

Statement of Todd F. Buchwald
U.S. Commission on International Religious Freedom
Ending Genocide: U.S. Government Genocide Determinations and Next Steps
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Thank you Chair Bhargava and Vice Chair Perkins, and to the members of the Committee, for the opportunity to speak at this important hearing.

I have been asked to address the meaning of the word “genocide” and provide an overview of how the U.S. government makes decisions to say, or not say, that genocide has occurred in a particular situation, and the implications of doing so.

Much of what I will address is elaborated in greater detail in a report that I, together with my former State Department colleague Adam Keith, had the honor to write for the U.S. Holocaust Memorial Museum in 2019.¹ That report is based largely on my experiences in the State Department, including as Ambassador for Global Criminal Justice, as well as on documentary research and extensive interviews we conducted with officials involved in these issues over the years. It was prepared with the assistance and support of Museum officials and staff, and of an illustrious Advisory Group that was chaired by Avril Haines and John Bellinger, and that included Antony Blinken, Lanny Breuer, Rosa Brooks, William Burns, Nicholas Burns, Richard Fontaine, Rebecca Hamilton, Sarah Margon, Sarah Mendelson, Anne Richard, David Scheffer, Leslie Vinjamuri, Jeremy Weinstein, Clint Williamson, and Lee Feinstein

At the time of the report, the U.S. government had made formal decisions that genocide had occurred in at least five situations since the United States ratified the Genocide Convention in 1988: Bosnia, Rwanda, Iraq, Darfur and ISIS-controlled areas of Iraq and Syria. Since then, the State Department has said that genocide, as well as crimes against humanity, have occurred against Muslim Uyghurs and other ethnic and religious minority groups in China, and President Biden has said that Ottoman-era atrocities against Armenians during World War I amounted to genocide.

How does the U.S. Government decide that “genocide” has occurred, and to say so publicly?

Perhaps surprisingly, there is no formal policy governing how this is done but a *de facto* process has emerged over time. In general, the decisions have been made at very senior levels, typically by the Secretary of State, based on information that is developed, marshaled and analyzed by State Department policy bureaus—which would include the relevant regional bureau and the Office of Global Criminal Justice—as well as the Department’s intelligence bureau (INR) and Office of the Legal Adviser. In cases involving questions about genocide against religious groups, this would also include the Office of the Ambassador-at-Large for International Religious Freedom. In at least some recent cases, the Department has supplemented the

¹ A copy of the report can be found [here](#). A short summary of the recommendations is attached to this Statement.

available information with reports from investigators it has commissioned to conduct interviews with displaced victims to better understand the situation.

What is genocide?

The internationally-accepted definition is set out in Article II of the 1948 Genocide Convention² but public perceptions of what qualifies can turn on relatively subjective factors – *e.g.*, the perceived heinousness or scale of the conduct in question. These public perceptions are not “wrong,” but they can diverge from the definition on which the U.S. and other governments rely under the Convention.

Beyond any disconnects between public perceptions and the technical definition under the Convention, there are also different views among technical experts about the definition under the Convention. For example, under the Convention, in order to qualify as genocide, the perpetrators must have acted “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such.” But what is the meaning of “destroy”? The predominant view has been that this requires the perpetrator to have intended to destroy the relevant group in a *biological or physical sense*—in other words, with an intent to make it impossible for the *members* of the group to survive. This differs from what is referred to as “cultural genocide” in which the aim of the perpetrators is to destroy the *identity* of the group or to make it impossible for the members to continue to function as a group.

There are other difficult questions too. For example, given how hard it can be to prove someone’s specific intent, how clear must it be that the perpetrator in fact intended to destroy the group in this biological or physical sense, and how willing should we be to infer the existence of the requisite intent from the surrounding circumstances? For their part, decisions by international courts have set quite a high bar. In the case between Bosnia and Serbia, for instance, the International Court of Justice has said that, because charges of genocide are of exceptional gravity, the claim of genocide must be proved by evidence that is “fully conclusive” in order for the Court to hold a state responsible.³

There are also differences of views regarding the extent of the obligation, contained in Article 1 of the 1948 Convention, for states “to prevent” the crime of genocide. For example, if the United States sees genocide occurring or threatened in a foreign country, does it have an international legal obligation under the Genocide Convention to intervene or take action to prevent it. If one reads internal State Department memorandum that have been released in response to FOIA requests, one can see that the U.S. Government has not agreed that the Convention requires states to take particular actions to prevent genocide in areas outside of their territories. For its part, however, the International Court of Justice has expressed a different view, saying that States have an obligation “to employ all means reasonably available

² The Convention on the Prevention and Punishment of the Crime of Genocide, the text of which is available [here](#). There is a similar, though not identical, definition in the legislation that makes genocide a crime under U.S. domestic law. [18 U.S.C. §1091\(a\)](#).

³ [Bosnia and Herzegovina v. Serbia and Montenegro](#), Judgment, I.C.J. Reports 2007, paragraph 209.

to them, so as to prevent genocide so far as possible.”⁴ It should be noted that, even if the U.S. legal view is taken as correct, a statement that genocide has occurred has the potential to create a tremendous sense of political and moral responsibility to take the same kind of action that the International Court of Justice has said is legally required.

There is no legal requirement to make public genocide determinations and most states do not do so, at least in most cases. Why should the United States? The reasons given by supporters for making such determinations vary from situation to situation but fall generally into two categories.

The first category relates to “intrinsic” reasons for doing so, including for example demonstrating respect for and solidarity with the victims, helping to establish a historical record, bearing witness, and avoiding a silence that could be seen as tantamount to denial. My time as head of the Office of Global Criminal Justice, and the appreciation I saw from victims group for the determination that ISIS crimes amounted to genocide, forever deepened my own conviction about the importance of these kind of intrinsic reasons.

The second category relates to “instrumental” reasons. Supporters of making a determination in a particular situation may see doing so as helpful for mobilizing efforts to prevent further atrocities, laying the groundwork for efforts to ensure those responsible for the atrocities are eventually held to account, deterring individuals from joining with or supporting the perpetrators, or otherwise shaping the narrative through which a conflict or situation is seen.

At the same time, there have been criticisms regarding the process of making such determinations. These include concerns that the making of such determinations can spawn painfully legalistic debates about whether the conduct in question meets the specific legal definition in the Convention. It can also contribute to an unfortunate sense that atrocities that fall outside the Convention’s definition do not warrant as robust a US response.

In connection with this last point, I am sympathetic to this concern but cannot see abandoning the practice of making such determinations in appropriate cases. As I have already said, I have seen first-hand the deep appreciation among victims’ groups for what amounts to a demonstration of respect, empathy and solidarity that this kind of bearing witness embodies.

That said, the United States government should work hard to dispel the notion that atrocities are less worthy of response simply because they fall outside the technical contours of the definition of genocide. This seems particularly important where perpetrators of mass atrocities intend to destroy the identity of a group, even if the evidence may not be clear that they intend to physically or biologically annihilate its members in the manner that the Genocide Convention has been interpreted to require. This would be in keeping with the original understanding of Raphael Lemkin—the Polish lawyer who lost so much of his family in the Holocaust, who coined

⁴ *Id.*, paragraph 430.

the word, and whose well-documented and tireless efforts eventually led to the adoption of the Convention—that the essential objective is to protect against acts that would deprive the world of the “traditions, culture and future contributions” of the groups being targeted.⁵ Separate from the way it speaks in the context of any particular crisis, it would be desirable for the U.S. Government to highlight this point in the way that it talks generally about responding to mass atrocities, and to do what it can bring greater awareness to this point.

At the end of the day, naming genocide—or any other mass atrocity—should be secondary to stopping or preventing it. By the time a situation is sufficiently grave to warrant serious assessment of whether genocide has occurred, the imperative for action will already be clear, and it should be made plain that the perpetration of atrocities will entail policy consequences regardless of whether the atrocities are named.

The particular response must of course depend on the particular circumstances. Identifying particular consequences that would flow automatically from a decisions that genocide or other atrocity crimes have been committed would inevitably create pressure for policymakers to make—and advocates to advocate for—those decisions based on whether they want those consequences, rather than based on a candid assessment of the facts.

Nevertheless, our report included recommendations that the U.S. Government should develop a “playbook” of steps that should be considered in the face of grave risks of genocide or other mass atrocities, and that such a playbook could include steps to—

- Amplify the voices of victims and show solidarity with them (e.g., engaging in meetings of high-level officials with victims and their advocates, issuing public messages of support, helping ensure victims are heard before Congress and multilateral bodies, and seeking supportive statements from such bodies);
- Help better protect the victims (e.g., creating, reviewing, or reinforcing peacekeeping or monitoring missions);
- Impose deterrent consequences (e.g., imposing sanctions, adjusting diplomatic contacts with the perpetrators, reviewing assistance programs from which the perpetrators benefit, and other efforts to stigmatize, hamstring, and stop the perpetrators);
- Address the context of the crimes (e.g., promoting political negotiations to reach a sustainable end to the surrounding conflict, and supporting conflict mitigation and local peacebuilding efforts);
- Facilitate accountability (e.g., supporting programs or local institutions that can investigate and document the crimes and otherwise provide a pathway to justice,

⁵ Raphael Lemkin. *Axis Rule in Occupied Europe; Laws of Occupation, Analysis of Government, Proposals for Redress* (1944), at 91.

supporting the creation of accountability mechanisms where existing institutions do not suffice, and supporting apprehension of fugitives); and

- Rally support from others (e.g., urging partner governments and private actors to take similar coordinated actions, sending signals that top US officials attach high priority to these efforts, and seeking support and scrutiny in multilateral forums)

While the steps from such a playbook that should be taken will of course need to be considered on a case-by-case basis, advocates have a strong interest in pressing to ensure that actions such as those described above are systematically considered, that sufficient resources are provided to support such actions, and that strong leadership is provided to ensure follow-up.

In conclusion, I thank the Chair, the Vice Chair and the other Commissioners for holding this hearing and drawing attention to these important issues, and would be pleased to answer any questions that you might have.

Attachment - Summary of Recommendations from Report

1. The U.S. government should continue its practice of making genocide determinations.
2. The U.S. government should continue to be rigorous in analyzing whether the acts at issue constitute genocide, as defined by the Genocide Convention.
3. The U.S. government should be prepared to explain publicly why it is able or unable to say that the crimes occurring in a country constitute genocide.
4. The U.S. government should work to empower others who can pronounce on and address the issue.
5. Consistent with the aim of the Genocide Convention to prevent genocide, U.S. government efforts should be focused on identifying and warning about the risk of genocide.
6. U.S. government determinations should ordinarily be made at very senior levels.
7. The U.S. government should not refrain from saying that genocide has occurred for the purpose of avoiding political pressure to respond.
8. U.S. government statements should highlight that individuals are responsible for genocide and should respect due process principles.
9. Separate from any particular crisis, the U.S. government should message strongly that mass atrocity crimes that fall outside the legal definition of the Genocide Convention are no less worthy of a robust response.
10. Advocates (both inside and outside the government) should consider the potential impact of a genocide determination when assessing whether to press the US government to pursue a genocide determination in cases where there is uncertainty.