will take some questions from the audience as a group, and then in our relatively short remaining time, I am going to invite each of our panelists both to respond to the questions from the audience and to make any remarks they would like to make in response to the other panelists' presentations.

AUDIENCE MEMBER:

¶140 I was wondering – Ambassador Scheffer's comments brought to mind – I am a psychiatrist, and it has been talked a lot about how the Security Council really is a group of member nations and you can not necessarily talk about the Council itself, it is the member nations who have to have the will, but I do know there are group processes that take affect, and I wonder if there has been study of the kind of group processes that might go on in the United Nations where as a group the nations might not necessarily act the same as they would when they are acting individually.

AUDIENCE MEMBER:

¶141 I would like to direct my question to the addendum to the human rights law, Chapter VII enforcement mission in Sudan, but if you look at the last occasion when the international community so interposed itself in a situation that there was not only no comprehensive political settlement but even any sort of semblance of peace on the ground, namely Kosovo, it seems that all we managed to do there is put the underlying political problems on hold, so to speak, perhaps even allowing it to fester.

¶142 So, I would just like you to respond to the assertion that perhaps if we were to take that route, would we not just be getting ourselves into another formidable situation as we seem to find ourselves now in Kosovo.

AUDIENCE MEMBER:

¶143 I think many countries have been reluctant to join the ICC until now, and Africa has especially few countries that have joined. Given this situation, do you think that a regional court would be more convenient than a domestic forum, like the IST in Iraq or like the international one that would not meet the reasons like you said?

AUDIENCE MEMBER:

¶144 This is probably not helpful, but the problem is not just genocide, but mass political killing of a hundred thousand or more.

¶145 Does that trigger the same sort of response, or is ethnic killing, ethnic cleansing somehow a specific crime that the international community can act on and ignore the other kinds?

AUDIENCE MEMBER:

¶146 My question has to do with the consequences of mass killings and genocide for Georgette Gagnon.

¶147 The question is, how do you protect human rights violations for refugees who have escaped Sudan and Darfur, such as in Egypt, examples in which their human rights will be violated, and is there a way in international response on how to do that?

AUDIENCE MEMBER:

¶148 With the High-Level Panel Report in the post Cold War era, there appears to be a reorganization in the role of the UN particularly in intervention policies.

¶149 My question is, what effect does this report or the interventions in the last decade have on the notions of sovereignty and in particular with less severe forms of human rights?

AUDIENCE MEMBER:

¶150 If, indeed, we are facing virtually certain vetoes in the Security Council from Russia and China on any serious action in Darfur, is it not another form of dithering on our own part to be sweating over whether we shall abstain or not in the United States.

¶151 Should not we already be looking toward something else?

BRIDGET ARIMOND:

¶152 Thank you for those questions. Professor Scheffer, could you lead off with response to those questions or some of them?

DAVID SCHEFFER:

¶153 I will respond to the third question, which is, "Would an international court somehow be a more convenient vehicle for accountability than a national court or a court similar to the special court on crimes against humanity that has been set up in Iraq?"

¶154 Sudan is a very different situation from most of the other situations that are on the international agenda today, particularly Iraq.

¶155 There is no invitation from the Government of Sudan or the will of the Government of Sudan to actually set up a separate special court within its national jurisdiction essentially to investigate itself in many respects, and that might be too much to expect of that particular government.

¶156 The Iraqi court is somewhat sui generis because the United States and the United Kingdom were military occupiers of Iraq, and thus had the capability of arranging that

type of court in Iraq. The United States does not have that kind of leverage or presence within Sudan.

¶157 But this does go back to my point, namely that I do think that you are going to have to look ultimately at a mix – not a mixed court but rather some kind of international court that would ultimately be joined with national efforts, both within national courts and national non-judicial means of addressing accountability and responsibility.

¶158 That also assumes some evolution of the political situation in Sudan for that to take place.

¶159 Regarding the fourth question about the problem of mass political killings: yes, there can be an effective judicial response to that because we put that normally under crimes against humanity as opposed to genocide.

¶160 We do have particular criteria that have to be met for crimes against humanity, including a widespread systematic application of a policy to assault the civilian population of whatever character. But crimes against humanity, as a category of crimes, does present the opportunity to look at what might be regarded as politicide for purposes of criminal prosecution.

¶161 As for the last question, if there are certain to be vetoes by Russia and China on the Darfur situation, why bother with an abstention strategy?

¶162 Well, I would think that an abstention strategy by the United States might play out as follows:

¶163 That we would accept European leadership on the Darfur situation within the Security Council; namely, to push forward with the Chapter VII enforcement resolution.

¶164 We would stand back with the intention of ultimately abstaining on the resolution, and we would, first of all, allow the Europeans to work with the Russians and Chinese to see if we could at least obtain abstentions from them.

¶165 It may not work, but I would think that our first step would be not to be in the lead.

¶166 We do not need to be in the lead at the Security Council on the issue of referring the Darfur situation to the ICC.

¶167 I think the better strategy is to position ourselves within the Security Council so that we get the right results.

¶168 Ultimately, the Chapter VII resolution referral to the ICC would embody our condition for abstention and thus satisfy US requirements for what needs to be in that resolution in terms of the parameters of the referral.

BRIDGET ARIMOND:

¶169 Thank you so much. I am going to turn now to Ambassador Williamson for your closing remarks in response to some of the questions.

RICHARD WILLIAMSON:

¶170 Thank you. I would like to touch on two of the questions.

¶171 I tried to address the issue of renewed dynamics a little bit in my remarks. There is no question that there is a unique dynamic within various UN venues. The rise of a premium on consensus has changed the dynamic within the UN in the post-Cold War era, where consensus suddenly became possible on some issues. It is my own view that smart political scientists and practitioners should give more thought to that.

¶172 I think, as a general rule, the United States is very poor at that sort of multilateral diplomacy, in part because of our tradition of bilateral diplomacy. We do not need multilateral diplomacy as much as other countries do, so we place a lower premium on it. In contrast, countries that are more dependent value multilateral diplomacy more and consequently have developed more skills at it and have become better practitioners.

¶173 I would also like to comment briefly on the question of the High-Level Panel Report and its effect on sovereignty. First, as I noted yesterday, the High-Level Panel Report will serve as a platform to launch some interesting discussion. Time will tell whether it has any impact beyond that discussion. I tend to think it will, but we shall see.

¶174 Second, I think the permeability of sovereignty is an issue that has been debated and discussed at great length, not only in the context of human rights but of economic factors, communication factors, etcetera, all of which have weakened sovereignty. I think that part of the tension between the European nations and the United States results from European nations' sacrificing some of their sovereignty to the process of the development and flourishing of the European Union. They hold sovereignty less precious than the United States, which is understandable given their experience, their geography, and their interests. That will be played out in many interesting ways, not always productively, but diplomatically and otherwise.

¶175 Thank you.

BRIDGET ARIMOND:

¶176 Thank you. Professor Lemmens, please.

PAUL LEMMENS:

¶177 A quick answer to maybe two of the questions.

¶178 One, what about the underlying political problem? I think that was also an issue that I tried to address. You cannot, indeed, in my opinion, go in, try to solve the situation militarily, and then leave the country with a political problem. And I think that is also one of the reasons why there has been so much hesitation in the case of Darfur to choose for the military option.

¶179 Second, there was another question on the possible regional court to be set up in Africa or by the Arab League. In principle, I think a court at the regional level is not a bad idea, but here, of course, the situation, the context should be taken into account. The whole context seems to show that the Sudanese issue has been taken up by the African continent, by the Arab League, in such a way that there may be some reasonable doubt as to whether it is a good idea now to leave the prosecution exclusively under the responsibility of that region of the world that has not been particularly eager to take action against the perpetrators. That is all that I want to say.

BRIDGET ARIMOND:

¶180 Thank you so much. Ms. Gagnon.

GEORGETTE GAGNON:

¶181 I will respond to the two questions posed to me.

¶182 First, I just want to be clear on Human Rights Watch's position. We do not advocate a non-consensual military intervention in Sudan, in Darfur. We are not advocating that. I do not know if that is what you thought. We do not think we are at that point yet. There is still more pressure that can be applied to the Government of Sudan to get it to consent – to force it to consent –to an increased international presence on the ground, so let us just be clear about that. We think the criteria have not yet been met.

¶183 Secondly, of course, there needs to be a political solution and no one is saying there should not be, and that is being pursued as well now by the African Union, and I think a new round of peace talks are starting January 31st.

¶184 Also the North-South peace agreement as has been suggested already may provide some answers for a political solution, the power-sharing solution to the issues between the Darfurian rebel movements and the Sudanese government. We are not sure whether it will, but it may.

¶185 And I will just answer the second question which is, how do you protect the human rights of those who are refugees from Darfur in Chad, for example. Well, there are a number of organizations working in Chad and in Egypt with the refugees, particularly the UN and others.

¶186 But I just might add some might argue that the refugees in Chad are in some ways better off than the internally displaced persons in Darfur, but all those groups greatly need more protection, and they need to be able to return home in safety and dignity and voluntarily.

BRIDGET ARIMOND:

¶187 Thank you so much. I would like to have a final round of applause for our panelists for their thoughts.