

# Stanford Law School

U.S. Commission on International Religious Freedom

“Ending Genocide:  
U.S. Government Genocide Determinations and Next Steps”

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Chair Bhargava, Vice Chair Perkins, Commissioners, and other esteemed guests, thank you for your focus on this pressing topic, for your important work, and for inviting me to participate in this conversation on the circumstances in which the United States has determined the commission of genocide against religious groups and the consequences that should flow from such a determination.

## The Genocide Determination Process

There is no formal process within the U.S. government for undertaking a factual or legal analysis of ongoing mass atrocities, including identifying the commission of crimes against humanity or acts of genocide.<sup>1</sup> As it stands, such determinations are undertaken on an *ad hoc* basis, usually confidentially, when mass atrocities are underway and the hallmarks of genocide are apparent. Given the importance of this exercise to both governmental policy and concerned civil society groups (including survivors and their communities), the Biden administration might consider establishing a more formalized system for making legal determinations about the nature of atrocities underway to guide strategic messaging, public diplomacy, accountability measures, humanitarian assistance, outreach to victims and survivors, and other policy interventions.<sup>2</sup> The United Kingdom is considering legislation in this regard, although their proposed process involves the courts rather than political or other non-judicial actors, which may not be the optimal approach.<sup>3</sup> In some circumstances, Congress has mandated that the Executive Branch collect information and offer a legal assessment of abuses,

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<sup>1</sup> See Todd Buchwald & Adam Keith, *By Any Other Name: How, When, and Why the United States has made Genocide Determinations*, U.S. Holocaust Memorial Museum, [https://www.ushmm.org/m/pdfs/Todd\\_Buchwald\\_Report\\_031819.pdf](https://www.ushmm.org/m/pdfs/Todd_Buchwald_Report_031819.pdf).

<sup>2</sup> See U.N. Office on Genocide Prevention and the Responsibility to Protect, When to Refer to a Situation as “Genocide,” Guidance Paper No. 1, <https://www.un.org/en/genocideprevention/documents/publications-and-resources/GuidanceNote-When%20to%20refer%20to%20a%20situation%20as%20genocide.pdf>.

<sup>3</sup> For a flavor of these debates over the proposed U.K. Genocide Determination Bill, which would vest the High Court of England and Wales with the power to upon petition make a preliminary finding of genocide, which would then empower the Foreign Secretary to refer the matter to the International Criminal Court or the U.N. Security Council, see U.K. House of Lords, Genocide & Crimes Against Humanity debate, Vol. 792 (Sept. 13, 2019), <https://hansard.parliament.uk/lords/2018-09-13/debates/CB30CF91-D412-4C1C-84A0-88A2E9D951CA/GenocideAndCrimesAgainstHumanity>. A similar bill pertains to the trade context. See Dr. Hemi Mistry, *The Proposed Genocide Amendment to the UK Trade Bill: Paper Tiger or Self-Inflicted Wound?*, EJIL: TALK! (Nov. 19, 2020), <https://www.ejiltalk.org/the-proposed-genocide-amendment-to-the-uk-trade-bill-paper-tiger-or-self-inflicted-wound/>.

as with the Uyghur Human Rights Policy Act of 2020, for example.<sup>4</sup> Efforts to pass similar legislation for Myanmar, in the form of the Rohingya Genocide Determination Act (which would require the State Department assess whether the persecution of the Rohingya constitutes genocide),<sup>5</sup> have failed notwithstanding strong civil society support and a “Call it Genocide” campaign.<sup>6</sup>

Given that the Elie Wiesel Act requires the Executive Branch to report on its assessment of ongoing atrocities, it would be a small step for Congress to invite more formal legal determinations as well.<sup>7</sup> In undertaking this analysis, expertise can be gleaned in-house from the relevant embassy and regional offices, the Department of Justice’s Human Rights & Special Prosecutions Unit (HRSP), the Office of Global Criminal Justice in the State Department (J/GCJ), the intelligence community, and the State Department’s Legal Adviser’s office. Those involved in this determination can also consult with outside entities, such as this Commission, the U.S. Holocaust Memorial Museum,<sup>8</sup> civil society watch groups, and academics who study these societies.<sup>9</sup>

### Previous Genocide Determinations Have all been Warranted

In all the situations in which the United States has issued a genocide determination in the past, the circumstances have so warranted. Most recently, this includes determinations made with respect to violence against non-Arabs in Darfur,<sup>10</sup> the multifaceted religious persecution of the Islamic State of Iraq and the Levant (ISIL) in Iraq and Syria,<sup>11</sup> and the detention and abuse of Uyghurs and other Turkic people in Xinjiang, China;<sup>12</sup> to this list of contemporary situations we can add the recent—and long overdue—recognition of the Armenian genocide.<sup>13</sup> I am concerned, however, with the possibility of this process becoming politicized. The haphazard way in which the prior administration issued its

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<sup>4</sup> Uyghur Human Rights Policy Act of 2020, Pub. Law 116-145, §§ 6-7, <https://www.congress.gov/bill/116th-congress/senate-bill/3744/text> (requiring a presidential report identifying each foreign person responsible for the commission of international crimes).

<sup>5</sup> S.4659, Rohingya Genocide Determination Act of 2020, <https://www.congress.gov/bill/116th-congress/senate-bill/4659> (requiring the U.S. Secretary of State, after consultation with the Atrocity Early Warning Task Force and human rights organizations, to submit a congressional report evaluating the persecution of the Rohingya, including whether the situation constitutes genocide).

<sup>6</sup> See Refugees International, *Call it Genocide: Act for the Rohingya*, <https://www.refugeesinternational.org/call-it-genocide>.

<sup>7</sup> Elie Wiesel Genocide and Atrocities Prevention Act of 2018, Pub. L. 115-441, § 5, <https://www.congress.gov/bill/115th-congress/senate-bill/1158/text> (mandating periodic reports on “a global assessment of ongoing atrocities” as well as U.S. government responses thereto).

<sup>8</sup> The Museum’s Early Warning Project assesses the risk of mass atrocities around the world. See Early Warning Project, <https://www.ushmm.org/genocide-prevention/simon-skjodt-center/work/early-warning-project>. The Museum will also make its own genocide determinations. See U.S. Holocaust Memorial Museum, “Our Generation is Gone”: The Islamic State’s Targeting of Iraqi Minorities in Ninewa, <https://minorityrights.org/> (asserting that the Islamic State committed genocide against the Yezidi people).

<sup>9</sup> See, e.g., Genocide Watch (<http://genocidewatch.net/>), Minority Rights Group International (<https://minorityrights.org/>).

<sup>10</sup> Beth Van Schaack, *Darfur and the Rhetoric of Genocide*, 26 WHITTIER L. REV. 1101 (2005), <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1408&context=facpubs>.

<sup>11</sup> Beth Van Schaack, *ISIL = Genocide?*, JUST SECURITY (Aug. 29, 2013), <https://www.justsecurity.org/14435/isis-genocide/>; Beth Van Schaack, *ISIL = Genocide, Per Secretary Kerry*, JUST SECURITY (Mar. 18, 2016), <https://www.justsecurity.org/30017/isis-genocide-secretary-kerry/>.

<sup>12</sup> Beth Van Schaack, *Genocide against the Uyghurs: Legal Grounds for the United States’ Bipartisan Genocide Determination*, JUST SECURITY (Jan. 27, 2021), <https://www.justsecurity.org/74388/genocide-against-the-uyghurs-legal-grounds-for-the-united-states-bipartisan-genocide-determination/>.

<sup>13</sup> See Natalie Longmire-Kulis, *Recognizing the Armenian Genocide Marks a Historic Turning Point in American Foreign Policy*, JUST SECURITY (Apr. 25, 2021), <https://www.justsecurity.org/75881/recognizing-the-armenian-genocide-marks-an-historic-turning-point-in-american-foreign-policy/>.

determination with respect to Xinjiang—an announcement on its way out the door even though an acute crisis had been underway since 2017, essentially handing the incoming administration a “poison pill” with respect to China—seemed particularly problematic in this regard. Also troubling are the situations in which no determination has been forthcoming, even though warranted. The focus of this hearing—the plight of the Rohingya in Myanmar, who have been subjected to ethnic and religious persecution of genocidal proportions—comes instantly to mind.<sup>14</sup>

All that said, and as I will conclude today, the U.S. government and its partners should not get caught in a semantic trap; when civilians are being directly targeted, the world should act, and it is of no moment that the precise elements of genocide cannot be fully established if the violence has reached a certain level of gravity. We should harness the preventative potential of policy interventions to mitigate harm and not just react to it.

### **The Challenge of Proving Genocide**

There is no question that the determination as to whether a situation constitutes genocide is factually and legally complex, requiring a careful review of the relevant facts and legal standards. The crime of genocide is defined by three elements involving the commission of enumerated acts (*actus reus*) of violence against a protected group with the intent to destroy that group, in whole or in part (*mens rea*). Specifically, Article II of the Genocide Convention defines genocide as “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.”<sup>15</sup>

In most situations, the first and second elements of the crime are relatively easy to establish from open-source research, media reporting, witness testimony, and human rights fact finding. Groups protected by the Convention include national, ethnical, racial, or religious groups; noticeably absent are political, social, and economic groups or groups defined by gender or disability. The international tribunals have determined that it is the subjective assessment of the perpetrators that matters, not necessarily whether the victim group “objectively” constitutes an enumerated group.<sup>16</sup>

When it comes to *actus reus*, it is important to emphasize that the acts that constitute genocide go beyond mass killing, even though that is often the colloquial understanding of the crime. The Genocide Convention thus purposefully reaches acts that fall short of murder but that will lead to the destruction of a group, reflecting the concentration camp “death through work” phenomenon of World War II. Accordingly, international criminal tribunals have recognized the concept of genocide by “slow death,” whereby conditions of life are inflicted upon a protected group that may not bring about the immediate death of members of the group, but will eventually lead to that result if implemented over a long period of time. Likewise, so called “biological genocide” relates to measures

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<sup>14</sup> Beth Van Schaack, *What is Happening to the Rohingya is Genocide*, JUST SECURITY (Oct. 1, 2018), <https://www.justsecurity.org/60912/happening-rohingya-genocide/>; Beth van Schaack, *Determining the Commission of Genocide in Myanmar*, 17 J. INT’L CRIM. JUST. 285 (2019), <https://www-cdn.law.stanford.edu/wp-content/uploads/2019/09/Genocide-Against-the-Rohingya-JICL.pdf>.

<sup>15</sup> Convention on the Prevention and Punishment of the Crime of Genocide art. II, Jan. 12, 1951, 78 U.N.T.S. 277.

<sup>16</sup> See David Nersessian, *The Razor’s Edge: Defining and Protecting Human Groups under the Genocide Convention*, 36 CORNELL INT’L L. J. 293 (2003).

to restrict births within the group or its ability to reproduce itself,<sup>17</sup> which can independently constitute genocide.<sup>18</sup> In determining the existence of genocide, the tribunals have emphasized the importance of examining the cluster of abuses suffered by members of the group and the collective impact of those actions on the survival of the group.

It is problems of proof surrounding the third element—relating to *mens rea*—that is often a cause for indecision or uncertainty. Assessing whether individuals are acting with genocidal intent does not lend itself to easy determination. Criminal intent is an inherently individualistic inquiry, so determining governmental or group responsibility for genocide raises particular questions about whose intent matters: the intent of members of the central authorities or leadership corps who may be designing a genocidal policy, or that of the “foot soldiers” responsible for implementing it? The difficulty of making a conclusive finding that a government has enacted a policy of genocide has led to more circumspect findings in the past by commissions of inquiry (as in Darfur)<sup>19</sup> and the International Court of Justice (as in the former Yugoslavia).<sup>20</sup> Uncertainty about whether the Chinese Communist Party or leadership are acting with genocidal intent may explain the apparent hesitancy of the State Department’s Office of Legal Adviser when it came to the Uyghur determination.<sup>21</sup>

In many circumstances, genocidal intent must be inferred from the totality of the circumstances. To be sure, in some cases, such as in Nazi Germany or with respect to the Hutu Power movement in Rwanda, a perpetrator or regime will articulate an unequivocal genocidal intent in a policy platform or self-incriminating statement. The Islamic State, for example, undertook a deliberative theological inquiry that led to express articulations of an intent to destroy the Yazidi people in the imagined caliphate, because the Yazidi faith could not be reconciled with the Islamic State’s radical brand of Sunni Islam.<sup>22</sup> By contrast, other perpetrators will be more circumspect or will attempt to justify their actions under the rubric of waging an armed conflict against an armed foe or counter-terrorism operation. The Sudanese regime of Omar al-Bashir never issued any sort of genocidal manifesto and yet he was indicted for genocide by the International Criminal Court, demonstrating that explicit avowal of genocidal intent is not required to establish *mens rea*.<sup>23</sup>

Of relevance to the mandate of this Commission: the treaty does not prohibit “cultural genocide” *per se*.<sup>24</sup> However, acts of forced assimilation or the destruction of cultural property—such as places of worship or burial sites—when coupled with other forms of violence targeting members

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<sup>17</sup> Jackson Neagil, *The Importance of ‘Biological Destruction’ in Responsible Coverage of Xinjiang*, LAWFARE (Apr. 14, 2021), <https://www.lawfareblog.com/importance-biological-destruction-responsible-coverage-xinjiang>.

<sup>18</sup> Mackenzie Austin et al., *A Theoretical Exercise : Can Either Compulsory Sterilization or the Forced Transfer of Children Alone Satisfy the Actus Reus Element of the Crime of Genocide?*, Stanford Law School Human Rights & International Justice Policy Lab (Jan. 2021), available here: [https://www.justsecurity.org/wp-content/uploads/2021/01/2021.01.10\\_Final-Version-Xinjiang-Genocide-Article-2d-and-e-SLS-2.docx](https://www.justsecurity.org/wp-content/uploads/2021/01/2021.01.10_Final-Version-Xinjiang-Genocide-Article-2d-and-e-SLS-2.docx).

<sup>19</sup> See Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2003 (Jan. 25, 2005) (concluding that the government of Sudan has not pursued a policy of genocide).

<sup>20</sup> See Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Serbia & Montenegro), Judgment, 2007 I.C.J. Rep. 43 (Feb. 26) (finding the respondent not liable for genocide but for failing to prevent a known genocide).

<sup>21</sup> Colum Lynch, *State Department Lawyers Concluded Insufficient Evidence to Prove Genocide in China*, FOREIGN POLICY (Feb. 21, 2021), <https://foreignpolicy.com/2021/02/19/china-ughurs-genocide-us-pompeo-blinken/>.

<sup>22</sup> Human Rights Council, *“They Came to Destroy”: ISIS Crimes Against the Yazidis*, U.N. Doc. A/HRC/32/CRP.2 (June 15, 2016), [https://reliefweb.int/sites/reliefweb.int/files/resources/A\\_HRC\\_32\\_CRP.2\\_en.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/A_HRC_32_CRP.2_en.pdf).

<sup>23</sup> Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09-95, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir (July 12, 2010), <https://www.icc-cpi.int/pages/record.aspx?uri=907140>.

<sup>24</sup> Lindsey Kingston, *The Destruction of Identity: Cultural Genocide and Indigenous Peoples*, 14(1) J. HUM. RTS. 63 (2015).

of protected groups can contribute to a finding of genocide even absent the complete physical destruction of the targeted group. Such attempts at cultural erasure can evince an intent to eliminate all manifestations or vestiges of a protected group, and thus undergird a finding of genocidal intent.<sup>25</sup> It may thus still constitute genocide when individuals are given a chance to renounce their religion or when individuals who convert under coercion are ultimately spared. Given that one's religious beliefs and heritage are often a fundamental aspect of an individual's identity or conscience, and religious expression represents a core human right, communities should not be required to surrender or denounce their religion in order to escape extermination.

## The Standard of Proof

Inherent to a genocide inquiry is the question of what evidentiary standard, level of certainty, or threshold should be applied in reaching a genocide determination outside of a court of law. Whereas courts employ well-developed—and, in some cases, legally-mandated—burdens of proof at various stages of their proceedings, there is no required protocol for non-judicial inquiries. For example, at the International Criminal Court, the standard of proof gradually escalates as the Prosecutor or the Court must decide whether to open/authorize an investigation (requiring a reasonable basis to proceed), to issue an arrest warrant (requiring reasonable grounds to believe the person committed a crime), and to convict (requiring proof beyond a reasonable doubt that the crime was committed).<sup>26</sup> A governmental or non-governmental entity making a genocide determination must decide what level of proof is sufficient to make such a potentially explosive determination. The proposed U.K. bill, for example, would empower the High Court to make a preliminary finding based upon the “balance of probabilities.”<sup>27</sup> Perhaps most authoritative for the State Department's purposes, the U.N. Independent International Fact Finding Mission devoted to Myanmar (IIFMM) applied a “reasonable grounds to conclude” standard of proof for factual findings: “This standard was met when a sufficient and reliable body of primary information, consistent with other information, would allow an ordinarily prudent person to reasonably conclude that an incident or pattern of conduct occurred.”<sup>28</sup> When it comes to genocide, the FFM determined that all other inferences were unreasonable.

In reaching my own genocide conclusion in the academic context, I have operated under a “clear and convincing” standard on the theory that it offers an appropriately heightened threshold given the gravity of the question presented.<sup>29</sup> Such a test generally requires proof that is of a quality and quantity that leads to a conviction that the facts and conclusions at issue are highly probable, without necessarily fully negating all alternative explanations.<sup>30</sup> This standard is higher than that required by most domestic and international courts for issuing an indictment against an identified

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<sup>25</sup> Azeem Ibrahim, *China Must Answer for Cultural Genocide in Court*, FOREIGN POLICY (Dec. 3, 2019).

<sup>26</sup> Rome Statute of the International Criminal Court July 1, 2002, 2187 U.N.T.S. 90. *Compare* Art. 15(3), 53(1) (articulating the standard for opening an investigation), Art. 58(1) (articulating the standard for issuing an arrest warrant), and Article 66(3) (establishing the beyond-a-reasonable-doubt standard to convict).

<sup>27</sup> *See* Genocide Determination Bill, H.L. Bill 61, [https://publications.parliament.uk/pa/bills/lbill/2017-2019/0061/lbill\\_2017-20190061\\_en\\_2.htm#l1g2](https://publications.parliament.uk/pa/bills/lbill/2017-2019/0061/lbill_2017-20190061_en_2.htm#l1g2).

<sup>28</sup> Human Rights Council, Report of the Independent International Fact-Finding Mission on Myanmar, ¶ 6, UN Doc. A/HRC/39/ 64 (Aug. 24, 2018).

<sup>29</sup> Karim Khan, the head of the United Nations' Investigative team on ISIL crimes (UNITAD), recently utilized the same standard in briefing the U.S. Security Council. *See* [https://twitter.com/UNITAD\\_Iraq/status/1391765953764003842](https://twitter.com/UNITAD_Iraq/status/1391765953764003842) (May 10, 2021).

<sup>30</sup> *See, e.g., Colorado v. New Mexico*, 467 U.S. 310, 316 (1984) (finding that the party bearing the burden of proof must “place in the ultimate factfinder an abiding conviction that the truth of its factual contentions are ‘highly probable’”).

individual (and higher than an ordinary civil lawsuit) but lower than would be required to convict any particular individual of the crime of genocide.

### Launch Interdisciplinary Investigations

In order to lay the groundwork for any determination, the U.S. government has, in the past, conducted formal investigations into potentially genocidal situations by deploying interdisciplinary teams to undertake a rigorous documentation and analysis process. A notable example is the Atrocities Documentation Team (ADT) deployed to study the violence in Darfur, Sudan, which led Secretary of State Colin Powell to conclude that genocide was underway in Sudan.<sup>31</sup> Although the ADT had no access to Darfur, they operated quite successfully on the border in refugee camps and within diaspora communities. Similar studies have been conducted in the “Two Areas” of Sudan (Southern Kordofan and Blue Nile) and with respect to persecution against the Rohingya Muslims in Myanmar/Burma.<sup>32</sup>

The United States can initiate its own analytical investigation into particular situations, either using in-house intelligence experts (such as the State Department’s Bureau of Intelligence and Research (INR)) or outside human rights implementing partners, such as the Public International Law and Policy Group (PILPG, which conducted the Myanmar study). U.S. experts from the intelligence community and the Federal Bureau of Investigations (FBI) can also be invited to verify existing documentation, such as the leaked “China cables” detailing the repression in Xinjiang, which China has claimed are fakes.<sup>33</sup> By way of example, the FBI was instrumental in verifying the Caesar photographs smuggled out of Syria, which depict industrial grade torture and summary executions in Syrian prisons.<sup>34</sup>

### The Consequences of a Determination

In the event that the U.S. government determines that genocide is underway, U.S. policy toward the responsible state cannot remain business as usual. The United States should coordinate a robust and coordinated response in the humanitarian, accountability, trade, and diplomatic contexts vis-à-vis the responsible state or entity—working with allies and partners—to reflect the fact that there is an effort afoot to eliminate a protected group in whole or in part from the human mosaic.<sup>35</sup> This response should include the following actions, implemented in coordination:

1. Developing strategic messaging and diplomatic outreach vis-à-vis the responsible state to demand a cessation of abuses and with partners and allies to amplify this message;

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<sup>31</sup> See U.S. Dep’t of State, *Documenting Atrocities in Darfur*, <https://2001-2009.state.gov/g/drl/rls/36028.htm>. See generally S. Totten and E. Markusen (eds), *Genocide in Darfur: Investigating Atrocities in the Sudan* (Routledge, 2006) (discussing US Atrocities Documentation Team in Darfur).

<sup>32</sup> See Public International Law & Policy Group, *Documenting Atrocity Crimes Committed Against the Rohingya in Myanmar’s Rakhine State* (Dec. 2018), <https://www.publicinternationallawandpolicygroup.org/rohingya-report>.

<sup>33</sup> Austin Ramzy & Chris Buckley, ‘Absolutely no Mercy’: Leaked Files Expose how China Organized Mass Detentions of Muslims, N.Y. TIMES (Nov. 16, 2019), <https://www.nytimes.com/interactive/2019/11/16/world/asia/china-xinjiang-documents.html>; Dylan Welch, et al., *The China Cables: Leak Reveals the Scale of Beijing’s Repressive Control over Xinjiang*, ABC NEWS (Nov. 24, 2019).

<sup>34</sup> Human Rights Watch, *Syria: Stories Behind Photos of Killed Detainees* (Dec. 16, 2015), <https://www.hrw.org/news/2015/12/16/syria-stories-behind-photos-killed-detainees>.

<sup>35</sup> See Beth Van Schaack, *Policy Options in Response to Crimes Against Humanity and Potential Genocide in Xinjiang*, JUST SECURITY (Aug. 25, 2020), <https://www.justsecurity.org/72168/policy-options-in-response-to-crimes-against-humanity-and-potential-genocide-in-xinjiang/>.

2. Deploying targeted sanctions (asset blocking and visa restrictions) against perpetrators under the Global Magnitsky Act,<sup>36</sup> the International Religious Freedom Act of 1998,<sup>37</sup> or other available authorities;
3. Imposing trade restrictions (such as supply chain limits and export controls) to prevent goods from entering U.S. markets that are produced in connection with violations and to prevent the export to responsible states of U.S. technology that could be used in abuses;
4. Contributing humanitarian assistance, funding psycho-social rehabilitation, and offering immigration relief to survivors and their communities;
5. Tasking the intelligence community and law enforcement to investigate the commission of international crimes and build potential casefiles for domestic, international, or foreign prosecutions or lawsuits;
6. Contributing to accountability efforts, including litigation before international courts where the issues are under adjudication, such as the matter pending before the International Court of Justice initiated by The Gambia against Myanmar;<sup>38</sup>
7. Expanding legal authorities to enable U.S. prosecutions of all atrocity crimes by drafting a crimes against humanity statute,<sup>39</sup> expanding the jurisdictional reach of the U.S. War Crimes Act, and extending the doctrine of superior responsibility to leaders whose subordinates commit international crimes with their knowledge;<sup>40</sup>
8. Utilize the International Labor Organization if members of the protected group are subject to unfair or abusive labor practices, including forced labor or human trafficking;
9. Invoke multinational fora—such as the Human Rights Council if the U.S. is re-elected thereto<sup>41</sup> or human rights treaty bodies, such as the Committee that supervises states’ compliance with Convention on the Elimination of All Forms of Racial Discrimination (CERD)<sup>42</sup>—to scrutinize state policy and organize mechanisms to document, prevent, and respond to atrocities.

To be sure, some of these levers are stronger than others when it comes to compelling concrete changes in national policy. If properly coordinated, they can exert a palpable impact on a country’s bottom line, contribute to the alleviation of profound suffering among the global victim community, and ensure that the United States, and its allies, are not inadvertently underwriting a campaign of ethno-religious persecution.

### **Actualize the Genocide Convention’s Prevention Mandate**

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<sup>36</sup> Sergei Magnitsky Rule of Law Accountability Act of 2012, Pub. Law 112-208, 22 U.S.C. § 5811 note.

<sup>37</sup> 22 U.S.C. § 6401 *et seq.*

<sup>38</sup> See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures, 2020 I.C.J. REP. 3 (Jan. 23), <https://www.icj-cij.org/public/files/case-related/178/178-20200123-ORD-01-00-EN.pdf>.

<sup>39</sup> See Beth Van Schaack, *Crimes Against Humanity: Repairing Title 18’s Blind Spots*, in ARCS OF GLOBAL JUSTICE (Margaret M. deGuzman & Diane Marie Amann eds. 2018), <https://www.justsecurity.org/wp-content/uploads/2019/06/Arcs-of-Global-Justice-The-Need-for-a-US-CAH-Statute.pdf>.

<sup>40</sup> See Beth Van Schaack, *Title 18’s Blind Spot: Superior Responsibility*, JUST SECURITY (June 3, 2014), <https://www.justsecurity.org/11066/title-18s-blindspot-superior-responsibility/>.

<sup>41</sup> The Biden Administration has indicated an intention to seek re-election to the U.N. Human Rights Council. The United States’ pledge brochure is available here: <https://www.state.gov/seeking-election-to-the-un-human-rights-council/>.

<sup>42</sup> Any state party to the Convention can raise a complaint against another state party by way of an inter-state communication to the CERD Committee. See Convention on the Elimination of All Forms of Racial Discrimination art. 11, Dec. 21, 1965, 660 U.N.T.S. 195.

The Genocide Convention, which has attracted 146 states parties (including Myanmar),<sup>43</sup> clearly states that its object and purpose is to ensure both the prosecution and the prevention of the crime of genocide. Nonetheless, the treaty is primarily penal in nature: it establishes genocide as an international crime, outlines the elements of genocide, and identifies punishable forms of liability (conspiracy, incitement, attempt, and complicity). By contrast, the preventative provisions in the Convention are frustratingly indeterminate. Most importantly, Article I of the Convention announces that “the Contracting Parties confirm that genocide is a crime under international law which they undertake to prevent and to punish.” The treaty also contains mechanisms to channel inter-governmental responses to genocide. For example, Article VIII empowers contracting parties to

call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III [complicity, conspiracy, etc.].<sup>44</sup>

To be sure, the Convention does not require states parties to undertake a formal genocide determination. However, engaging in this analysis based upon careful documentation offers a way to operationalize the Genocide Convention’s prevention mandate and lay the groundwork for states parties to diligently fulfill their treaty duties to protect, prevent, and punish.

## Conclusion

In closing, labels matter. Research has shown that members of the international community are more willing to contemplate forceful action with respect to atrocities deemed to be genocide as compared with those described as crimes against humanity or ethnic cleansing.<sup>45</sup> This is even though there is no express hierarchy of these crimes under international law.<sup>46</sup> That said, it should be noted that the international community’s response to mass atrocities against civilians need not hinge on the question of whether or not the violence constitutes genocide. If mass violence is underway, no matter how it is denominated under the law, then the time has passed for debating legal semantics about whether the violence meets the definition of genocide.<sup>47</sup> Indeed, as I have written elsewhere, “the methodology necessary to determine the commission of genocide is inapt—and the surrounding discourse discordant—when people are being systematically killed and expelled from their homes through violence on a mass scale.”<sup>48</sup> What matters is that the level of violence and the risk to humanity has reached a certain threshold. As then-Secretary of State John Kerry stated in his ISIL genocide determination:

Naming these crimes is important. But what is essential is to stop them. That will require unity in this country and within the countries directly involved, and the

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<sup>43</sup> Convention on the Prevention and Punishment of the Crime of Genocide State Parties, [https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp\\_viewStates=XPages\\_NORMStatesParties&xp\\_treatySelected=357](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=357).

<sup>44</sup> Genocide Convention, *supra* note 14, at art. VIII.

<sup>45</sup> Matt Hadro, *What History Can Teach Us About Why the ‘Genocide’ Label Matters*, CATHOLIC NEWS AGENCY (Dec. 10, 2015) (recounting the congressional testimony of genocide expert Gregory Stanton), <https://www.catholicnewsagency.com/news/33110/what-history-can-teach-us-about-why-the-genocide-label-matters>; Hollie Nyseth Brehm, *ISIL and Genocide: On the Power of Label*, POLICY TRAJECTORIES (Apr. 4, 2016), <http://policytrajectories.asa-comparative-historical.org/2016/04/isil-and-genocide-on-the-power-of-a-label/>.

<sup>46</sup> Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-A, Judgement, ¶ 367 (June 1, 2001), <https://cld.irmct.org/notions/show/1067/hierarchy-of-crimes#>.

<sup>47</sup> See *supra* note 34.

<sup>48</sup> See *supra* note 10.

determination to act against genocide, against ethnic cleansing, against the other crimes against humanity must be pronounced among decent people all across the globe.<sup>49</sup>

Furthermore, genocide is a crime of intent and not of results. As such, it is not necessary to wait for a group to be destroyed in whole or in part before declaring a campaign of violence to be genocidal if the requisite intent can be evinced before the threat of wholesale extermination is realized. As recognized by Polish jurist Raphael Lemkin, who coined the term “genocide” and lobbied tirelessly to establish the crime under international law, this foresight ensures that the preventative potential of the Genocide Convention—the promise of “no more extermination, no more mass killings, no more concentration camps, no more sterilizations, no more breaking up of families”—can be realized.<sup>50</sup> As President Joe Biden noted on Holocaust Remembrance Day, it is a “simple truth” that “preventing future genocides remains both our moral duty and a matter of national and global importance.”<sup>51</sup>

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<sup>49</sup> See Van Schaack, *supra* note 11 (quoting statement).

<sup>50</sup> Douglas Irvin-Erickson, *The Life and Works of Raphael Lemkin: A Political History of Genocide in Theory and Law* (Oct. 2014) (unpublished Ph.D. dissertation, Rutgers University) (available at: <https://rucore.libraries.rutgers.edu/rutgers-lib/45631/PDF/1/play/>) (quoting Raphael Lemkin, Statement at Testimonial Luncheon of the New York Region of the American Jewish Congress (Jan. 18, 1951) (transcript available in the New York Public Library)).

<sup>51</sup> White House, *Statement by President Joseph R. Biden, Jr. on International Holocaust Remembrance Day* (Jan. 27, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/27/statement-by-president-joseph-r-biden-jr-on-international-holocaust-remembrance-day/>.