Chair Manchin, Vice Chair Perkins, Vice Chair Bhargava, 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.

The Genocide Determination Process

There is no formal process within the U.S. government for undertaking a factual or legal analysis of mass atrocities underway, including identifying the commission of crimes against humanity or acts of genocide. As it stands, such determinations are undertaken on an ad hoc basis when mass atrocities are underway and the hallmarks of genocide are apparent. The government is responsive to civil society and other forms of pressure in this regard; as such, this process can succumb to political considerations.

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, and other policy interventions. The United Kingdom has legislated this practice in the trade context, although their process involves the courts rather than political actors, which may not be the optimal approach. In some circumstances, Congress has mandated that the Executive Branch collect information and offer a legal assessment, as with the Uyghur Human Rights Policy Act of 2020, for example. Efforts to pass similar legislation for Myanmar, such as the Rohingya Genocide Determination Act (which would require the State Department to conduct a formalized analysis).

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Department assess whether the persecution of the Rohingya constitutes genocide, have failed so far notwithstanding strong civil society support and a “Call it Genocide” campaign.\(^5\)

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 such a legal determination as well.\(^6\) 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 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, civil society watch groups, and academics who study these societies.\(^7\)

**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,\(^8\) the multifaceted religious persecution of the Islamic State of Iraq and the Levant (ISIL),\(^9\) and the detention and abuse of Uighurs and other Turkic people in Xinjiang, China.\(^10\) I am concerned, however, with the possibility of this process becoming politicized. The haphazard way in which the prior administration issued its determination with respect to Xinjiang—on its way out the door, 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 subject of this hearing—the plight of the Rohingya in Myanmar, who are subjected to ethnic and religious persecution of genocidal proportions—comes instantly to mind.\(^11\)

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.

**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 of

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\(^6\) See, e.g., Genocide Watch (http://genocidewatch.net/), Minority Rights…


violence against a protected group with the intent to destroy that group, in whole or in part.\textsuperscript{12} 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.”\textsuperscript{13}

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 group “objectively” constitutes an enumerated group.\textsuperscript{14}

It is important to emphasize in this regard that the acts that constitute genocide go beyond mass killing, even though that is 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. 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. This broader conception of genocide reflects the fact that eliminating the members of an entire race or religion, or a substantial part thereof, through outright extermination is difficult work. If that is the goal, it may be much easier to deprive people of their livelihoods, homes, medical care, food, humanitarian assistance, etc.

It is problems of proof surrounding the third element—relating to \textit{mens rea}—that is often a cause for indecision or uncertainty. Determining 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)\textsuperscript{15} and the International Court of Justice (as in the former Yugoslavia).\textsuperscript{16} Uncertainty about whether the Chinese Communist Party or leadership are acting with genocidal intent may explain the apparent hesitancy of the Legal Adviser’s office in the State Department when it came to the Uyghur determination.\textsuperscript{17}

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

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17 & Colum Lynch, \textit{State Department Lawyers Concluded Insufficient Evidence to Prove Genocide in China}, FOREIGN POLICY (Feb. 21, 2021), \url{https://foreignpolicy.com/2021/02/19/china-uighurs-genocide-us-pompeo-blinken/}.
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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. By contrast, others will be more circumspect or will attempt to justify their actions as an armed conflict or counter-terrorism movement. 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.

Of relevance to the mandate of this Commission: the treaty does not prohibit “cultural genocide” per se. However, acts of forced assimilation or the destruction of cultural property—such as places of worship—when coupled with other forms of violence targeting members of protected groups can contribute to a finding of genocide even absent the complete physical destruction of the targeted group. Such acts can evince an intent to eliminate all manifestations or vestiges of a protected group, and thus undergird a finding of genocidal intent. A finding of genocide may thus be appropriate even when individuals are given a chance to renounce their religion or when individuals forcibly converted are ultimately spared. Given that 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 avoid extermination.

The Standard of Proof

Inherent to State Department inquiries is the question of what evidentiary standard, level of certainty, or threshold should be applied in articulating 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). 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.

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. 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. This standard is higher than that required by most domestic and international courts for issuing an indictment against an identified individual but lower than would be required to convict any particular individual of the crime of genocide.

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20 Rome Statute. 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 ___ ().

21 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”).
Perhaps most authoritative for the State Department’s purposes, the U.N. Fact Finding Mission devoted to Myanmar applied a reasonable grounds 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.” When it comes to genocide, the FFM determined that all other inferences were unreasonable.

Many observers have been historically cautious about announcing the commission of genocide in unalloyed terms. Some observers fear that a genocide determination is somehow more technical and complex than other international criminal law or human rights allegations; others are no doubt concerned that such a conclusion will elicit heightened pressure to “do something.” At the same time, this restraint can generate sharp criticism if it appears that the term is being avoided for unprincipled reasons. Indeed, the United States was excoriated in the past for employing the term ‘acts of genocide’ in connection with events in Bosnia-Herzegovina and Rwanda. Commentators focused on Myanmar have revealed similar preoccupations with semantics, at times couching their genocide conclusions in difflent terms. By contrast, these same observers exhibit less angst about accusing regimes and individuals with the commission of crimes against humanity or war crimes.

Launch Interdisciplinary Investigations

In order to lay the groundwork for a definitive 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 process. The most 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. 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.

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) or outside human rights implementing partners, such as the Public International Law and Policy Group (which conducted the Myanmar study). U.S. experts from the intelligence community and the Federal Bureau of Investigations (FBI) can be invited to verify documentation, such as the leaked “China cables” detailing the repression in Xinjiang, which China has claimed are fakes.

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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.\(^{28}\)

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

Although the Genocide Convention, which has attracted 146 members (including Myanmar), clearly states that its object and purpose is to ensure both the prosecution and the prevention of the crime of genocide, 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).\(^{29}\) 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.

Engaging in a genocide determination based upon careful documentation offers a way to operationalize the Genocide Convention’s prevention mandate.

**Conclusion**

In closing, it should be noted that the international community’s response to mass atrocities need not hinge on the question of whether or not the violence constitutes genocide. If economic, political, or military responses to mass violence are being contemplated, then the time has passed for debating legal semantics about whether the violence meets the definition of genocide.\(^{30}\) 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.”\(^{31}\) What matters is that the level of violence and the risk to humanity has reached a certain threshold. As Secretary 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 determination to act against genocide, against ethnic cleansing, against the other crimes against humanity must be pronounced among decent people all across the globe.\(^{32}\)

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 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

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\(^{31}\) *See supra* note ___.

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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. 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.”
