

By Any Other Name

How, When, and Why the US Government Has Made
Genocide Determinations

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Foreword

In the aftermath of World War II, Raphael Lemkin, a Polish lawyer who lost 49 members of his family in the Holocaust, could find no suitable language to describe the scale and scope of the crime perpetrated against the Jews of Europe.

A word that conveyed the depth of the atrocity did not exist – so he created it. In 1944, Lemkin combined the Greek prefix for “race” (génos), with the Latin suffix for “killing” (-cide) to coin the term “genocide,” and with this, launched his quest to create an international legal framework to prevent and punish any future attempt to destroy a group of people because of their national, ethnical, racial, or religious identity.

Lemkin’s tireless efforts following the Holocaust led, in 1948, to the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide by the United Nations General Assembly, a turning point in world history. For the first time, nations of the world undertook to prevent and punish the crime of genocide under international law. After the US Senate provided its advice and consent for ratification of the Convention in 1986, Elie Wiesel, the United States Holocaust Memorial Museum’s founding chairman, said: “I know that a law on genocide will not stop future attempts to commit genocide. But at least we, as a moral nation, whose memories are alive, have made this statement: We are against genocide, and we cannot tolerate a world in which genocide is being perpetrated.”

Today, 150 nations are parties to the Genocide Convention. 2018 marked the Convention’s 70th anniversary as well as the 30th anniversary of its ratification by the United States. To commemorate these anniversaries, the Museum invited former Ambassador Todd Buchwald, its Tom A. Bernstein Genocide Prevention Fellow, to explore how the US government has utilized the Convention, including how, when, and why the US government has decided to say that genocide has been committed. It seeks to compile, for the first time in one place, the many instances in which senior US government officials have publicly invoked the term, as well as describing the behind-the-scenes decision-making process leading to its use and the lessons to be learned from that process.

The word genocide has power. For groups who have faced eradication, naming their existential harm a “genocide” serves as an important symbolic recognition of the inherent value the group itself brings to the world. It recognizes their human dignity. It is also powerful as a legal matter: Under international law, the Convention has a very particular definition that demands punishment for perpetrators of genocide and is intended to deter would-be perpetrators.

Deciding when to invoke that word, with its attendant power, is complicated. It is particularly complicated for a government – as opposed to a court of law – to determine when to use the word. This complexity stems from the combination of legal and moral considerations that simultaneously inform the decision to make a statement that genocide has been committed. In using the word “genocide,” the US government at once expresses its legal conclusion about a set of facts and inevitably evokes the moral conclusion that, in Wiesel’s words, “we are against genocide, and we cannot tolerate a world in which genocide is being perpetrated.” In light of the difficulty of weighing these legal and moral considerations, this study aims to be a resource for policy makers faced with the difficult task of evaluating, naming, and of course halting or preventing this heinous crime.

This research also offers an important warning: calling or not calling a situation a genocide cannot be a substitute for preventive and responsive action. Ultimately, this is the US Holocaust Memorial Museum’s

central aim in commissioning this report: to prompt considered and concerted action in the face of mass atrocities. When the risk of genocide arises or grave crimes are already underway, senior leaders in the US government should consider a playbook of actions, including actions to amplify the voices of victims and show solidarity with them; actions to protect at-risk communities; actions to address the context that is driving mass atrocities; actions to deter potential perpetrators; and actions to facilitate accountability for those responsible. This study highlights that there is always something more that we can collectively do to prevent, respond to, and punish genocide and related mass atrocities.

We would like to thank all those who participated in this project. We thank our lead authors, Todd Buchwald and Adam Keith, whose research, interviews, analysis, and observations have advanced our collective efforts to make the prevention of genocide and related crimes against humanity a national and international priority. We also thank Kate Cronin-Furman, who served as the research advisor for the project. We particularly appreciate the guidance of our bipartisan advisory group, chaired by John Bellingher and Avril Haines, who together helped to inform, oversee, and assist this study. In addition to our co-chairs, we are grateful to our advisory group, which 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, who is the chair of the Museum's Committee on Conscience. We are also grateful to the Museum staff who contributed to this project.

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Executive Summary

This report reviews the experience of the US government across recent decades in making decisions to say—or not to say—that genocide has occurred in a country. It reviews the political, policy, and legal difficulties that the US government has encountered in considering whether or not to do so. The report goes on to describe the circumstances in which the US government has considered and made such statements, the objectives to which supporters of such statements have pointed as reasons for making such statements, including to show solidarity with victims and to help mobilize a response to prevent further atrocities, and concerns and criticisms that have been offered of pursuing such statements. It then offers a series of recommendations aimed at helping US officials and congressional, civil society, and other advocates address future atrocity situations.

To address these issues, the authors reviewed the public record concerning US policy regarding large-scale mass atrocities in recent decades, focusing on situations where available documents (including public remarks, internal US government documents that have been publicly released, and other studies) provided insight into whether and how the US government considered the applicability of the term “genocide.” The authors also reviewed a handful of recent situations where statements about genocide appear not to have been considered but arguably could have been. This research was supplemented by consultations with more than 60 individuals who were personally involved in the relevant situations, focusing primarily, but not exclusively, on former and current US government officials, as well as by reflections upon the authors’ experiences while working in the government on efforts to prevent and respond to genocide and other mass atrocity crimes.

The first section of the report, together with the case studies that are appended to it, provides an overview of the process used by the US government in determining whether genocide has occurred. While nothing in the legal or policy frameworks concerning genocide actually requires the US government to make public statements that genocide has occurred, it has done so on several occasions, including at least five times (regarding atrocities in Bosnia, Rwanda, Iraq, Darfur, and ISIS-controlled areas, and perhaps also Burundi) since the end of the Cold War. No formal US policy guides decisions on whether to pursue and make such a statement, but a de facto process has emerged over time for gathering and evaluating information and presenting it for high-level decision-making.

The second and third sections of the report discuss the meaning of the word “genocide,” and the historical and other connotations that give the word a special resonance, even relative to other mass atrocity crimes. Public perception of the meaning of genocide frequently diverges from the definition that applies under the 1948 Convention on the Prevention and Punishment of Genocide. Moreover, there are differences in understandings about key elements of the treaty definition itself. Mass atrocities that do not fit within the definition are all too easily—even if wrongly—seen as less grave, or less deserving of an international response, thus creating incentives for advocates to focus on establishing that the crime is occurring even when it may not be feasible to do so.

Perceptions that the 1948 Genocide Convention establishes international legal obligations for states to take robust steps to prevent genocide (discussed in the fourth section of the report) can create further pressure. While it has become more widely understood over time that the US government interprets the Convention as not creating particular legal consequences for the United States in foreign countries, acknowledgments that genocide has been committed can nonetheless underscore a moral responsibility to

act. Indeed, the expectations associated with using the term have sometimes made US officials reluctant to do so because of concerns about creating pressure to take actions that they do not want to take.

The fifth and sixth sections of the report set out overarching observations and a series of recommendations. The fifth section explores in greater detail the circumstances in which the US government has considered and made genocide determinations, the reasons that have been advanced for doing so, and concerns and criticism that have been expressed about the process. In practice, relatively few cases will involve crimes that fit within the definition of genocide. It is thus important to be realistic about the difficulties and risks of trying to show that genocide has occurred, and the limits of the impact such a statement can have—but some degree of impact is possible, both in helping mobilize a response and acknowledging the suffering of victims.

The recommendations in the sixth section are aimed at making US genocide determinations more effective, but also at reducing the need for them. A core premise of these recommendations is that action to prevent or stop genocide and other mass atrocities is of higher importance than naming the crime. Such action should be dependent on assessments of the risk of such atrocities occurring, and policy makers should give greater emphasis to responding to such risks before the atrocities occur. In any event, the authors believe that strong US and international responses should not be limited solely to those mass atrocities that fall within the legal definition of genocide, but should apply to other mass atrocities as well; that the US government should underscore that its moral commitment to preventing mass atrocities includes those that fall outside the Genocide Convention; and that the US government and other advocates should take concrete steps to educate the public about how other mass atrocity crimes should not be considered less grave or less deserving of an international response than genocide.

List of Acronyms

CIA	Central Intelligence Agency
HRW	Human Rights Watch
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ISIS	The Islamic State of Iraq and Syria (also known as ISIL or Daesh)
NATO	North Atlantic Treaty Organization
NSC	National Security Council
UN	United Nations

Introduction

In early May 1994, as Hutu militias began to overcome local resistance in areas of Rwanda that had not yet been reached by their campaign of slaughter, a subcommittee of the US House of Representatives held a public hearing on the crisis. To that point, the international community had been overwhelmingly passive in its response to the killings. Rather than reinforcing or adapting the peacekeeping mission that was in place to monitor the implementation of a power-sharing agreement, the United Nations (UN) Security Council—with active support from the US, Belgian, and other governments—withdrawed 90 percent of the mission’s troops as the killings continued unchecked.

The issue of how to characterize the unfolding violence in the language of law was hardly at the top of the policy agenda. Nonetheless, the careful avoidance of the word “genocide” that characterized government and international statements about the crisis—including a Security Council statement that recited the legal definition of the crime without naming it—seemed both to reflect and enable the desire of many governments to avoid taking responsibility for responding.

Alison Des Forges, a historian of central Africa and at the time a board member of Human Rights Watch’s Africa division, was one of the witnesses invited to testify at the House subcommittee hearing. In her remarks, which focused on a variety of steps the United States and others could take to halt the continued slaughter, Des Forges also addressed the question of genocide. “I am a pragmatist at this point,” she said. “If it is a choice between saying the word or saving lives, I am for saving lives. Let’s not deal with the word if the word is troublesome. But let us remember the moral obligation that is incumbent upon us because of what is happening, and it is genocide.”¹

Des Forges’s comment captured a tension that has arisen as a secondary but persistent theme across a number of the atrocities that the United States has confronted since the end of the Cold War. On one hand, describing a crime is clearly of secondary importance to taking action to stop the crime. On the other hand, in a world where action to prevent or respond to genocide is difficult to mobilize, activists and governments alike have seen both intrinsic and pragmatic value in calling genocide by its name—a name that evokes the awful intent behind the crime, and that makes a connection between the solemn commitments of the past and a new atrocity unfolding before the world’s eyes.

The United States eventually affirmed that genocide had occurred in Rwanda. In the nearly 25 years that have passed since then, the issue of whether genocide was occurring has arisen in a number of other cases—many of which were very different from Rwanda, raising different issues and posing different challenges. A number of observers—including Samantha Power, whose accounts of the US government’s responses to genocide did more than any other reporting to shine a critical spotlight on the awkward avoidance of the term “genocide”—have cautioned against focusing on the word during a crisis. The term’s legal elements are notoriously difficult to prove, especially while crimes are occurring, and its definition contains gaps that are capable of omitting some of history’s greatest atrocities, making it less than ideal as a tool for activating response.

Against this backdrop, this report takes a cross-cutting look at how the US government has decided to make, or not to make, statements that genocide had occurred—and makes recommendations about how to approach the issue in the future. This analysis is not a substitute for a broader atrocity prevention agenda, but rather an attempt to shine light on a particular aspect of this challenge. As mass atrocities continue to occur around the world, this report is meant to help ensure that advocates inside and outside of government have greater insight into the potential and the limitations of the language and laws surrounding genocide, as they attempt to shape a more effective policy response to mass killing.

Section 1 - Overview of US Practice and Process in Determining Whether Genocide Has Occurred

In at least five situations since the end of the Cold War, the US government has concluded and stated that genocide has occurred. This section of the report discusses those situations as well as others in which such statements were considered, and the de facto process that has emerged over the last 25 years within the State Department for deciding whether to make such statements. The word “process” is used guardedly; the process is neither written down nor applied uniformly, there has been no formal decision to adopt a process as a matter of policy, and there are no specified standards governing the facts or circumstances that set it in motion. Information about the process is limited by the fact that only some of the relevant memoranda and supporting information have been publicly released.

When Have Such Decisions Been Made?

Since the end of the Cold War, the State Department has made statements that genocide has occurred regarding at least five distinct situations: Bosnia (1993), Rwanda (1994), Iraq (1995), Darfur (2004), and areas under the control of ISIS (2016 and 2017). As discussed below, State Department records suggest that a finding of genocide was also made regarding the situation in Burundi in the mid-1990s, although we could not confirm that through our own research. In at least two other cases—regarding Sudan’s “Two Areas” in 2013 and Burma in 2018—the process of exploring whether genocide had occurred appears to have been initiated but as of this writing did not lead to a public statement.

US officials also referred to some abuses as genocide during the Cold War itself, including atrocities that occurred in Cambodia, Nicaragua, the Soviet Union, and Armenian-populated areas of the Ottoman Empire. It is not clear, however, that these statements emerged from the kind of analytical or decision-making process that developed in more recent decades, and we thus focus on the post-Cold War situations as a distinct phase. Moreover, in a number of instances in which atrocities were being committed on a massive scale, seemingly targeted against groups that would be covered by the Genocide Convention, no serious analysis was initiated to consider whether the crimes constituted genocide, let alone whether a public statement should be made.

The Nature of the Process

No formal policy exists or has existed to guide how or when the US government decides whether genocide has occurred and whether to state its conclusion publicly. Nevertheless, two publicly available documents shed considerable light on how such decisions have been made. The first is a decision memorandum from State Department

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bureaus to Secretary of State Warren Christopher in May 1994 pursuant to which the Secretary authorized US officials to state that “acts of genocide” had occurred in Rwanda. This appears to be the only publicly released written memorandum that actually embodies the decision-making process—*i.e.*, that is the actual vehicle for recommending that the secretary make such a decision. In this particular case, the memorandum was not styled as a recommendation that the secretary make a “finding” or “determination,” but simply that he authorize department officials to make public statements regarding genocide in Rwanda. The memorandum was accompanied by supporting factual and legal analyses from the State Department’s Bureau of Intelligence and Research and Office of the Legal Adviser, respectively.²

The second document is an “information memorandum” from June 2004 that was prepared by State Department bureaus in the lead-up to the eventual decision by Secretary Colin Powell in 2004 that genocide had occurred in Darfur. The information it provided was generic—that is, the memorandum provided a general overview of genocide and the legal and practical consequences of a determination that genocide had occurred, but it did not evaluate the situation in Darfur and did not make a recommendation for a decision of any kind. The memorandum did, however, contain a section describing how such decisions had been made in past cases, and it states that, as of 2004, the State Department had in recent years concluded that genocide had occurred in four countries: Cambodia, Bosnia, Rwanda, and Burundi. (It is unclear why the memorandum did not mention the 1995 Iraq determination.)³

As described and demonstrated in these documents (and as further illustrated in the case studies contained in the appendix), US decisions to state that genocide has occurred have typically been made by the secretary of state. The decisions have been based on information about the acts of violence occurring in the relevant country as developed, marshaled, and analyzed by State Department policy bureaus, together with the department’s Bureau for Intelligence and Research and Office of the Legal Adviser. Publicly available documents and the case studies suggest that the process has typically not involved a significant amount of legal or policy coordination with other US government agencies.⁴

Even in the case of Rwanda, where roughly six weeks elapsed between the onset of the 1994 killings and a US acknowledgment of genocide, US officials have stated that the process was far longer than any analytical uncertainty would have justified.

In most cases, the analytical and policy deliberations took months—arguably 5 months in the case of Darfur and as many as 16 months in the case of ISIS—between the first internal discussions of whether genocide was occurring and a decision to state that it was. Even in the case of Rwanda, where roughly six weeks elapsed between the onset of the 1994 killings and a US acknowledgment of genocide, US officials have stated that the process was far longer than any analytical uncertainty would have justified.⁵

In certain recent cases, the State Department has supplemented the information available to it with reports from a group of investigators that it has commissioned (called an “Atrocities Documentation Team” in the 2004 Darfur context), usually to conduct a statistically rigorous series of interviews with displaced victims of the crimes being researched.⁶ State Department officials had also conducted interviews with such displaced victims that informed atrocity-crime assessments in earlier contexts, such as near Kosovo in early 1999, but the Darfur investigation was more formal, extensive, and rigorous, and subsequent US efforts in Sudan’s so-called “Two Areas” regions and in Burma appear in turn to have been patterned after it.

These documents and other sources provide much less of a basis for understanding how the process is initiated. For example, they do not make clear why the specific countries were chosen for consideration or whether there were other situations in which the process was applied but did not lead to a decision to say

that genocide occurred. They also do not make clear what prompted the relevant bureaus to begin gathering information and evaluating it against the Genocide Convention in the first place. That said, the case studies in the appendix suggest that a number of factors—including the apparent gravity of the crimes, the decisions of advocates to press or not to press for a genocide statement, and the assessment of high-level officials of how a genocide statement would affect other US policy interests—played an important role in accounting for whether the process was set in motion.

The specific statements that have emerged from the decision-making process have varied in their formulation, ranging from the carefully parsed statements that “acts of genocide” had occurred in Bosnia and Rwanda to Secretary Powell’s more expansive statement that “genocide has been committed . . . [and] may still be occurring” in Darfur, and identifying the Government of Sudan and Jinjaweit militias as bearing responsibility. Similarly, the decision itself has been framed in different ways—the 2004 memorandum referred to the secretary making “findings” or “determinations” that genocide was taking place, while the Rwanda memorandum, for example, framed the issue as whether to authorize US officials to make or agree to certain statements that genocide had occurred. The substance of the underlying analysis, however, has generally focused on the same question: whether the facts support a conclusion that some or all atrocities within the country fall within the definition of “genocide,” set out in the 1948 Convention for the Prevention and Punishment of the Crime of Genocide.

There is typically significant congressional and public interest as these decisions are being considered, and the process appears seldom to have been completed without its existence or some of its elements being aired publicly, whether through leaks or in response to press and congressional inquiries. The process is undertaken against the background of a general view that the answer to the question whether genocide has occurred is of significant importance, though there are different perspectives about the reasons why it is important.

To be sure, genocide is not the only atrocity crime about which the United States has made pronouncements.⁷ The US government has on various occasions made statements that crimes against humanity,⁸ war crimes,⁹ or ethnic cleansing (even though that is not a legally defined term)¹⁰ have occurred but, at least typically, such statements have not been preceded by the kind of elaborate and lengthy analytical process associated with genocide. For example, there appears to have been no such process before Secretary Lawrence Eagleburger “named names” regarding the perpetrators of crimes against humanity in Bosnia in December 1992, and the process for deciding on State Department statements about the commission of ethnic cleansing in Darfur and Kosovo was resolved in days. The absence of a more protracted process at least in part reflected an implicit understanding that the elements of these other crimes were not as difficult to establish as the elements of genocide—particularly the element of genocidal intent. More recently, however, there has been a tendency to borrow from the genocide practice in deciding whether to make pronouncements about these other crimes, such as in connection with a statement that Secretary of State Rex Tillerson made August 2017 about ethnic cleansing of Rohingya Muslims in Burma.¹¹

Cold War and Historical Cases

There were of course numerous situations before Bosnia and Rwanda in which the genocide issue was discussed, even if not always prominently or in strictly legal terms, and even before the United States became a party to the Genocide Convention in 1988. Publicly available documents suggest that the issue

was discussed within the Executive branch in connection with Biafra (from 1967 to 1970), Bangladesh (in 1971), Burundi (1972), Nicaragua (1982), Guatemala (1982), the former Soviet Union (throughout the period and with reference to historical crimes as well), Iraq (1988), and Cambodia (from the late 1970s through 1989), as well as regarding historical Ottoman-era atrocities against Armenians. The Burundi case is in some ways the most interesting as it involves President Nixon—responding personally, in a long hand-written note, to an information memorandum from then National Security Adviser Kissinger that described the massive Tutsi-led attacks against a majority Hutu population as genocide—characterizing the passive State Department reaction to the atrocities as “one of the most cynical, callous reactions of a great government to a terrible human tragedy I have ever seen.”¹²

Throughout the Cold War period, there are few indications—at least in publicly available records—of extensive legal and factual analysis of whether the atrocities fell within the legal definition of genocide, and bureaucratic “oversight” of use of the term seems to have been limited. As the case studies show, for most of this period, those advocating for a stronger US government response to unfolding atrocities rarely pressed for public acknowledgments that genocide had occurred as a means to pressure the US government to take stronger actions.

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This began to change toward the end of this period, as we can see in connection with the situations in Iraq and Cambodia. In Iraq, following the government’s methodically brutal attacks against the country’s rural Kurdish population, Senate Foreign Relations Committee staff and human rights advocates worked to expose the Iraqi atrocities against the Kurds. Major newspaper columnists began to echo earlier statements by Kurdish officials that the attacks amounted to genocide, and members of Congress made similar charges.¹³ Senator Claiborne Pell introduced legislation—“the Prevention of Genocide Act”—which included a finding that “Iraq’s campaign against the Kurdish people appears to constitute an act of genocide” and required the president to certify that

“Iraq is not committing genocide against the Kurdish population of Iraq” before the executive branch could lift a series of sanctions that the bill would have imposed.¹⁴

In Cambodia, charges of genocide against the Khmer Rouge had long been made about the atrocities they committed, notwithstanding doubts about whether the atrocities had been directed “only” against political and social groups, and not the kind of groups—“national, ethnical, racial, or religious”—that are protected under the Convention.¹⁵ In the late 1980s, however—after it had become more clear that at least some of the atrocities had been directed against groups such as the ethnic Vietnamese and Cham that did indeed fit within the Convention’s definition¹⁶—key members of Congress called for a public acknowledgment of Khmer Rouge responsibility for genocide as part of their efforts to press the State Department to exclude the Khmer Rouge from any role in a transitional government.

There was at least one prominent case—involving the Ottoman-era atrocities against Armenians—in which the US government faced intense pressure to characterize historical abuses as genocide. The issue of the Armenian genocide has of course been highly politically charged, including to the present day, amidst US government concerns about the potential effect of doing so on relations with Turkey. Interestingly, there have been at least some Executive branch statements—early on, before the issue became so politically charged—that characterized the atrocities as genocide. For many years since, however, the Executive branch has sought to insulate itself from pressures to pronounce on—or even officially study—

the issue, largely by appealing to the idea that historic cases should be left “in the hands of scholars and historians.”¹⁷

See pages 33-42 of the Appendix for more detailed discussion of these situations.

Bosnia, Rwanda, and the 1990s

The Bosnia and Rwanda experiences are the clear antecedents of the process now used for making decisions about whether to say that genocide has been committed, and are remembered for the resistance shown by senior State Department leadership to embracing such conclusions. In Bosnia, the question of whether the US government should state that Serb forces were responsible for genocide was part of a much larger question about the extent to which the US government should assume responsibility for dealing with the ongoing war in the country. For their part, numerous lower level State Department officials pressed for official recognition of the atrocities as genocide as part of a broader push by individuals inside and outside the US government for a more assertive US role, focused especially on action to lift (or disregard) the arms embargo that the U.N. Security Council had imposed on former Yugoslavia, or to undertake airstrikes aimed at preventing further atrocities.

For their part, senior officials did not see solving the crisis as a US vital interest, considered that the Europeans should accept primary responsibility for dealing with the issue, believed that characterizing the atrocities as genocide would trigger pressure on the US government to take actions that it was not prepared to take.¹⁸ The Clinton Administration eventually settled on formulations—like saying that “acts of genocide” as opposed to “genocide” had occurred—that left a lasting impression that Executive branch pronouncements on these issues should be treated with skepticism and are widely seen as having been used in order to avoid the responsibility that might attach in situations involving genocide. That impression was cemented when the same “acts of genocide” formulation was used to describe the atrocities the next year in Rwanda—an extreme case in which there was no real doubt that genocide had been perpetrated. Under pressure, the United States ultimately made an un-caveated statement that genocide had occurred, though skepticism generated by the earlier statements would endure.

There were other cases in the 1990s that are not as well known. In Iraq, the administration in 1995 embraced the conclusion that Iraq’s atrocities against the Kurds constituted genocide. It did so in support of an effort to find and encourage a group of countries to bring a case against Iraq under the Genocide Convention to the International Court of Justice (ICJ). Significant attention appears to have been given to whether the Iraqi crimes in fact constituted genocide, but the conclusion was not widely publicized, as it was thought that a visible US role would undermine the ICJ effort by politicizing the issue. Because of this, there was an effort—which ultimately failed—to find a geographically diverse group of small, less-politically involved countries to join together to bring the case. In Burundi, where a UN Commission of Inquiry had concluded that there had been acts of genocide against the Tutsi minority in 1993,¹⁹ the United States proceeded cautiously, but at least two senior US officials described events in Burundi as genocide in public comments²⁰ as the United States increased its level of involvement to prevent simmering ethnic violence from exploding.

The 1999 crisis in Kosovo represents a different way of dealing with the genocide issue—one that should be given significant consideration as the US government faces new cases in the future. US officials made

statements acknowledging that “indicators of genocide” were present, thus quickly acknowledging a risk that genocide would occur while avoiding legalistic debates about whether each of the elements necessary to demonstrate that genocide had been committed could be demonstrated in the fog of war. The fact that the United States response in Kosovo was robust—leading to a large-scale NATO air campaign to stop the atrocities—undoubtedly increased the political space for such an approach, as advocates for a strong response had less need to persuade the Executive branch to pronounce on the issue as a means to create pressure for it to respond to the crisis.

See pages 42-58 of the Appendix for more detailed discussion of these situations.

Darfur and Thereafter

The Darfur experience was a watershed—a situation in which a structured and deliberate process, aimed at mobilizing other governments to help prevent atrocities, led to a high-profile, high-level US announcement that a government was responsible for genocide. Unlike the Bosnia and Rwanda cases, the administration was not in the posture of resisting a conclusion that it thought would generate political pressure to take actions that it did not want to take. With recent history clearly in mind—President Bush had famously scribbled “not on my watch” in the margins of a memorandum about the Clinton Administration’s response in Rwanda²¹—Secretary of State Powell signaled that he was prepared to state that the atrocities constituted genocide so long as there was a proper process to consider the issue and the conclusion was established factually. The State Department created and deployed a team of investigators—called an Atrocity Documentation Team—to research the situation and conduct interviews of refugees on the other side of the border in Chad, and Powell acknowledged publicly that Administration lawyers and policy makers were reviewing the issue. When he finally announced his conclusion in testimony before the Senate Foreign Relations Committee, Powell not only said that genocide had occurred, but also specified who—the Government of Sudan and Jinjaweit militias—were responsible.

Secretary of State Powell signaled that he was prepared to state that the atrocities constituted genocide so long as there was a proper process to consider the issue and the conclusion was established factually.

Similar efforts to conduct interviews and develop facts about ongoing mass atrocities were undertaken in connection with Sudan’s “Two Areas” (around 2012) and Burma (in 2018). In both cases, the State Department conducted an investigation and documentation effort regarding abuses committed against civilians, with the understanding that the results might lead to a US government statement that genocide had been committed even if the efforts did not, at least as of this writing, lead to the making of such a statement.

A somewhat different process was used in 2016 in connection with Secretary Kerry’s statement that the so-called Islamic State was responsible for genocide in areas under its control. There was no Atrocity Documentation Team as such, but State Department officers combed through extensive open-source information—ISIS has been notoriously (indeed horrifically) open about its intentions and goals—as well as intelligence. The ISIS situation became politically more fraught, however, as strong concerns were raised about a number of related issues, including whether an eventual US statement would only address genocide against the Yezidi minority in northern Iraq—about whom ISIS had made its genocidal intent particularly explicit—or would also cover Christians and other groups. In the end, Secretary Kerry’s statement,

and a similar statement the following year by Secretary Tillerson, covered Christian and other groups as well.

In other situations, potential advocates within the State Department considered but decided at an earlier stage not to pursue efforts to develop the information that would be needed to make a genocide determination. For example, the possibility of undertaking a legal analysis of the ethnically or religiously targeted atrocity crimes being committed in South Sudan or the Central African Republic from 2013 on was reportedly discussed at the staff level, though in the face of practical concerns—e.g., questions about the likelihood that they would be able to develop sufficient evidence or tactical judgments that it was better to concentrate resources and attention on other aspects of the response to the crisis—it does not appear to have been seriously pursued in either case.

See pages 59-72 of the Appendix for more detailed discussion of these situations.

Section 2 - What Does the Word “Genocide” Actually Mean?

What does it mean to say that genocide has been committed?

The answer to this seemingly simple question can be enormously complex. There is a definition of the crime in the 1948 Genocide Convention, but public perceptions of the term are based on more subjective factors than the treaty definition, and there are significant differences of views about how the terms of the Convention itself should be interpreted and applied. The very different perceptions of what constitutes genocide can significantly complicate US government efforts to assess whether genocide has occurred and to explain its conclusions publicly.

Public Perceptions of the Word “Genocide”

The word “genocide” was coined by Raphael Lemkin, the man whose well-documented and tireless efforts led to the unanimous adoption of the Genocide Convention on December 9, 1948, and its entry into force a little more than two years later on January 12, 1951, after its ratification by 20 countries. Lemkin’s original concept was that genocide entailed “the destruction of a nation or an ethnic group” and “a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves.”²² In a general sense, “genocide” is often understood as a pattern of atrocities that resembles the systematic atrocities committed by Nazi Germany against the Jews and other minorities, or simply any particularly grave set of abuses targeted against civilians. One scholar has described this perception of the word:

For many, genocide is simply the pinnacle of evil, and they employ the term to draw attention to the suffering of their people. In that sense, *genocide* is less an empirical term—a term that conveys specific qualities that can be observed—and more a moral term designed to convey that something terrible is happening.²³

There is often a sense that the perpetrators must have acted with an underlying intent to eliminate the group in order for the crime to constitute genocide, but different people may have different senses of what “eliminate” means for these purposes. Discussion about whether particular atrocities constitute genocide can also turn on perceptions of whether they are sufficiently grave as to warrant an obligation—or at least a moral responsibility—to take tangible action to stop them.

A Legal Definition of the Word “Genocide”

The common understandings of genocide described above are not “wrong,” but they diverge in key ways from the definition on which governments and international courts rely under the Genocide Convention. The publicly available documents make clear that it is the definition in the Convention that the

State Department uses when considering whether genocide has occurred in a country.²⁴ Article II of the Convention sets out that definition:

In the present Convention, genocide means 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

Thus, although the common understanding and the definition in the Convention are both focused on action targeting a specific group with the intent to destroy it, the common understanding can turn on a variety of subjective impressions, while the definition in the Convention turns on a specific set of criteria selected by the negotiators of the Convention. This can easily lead to disconnects between US government pronouncements and perspectives in the general public about whether genocide has occurred.

...the common understanding can turn on a variety of subjective impressions, while the definition in the Convention turns on a specific set of criteria selected by the negotiators of the Convention.

In addition, there are different interpretations of the treaty definition itself. Several of the elements of the definition are not self-evident and some are not stated particularly clearly. The text of the Convention, like that of most treaties, reflects both political compromises and the intrinsic difficulties in translating broad ideas into specific treaty language. Other criteria for the crime would have been plausible—perhaps equally or more plausible—but the states that negotiated the text brought to the table specific concerns and interests, some of which led them to seek to narrow the definition in order to reduce the possibility that their own past or present conduct would be described as genocide. The definition that they adopted is thus often criticized by scholars as an ill fit for the concept as Lemkin or others have conceived it, but states have come to treat the definition as “almost sacred”²⁵ and have incorporated its terms virtually verbatim into the statutes of other international courts.²⁶

Complications Presented by the Definition

Entire books have been written about the terms of the definition²⁷ and a complete analysis is beyond the scope of this report. The remainder of this section attempts to provide enough of an overview in order to help the reader understand the kinds of difficulties that the US government (and others) can encounter in the process of assessing whether genocide has occurred.

(a) What are the kinds of groups against which attacks must be directed?

Under the Convention’s definition, genocide can be committed only against certain kinds of groups—specifically “national, ethnical, racial, or religious” groups. Intent to destroy a social, political, economic, or other type of group would not suffice to make a crime genocide, no matter how high the number of victims or how heinous the acts of the perpetrators.

The limitation of the definition to these kinds of groups was not inevitable. Indeed, when the U.N. General Assembly in 1946 adopted the resolution that urged states to negotiate a convention on genocide, it noted past cases in which genocide had been committed against “political” groups, and affirmed that genocide is punishable “whether the crime is committed on religious, racial, political, or any other grounds.”²⁸

The Convention’s narrower approach—“born of politics and the desire to insulate political leaders from scrutiny and liability”²⁹—omits many cases that would seem also to shock the conscience and to clamor for the same kind of international response as cases that fell within the Convention’s definition. For example, while the Khmer Rouge may have been responsible for nearly two million deaths in Cambodia,³⁰ only the atrocities directed against groups like the Cham Muslims and the ethnic Vietnamese minority fit neatly within the definition of genocide.³¹

(b) What does “destroy” mean?

The international courts have concluded that, for a crime to come within the definition in the Convention, the perpetrator must intend to destroy the relevant group in a biological or physical sense—in other words, 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. The State Department also

...an intent to destroy “the identity of the group without destroying the members of the group” is not considered sufficient to establish genocide.

uses this approach and its lawyers have noted that the drafters of the Convention excluded “cultural genocide.” The effect of this is that—even though this kind of “cultural genocide” threatens to deprive the world of the “traditions, culture, and future contributions” so as to fall within Lemkin’s original conception of the word³²—an intent to destroy “the identity of the group without destroying the members of the group”³³ is not considered sufficient to establish genocide.

This has been a particularly important issue in assessing situations of widespread ethnic cleansing. According to the International Court of Justice, the intent to “render an area ‘ethnically homogenous’” is insufficient to establish genocide.³⁴ Thus, while many people would consider a perpetrator’s crimes *more* egregious if undertaken in order to ethnically cleanse a country or area, a defendant facing a genocide charge could argue that he *only* intended to displace the ethnic group rather than to destroy it.³⁵

This approach can thus be another source of divergence between the common understanding and the understanding of those applying the definition in the 1948 Convention. In addition, *proving* that a perpetrator acted with intent to destroy a group in the physical or biological sense can be quite difficult, potentially creating further divergence between public perceptions of whether genocide has occurred and an analysis under the 1948 Convention.

(c) What does it mean to intend to destroy a group “in part”?

Under the Genocide Convention, the perpetrators must intend to destroy the relevant group “in whole or in part.” There can be significant confusion and differences of view about how large a part of the group the perpetrators must intend to destroy in order to fall within the Convention’s definition of genocide.

For its part, the US Senate adopted an Understanding during the Convention’s ratification process that specified that the intent must be to destroy the relevant group “in *substantial* part.”³⁶ The Understanding did not specify what would qualify as a “substantial part” but the domestic legislation adopted by Congress to implement the Convention under US domestic law defined the phrase as follows:

“the term ‘substantial part’ means a part of a group of such numerical significance that the destruction or loss of that part would cause the destruction of the group as a viable entity within the nation of which such group is a part.”³⁷

International courts have adopted a similar approach, saying that such a requirement “is demanded by the very nature of the crime of genocide”³⁸ and by the understanding that genocide is both “a crime of massive proportions” and has an impact “on the overall survival of the group.”³⁹

Cases that arose in Bosnia reflect the real-world complexities in applying these concepts. Faced with the massacres near Srebrenica, the UN’s Yugoslavia Tribunal concluded that the relevant “group” was Muslims in Bosnia. It recognized that the Bosnian Muslims of Srebrenica formed “only a small percentage” of that group, but looked to a series of qualitative factors—such as evidence that Muslims in Srebrenica “had a special significance or were emblematic in relation to the protected group as a whole”—in deciding that they represented a sufficiently substantial part of Muslims in Bosnia.⁴⁰ In addition, even though only “military-aged men” were targeted for killing, the Tribunal reasoned that the destruction of such a sizeable number of men would “inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica” and would eliminate “even the residual possibility that the Muslim community in the area could reconstitute itself.”⁴¹

Under such principles, there is a significant element of judgment involved in deciding whether a sufficiently substantial “part” of the relevant group has been destroyed. The key point for present purposes is that differences of view about the significance or substantial-ness of a part of a group that has been attacked can easily reflect differences of view that are more about how the Convention should be interpreted than about the atrocities themselves.

(d) Whose intent is relevant?

In the context of any specific set of atrocities, different persons may well act with different intentions, thus complicating efforts to identify which particular actors may have committed genocide. To some extent, this difficulty is eased by separate provisions in Article III of the Convention that make punishable certain acts—such as incitement to commit genocide and complicity in genocide—in addition to direct perpetration of genocide. For example, the UN’s Rwanda Tribunal found that a person could be convicted of aiding and abetting if he knew that a person that he was aiding and abetting intended to destroy the relevant group, even if he did not share that person’s intent.⁴²

The fact that different actors may have acted with different intentions can complicate decision-making about whether to make statements that genocide has occurred. At least in an abstract sense, the statement that genocide has occurred would be true even if only a small handful of low-level individuals had acted with the requisite intent, though US policy makers would presumably be hesitant to make such a statement on this basis, at least absent indications that more senior officials had failed in their duty to prevent or punish such actions.

How Clear Must the Evidence Be in Order to Conclude that Genocide has Occurred?

Some perpetrators, such as the leaders in Nazi Germany, may overtly express their intent to destroy the relevant group. More typically, however, the oppressor's intent can only be inferred, and the surrounding facts and circumstances may not be entirely clear. This further contributes to the difficulty of concluding that genocide has occurred.

This question is especially important in assessing the issue of intent. Some perpetrators, such as the leaders in Nazi Germany, may overtly express their intent to destroy the relevant group. More typically, however, the oppressor's intent can only be inferred, and the surrounding facts and circumstances may not be entirely clear. This further contributes to the difficulty of concluding that genocide has occurred.

The practical question for the US government as it considers the issue, or for advocates pressing it to do so, is how conclusive must the inferences be? For its part, the International Court of Justice has set a remarkably high bar, reasoning in the *Croatia v. Serbia* case that, because charges of genocide are of exceptional gravity, the claims must be proved by evidence that is “fully conclusive” in order for the Court to hold a state responsible.⁴³ In line with this approach, the Court said that, while intent can be inferred from a pattern of conduct, it would do so *only* where “this is the *only* inference that could reasonably be drawn from the acts in question.”⁴⁴ Similarly, in a criminal prosecution for genocide, a court would need to establish each of the elements of genocide, including that the defendant acted with the requisite intent, through proof beyond a reasonable doubt.

The standard applied by the ICJ is derived from its view that “claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive.”⁴⁵ The international criminal courts also apply a high standard, in their cases derived from their obligations under international criminal law to ensure that persons are convicted only in cases in which their guilt is established beyond reasonable doubt.⁴⁶

It does not necessarily follow, however, that states—the responsibilities of which include preventing genocide—should self-impose a similar standard when deciding whether to use the term. At the same time, use of a standard noticeably lower than those used by the international courts could result in other countries discounting or giving less weight to US government pronouncements—an important consideration insofar as part of the goal in making these statements is to galvanize international support for action.

Section 3 - The Power and Importance of the Word “Genocide”

Genocide is widely seen as atop a kind of hierarchy of atrocity crimes. The singularity of its status seems to have diminished over time as the international legal architecture and the commitments to prevention that governments have undertaken have expanded to cover other types of atrocity crimes. As the case studies show, there persists a strong sense of the special stigma and moral power that the word “genocide” conveys. Indeed, Raphael Lemkin’s original idea of having a Genocide Convention was grounded in the notion that genocide was a crime that stood apart, and he argued that genocide must be “treated as the most heinous of all crimes,” as the “crime of crimes,” and as crime that “not only shocks our conscience but affects deeply the best interests of mankind.”⁴⁷

Genocide’s Unique Status

There are powerful reasons for thinking of genocide in this way. The passion surrounding use of the word “genocide” grows in part from its unique focus on human groups and its association with the horrors of the Holocaust. The idea that a perpetrator’s aim is to wipe out an entire people seems so grotesque—so qualitatively different from “mere” mass murder—as to defy imagination. As Lemkin explained, the perpetrator of genocide aims to deprive our planet not only of the sacred lives of the individuals who are exterminated, but of the traditions, culture, and future contributions to the world that are lost when entire human groups are destroyed.⁴⁸ Such destruction is a crime not just against the group being targeted, but against all humanity. In the words of the judges of the UN’s Yugoslavia Tribunal, “the crime of genocide is singled out for special condemnation and opprobrium.”⁴⁹

Even though the actual postwar prosecutions of Nazi German leaders were for crimes against humanity, not genocide, the word “genocide” is seen to more compellingly evoke the horror that befell European Jews, and the shame that shrouded the international community for allowing the Holocaust to unfold. The word is often seen as carrying a moral power that embodies crimes of the type that the world must spare no effort to prevent and punish, and “never again” be allowed to be perpetrated. The commander of UN forces in Rwanda between 1993 and 1994 gave a clear expression of this power when he recalled a moment in the unfolding slaughter at which he “just needed a slap in the face to say, ‘... This is genocide, not just ethnic cleansing.’”⁵⁰ Other statements reflect the sense of a hierarchy of crimes in a more subtle way, such as when the independent commission tasked with studying the UN’s actions in response to the Rwanda genocide, even while emphasizing the importance of mobilizing political will to address crimes that do not fit the criteria of the Genocide Convention, described such crimes as having “not reached *the ultimate level* of a genocide.”⁵¹ One scholar describes the word as having “entailments that these other atrocities do not,” including a sense of being “more inflammatory, more reproachful. . . .”⁵² Another scholar concluded that advocates during the Darfur crisis held “a widespread belief that a situation labeled genocide would attract more government resources (both attention and money) than a situation that was not labeled genocide.”⁵³ Still other scholars have written about the incentives that victims and their advocates—reacting to “popular understandings of genocide as the ‘ultimate crime’”—have to invoke the term to rally support for intervention, even when the criteria have not been met.⁵⁴

There are also structural reasons for the special perception of genocide, rooted in the legal history of the crime. In the wake of World War II, the idea that the international community had a cognizable legal interest in the way that governments treated their own populations was only beginning to emerge. Indeed, when the Genocide Convention was adopted in 1948, none of what are now considered the modern human rights treaties were yet in place. Yet if a crime qualified as genocide, the new legal regime created by the Convention provided a protective role for the international community—a role that, however limited, did not apply to crimes outside the Convention’s definition of the word “genocide.” As William Schabas wrote, “In cases of mass killings and other atrocities, attention turned inexorably to the Genocide Convention because there was little else to invoke.”⁵⁵

Under modern law, most crimes that could be prosecuted as “genocide” could also be prosecuted as “crimes against humanity,” but most crimes against humanity cases could not be prosecuted as genocide. While there is a requirement that the act have been committed as part of a widespread or systematic attack against a civilian population in order to constitute crimes against humanity, it is far less difficult in practice to prosecute crimes against humanity because the prosecutor need not prove that the perpetrator acted with the specific intent to destroy the relevant group.

A Different Perspective

The view that genocide should be seen as a crime apart is not universally held. Indeed, the same tribunals that have spoken of the need for genocide to be specially condemned have at other times observed that there is “no hierarchy of crimes” under any of the statutes that govern their work, and that all of the crimes specified therein are “serious violations of international humanitarian law,’ capable of attracting the same sentence.”⁵⁶ The same is true for the UN’s Commission of Inquiry for Darfur in 2005, which—in finding that the atrocities in Darfur were horrific but that there was insufficient evidence to call them genocide—said that the lack of a finding of genocide “should not be taken as in any way detracting from or belittling the gravity of the crimes perpetrated in that region.” In its words:

[G]enocide is not necessarily the most serious international crime. Depending on the circumstances, such international offences as crimes against humanity or large-scale war crimes may be no less serious and heinous than genocide.⁵⁷

Government officials, too, have cautioned against underestimating the significance of atrocity crimes that do not fit the criteria of genocide, saying they “deserve the same moral condemnation, criminal prosecution, and efforts to prevent and to punish that we give to the crime of genocide.”⁵⁸

Government officials, too, have cautioned against underestimating the significance of atrocity crimes that do not fit the criteria of genocide, saying they “deserve the same moral condemnation, criminal prosecution, and efforts to prevent and to punish that we give to the crime of genocide.”

Why the difference in views? For one thing, the legal regimes and the broader expectations associated with atrocity crimes other than genocide have undoubtedly matured, and in at least some ways have caught up to those that were once associated only with genocide. Beginning with the ad hoc tribunals for Rwanda and the former Yugoslavia, and with the creation of a permanent International Criminal Court, the international community has put in place a far clearer and more robust legal architecture that covers a wide range of atrocity crimes.⁵⁹ This is most importantly true in connection with crimes against humanity,

which have become prosecutable crimes within the jurisdiction of all of the international criminal tribunals. It is no longer true (or, at least, as true) that there is little to invoke in the way of legal protections or policy commitments in cases that do not fall within the definition of genocide.

In many practical ways, the United States has taken steps to lessen the perceived gap between genocide and other atrocity crimes, primarily by making clear that genocide is not the only crime that warrants international attention and response. For example, in formal comments, the US government proposed that the “Responsibility to Protect” principles to be adopted at the September 2005 United Nations summit of heads of state and government should cover not only genocide but also “other large-scale atrocities,” explaining that this would help “avoid legalistic debates about whether a particular situation constitutes, for example, genocide.”⁶⁰ A high-level civil society panel—the Albright-Cohen Genocide Prevention Task Force—similarly made clear in its landmark 2008 report that its recommendations were aimed at helping prevent “genocide and mass atrocities”—a phrase the panel said was expressly chosen to help “avoid legalistic arguments that have repeatedly impeded timely and effective action.”⁶¹ Similarly, President Barack Obama’s 2011 Presidential Study Directive on Mass Atrocities also defined the US government’s interests in atrocity prevention in broad terms, finding that “preventing *mass atrocities and genocide* is a core national security interest and a core moral responsibility” and mandating the establishment of an Atrocities Prevention Board (APB) that focuses on a set of crimes that includes more than genocide.⁶²

None of this is to argue that too much attention is given to instances of genocide—rather, it highlights the potential shortcoming in the attention that governments pay to other mass atrocity crimes that in some way or other may not fit the particular criteria of the Genocide Convention. Indeed, a number of activists and policy makers with whom we spoke as we prepared this report cautioned against placing too much emphasis on whether a set of atrocities constituted genocide. Concerns were expressed on a number of fronts, including about: 1) situations receiving insufficient attention and response if they “only” constitute crimes against humanity, 2) valuable time being wasted awaiting an outcome of a lengthy decision-making process, 3) the act of declaring genocide to have occurred serving as a substitute for more tangible action, and 4) having decisions on whether genocide had occurred or was occurring plagued by difficulties of proof, in particular in relation to specific intent, and by the difficulties in applying the definition.

Section 4 - International Legal Consequences of “Genocide”

Observers have sometimes overstated the degree to which a statement by the US government that genocide has occurred in a particular country triggers *legal obligations* for the United States, at least as it has historically interpreted its obligations under the Genocide Convention. Regardless of how those obligations are understood as a legal matter, the *expectations* that flow from using the word can be significant in their own right. This section provides a brief overview of what the United States has committed to do in the relevant treaties and other frameworks concerning genocide, and it highlights the limited linkages between those commitments and the use of genocide language.

The Genocide Convention addresses the genocide-related obligations of the United States in four places.

- Article I describes genocide as a crime under international law that the parties “undertake to prevent and punish.”
- Article V requires the parties “to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the...Convention,” and in particular to provide effective penalties for persons convicted for acts of genocide.
- Article VI requires states to try persons charged with committing genocide in their territory (at least in cases in which an international penal tribunal is not doing so).
- Article VII establishes obligations for parties to grant extraditions in cases of genocide in accordance with their laws and treaties.⁶³

As is apparent on the face of all of these provisions but Article I, the actual legal obligations are quite modest—and they are not implicated in a meaningful way by the US government making a statement that genocide has occurred in a foreign country. The United States has already adopted legislation to criminalize and punish genocide that meet its obligations under Article V.⁶⁴ A statement that genocide has occurred in the territory of another country would not trigger a requirement under Article VI for the United States to undertake prosecutions (nor would such a statement by the State Department be necessary for US law enforcement authorities to proceed with such a prosecution). Finally, with respect to Article VII, any obligation to extradite a person would be subject to U. S. laws and treaties, regardless of whether the US government had made statements about genocide having occurred.

Different Views about the Obligation to Prevent and Punish

With respect to Article I, there are differences of views about what states are in fact required to do in order to discharge their obligation to “prevent and punish.” For its part, the International Court of Justice concluded in the *Bosnia v. Serbia* case in 2007 that the obligations are not limited to genocide that occurs on a state’s own territory, and that the obligation to prevent genocide “is not to be read merely as an introduction” to the measures described in the later articles of the Convention.⁶⁵ The Court neverthe-

less concluded that the Article I obligation is limited in several ways: the extent of the obligation would depend on the state's capacity to influence persons likely to commit genocide, and that capacity, in turn, depends on such factors as the geographical distance between the state concerned and the perpetrators, and any political and other links with those perpetrators. Many of those ties were unusually strong in the *Bosnia v. Serbia* case, given the special relationship and "undeniable influence" that Serbia at that time exerted over the ethnic Serb leaders operating in neighboring Bosnia. The Court also concluded that in any event the Convention's obligation to prevent creates no right, let alone an obligation, to intervene militarily in a foreign country to stop genocide.⁶⁶

Importantly, however, the Court stated that, if a state "has available to it means likely to have a deterrent effect on those suspected of preparing genocide," it then is under "a duty to make such use of these means as the circumstances permit," and that this duty arises when "the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed."⁶⁷ As a result, the obligation to prevent under this interpretation of the Convention would ordinarily be triggered *before* a determination could be made that genocide had already occurred.

The United States has taken a different position. Its view has been that the obligation to prevent and punish under Article I applies only within the territory of the United States and does not go beyond the specific obligations set out in the other provisions of the Convention. This view can be seen in the State Department memorandum on Darfur, which noted that the department had "rejected arguments by some human rights advocates for an expansive reading of Article I . . . that would impose a legal obligation on all [parties to the Genocide Convention] to take particular measures to 'prevent' genocide in areas outside of their territory."⁶⁸ Indeed, the US government's view—including as least as far back as the 1994 Rwanda crisis—has been that a US statement that genocide had occurred "would not have any particular legal consequences."⁶⁹

[The US view] has been that the obligation to prevent and punish under Article I applies only within the territory of the United States and does not go beyond the specific obligations set out in the other provisions of the Convention.

Political and Moral Responsibility

Nevertheless, whatever one's views of scope and content of the legal obligations, a statement that genocide has occurred has the potential to create political and moral pressure to take some type of action.

Indeed, in the "Responsibility to Protect" principles adopted at the 2005 UN World Summit, the United States and other states agreed that the international community has a responsibility "to use appropriate diplomatic, humanitarian, and other peaceful means...to help protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity." The use of the word "responsibility" reflects the non-legal character of the provisions, but the principles highlight the importance of the international community acting effectively to ensure that populations are protected. In the lead-up to the adoption of these principles, the United States in particular publicly agreed in a "general and moral sense that the international community has a responsibility to act" in the face of mass atrocities even if there were no "obligation to intervene under international law."⁷⁰ More generally, US policy statements on atrocity prevention and the recurring invocations of "Never Again" serve as sources of pressure to act when there

is a clear risk of genocide—and presumably all the more so when the US government confirms its view that genocide is being committed.

Statements that genocide has occurred do not have a specified role to play in this framework of commitments, nor are such statements necessary in order to trigger any obligation or responsibility that might exist. What they show, however, is that the United States perceives the situation as being of the type that implicates its responsibility to act, even if the actions it should take are not specified. The responsibilities may apply even if genocide has not occurred, since the “responsibility to protect” principles apply equally to other forms of mass atrocities. In any event, as the case studies will show, this combination of the legal and political expectations associated with genocide has sometimes worked to discourage US officials from making such statements in order to avoid creating pressure to take actions that they do not want to take, and has sometimes inspired advocates to seek out such statements precisely in order to create this kind of pressure.

Section 5 - Observations

The previous sections of this report describe how the US government has approached the issue of whether to make genocide determinations in a number of specific situations, and the case studies appended to the report provide considerably more detail. We now turn to some general observations that can be distilled from these cases: Why has the US government considered and made these statements in certain situations? What were the reasons offered for pursuing genocide determinations, and what concerns and criticisms have been expressed about doing so, either in specific cases or more generally? Finally, how does the US approach compare with how others approach these issues?

1. In what circumstances has the US Government considered and made genocide determinations?

The United States has no established policy framework to guide decision-making on *whether* to make a statement that genocide has occurred in a given situation. In the absence of such a framework, we attempt to draw some conclusions from the case studies about the circumstances under which the US government has proceeded to make such statements.

The case studies suggest that a mixture of interrelated factors are relevant. The gravity of the atrocities, and the extent to which the atrocities are understood as being targeted against a group protected under the Genocide Convention, offers the obvious starting point. Clearly, the question is more likely to arise when the crimes are seen as particularly heinous, and a clear sense at any point that there is no reasonable basis to conclude that genocide may be occurring can obviate the need for further discussion. But the last section of the case studies (pages 33-72) highlights a number of instances when atrocities were being committed on a massive scale, seemingly targeted against the kinds of groups covered by the Convention, yet appear not to have prompted serious analysis about whether the crimes constituted genocide—let alone the kind of information-gathering efforts that the State Department undertook in certain cases that were aimed (at least in part) at better informing such an analysis.

This highlights that the US government does not *automatically* proceed to assessing the facts of an unfolding mass atrocity situation against the Genocide Convention simply based on the gravity of the atrocities being committed, but rather appears only to consider doing so if some set of advocates within or outside the government affirmatively put the issue into play and press it to do so. The case studies provide examples of a wide range of individuals or institutions taking this kind of initiative, ranging from newspaper columnists to advocacy groups to members of Congress, and of course to US government officials at junior or higher levels in the State Department. Although there is no formulaic way to predict the situations in which the issue of genocide will gain traction with US government officials, relevant factors appear to include the extent to which:

...the US government does not *automatically* proceed to assessing the facts of an unfolding mass atrocity situation against the Genocide Convention simply based on the gravity of the atrocities being committed...

- The perpetrators are seen in a particularly negative light.
- The victim group is seen in a particularly sympathetic light.
- There is one group that is (at least primarily) the perpetrator group and another that is the victim group, as opposed for example to situations where both groups are seen as culpable.
- There is widespread reporting about the atrocities, so as to make the issue a matter of general public attention.
- There is particular congressional interest in the country or the victims.
- There is perceived to be a substantial gap between the “degree of activism” in US efforts to prevent and stop the atrocities and what is seen to be appropriate or achievable.
- The impact of the US government making a genocide statement is perceived as worth the effort likely to be required to advocate for it, and to do the necessary work to develop the evidence needed to support the conclusion.
- The characteristics of the violence are likely to support a conclusion that genocide has occurred.

For each of these factors, different actors may have different perceptions. For example, with respect to whether the characteristics of the violence are likely to support a conclusion that genocide has occurred, different actors may have very different views of what constitutes genocide and thus may come to different assessments. In other cases, the weight of these factors may shift over time depending on the lessons that advocates and others inside and outside the US government have taken away from previous crises. As an example, at the time of the Bosnia war, many advocates believed that a candid statement by the US government about genocide would help catalyze a much stronger US government response, and the same appears to have been true for Darfur. More recently, however, the prospect of catalyzing a stronger response appears to have become less of a factor, with would-be advocates sometimes specifically citing disappointment with the perceived impact of the Darfur determination on US policy, as well as frustration with the length of the process required to produce the ISIS determination, as reasons not to pursue a determination of genocide.

[T]here are a variety of factors that may make the US government more reluctant to push the issue forward...

At the same time, the case studies suggest there are a variety of factors that may make the US government more reluctant to push the issue forward, including whether its senior leadership believes that a determination would:

- Limit policy flexibility that it sees as being important to maintain, including by limiting the ability to work with particular actors with whom it believes that it needs to work;
- Trigger political pressure to take actions that they do not want to take
- Undermine a relationship with a government that they believe is important for other reasons
- Be inconsistent with a negative narrative of the victim group or otherwise not be broadly consistent with US policy toward a particular situation

The weight of these considerations has varied from one situation to another. For example, the US government appears to have resisted a straightforward statement about genocide in Bosnia in 1992 and 1993 because of concerns that a statement would create pressure to take actions that it did not want to take, but subsequently (in 1994) came to a point at which it was decided that the effects of making a genocide statement were sufficiently manageable, and the political costs of resisting such a statement too high. The weight of these factors can shift as a situation unfolds, and the conduct of the relevant groups in the countries in which the atrocities are occurring can of course lead to shifting perceptions of these factors over time.

The considerations described above are sometimes weighed at the outset, before the work of investing significant time and energy needed to assess whether genocide has occurred is actually undertaken. Thus, in some cases, relevant bureaus have sought confirmation that senior State Department officials were supportive of developing the evidence that would be needed to support a conclusion that genocide occurred and potentially open to making such a statement before they proceeded to undertake the work necessary to do so.

2. To what objectives have supporters of such statements pointed for pursuing statements from the US government that genocide has been committed?

The case studies highlight a number of arguments that supporters have advanced for the US government to make statements that genocide has occurred in particular cases. These reasons can be divided into two categories. The first category relates to the *intrinsic value* of such a statement, such as when supporters of a statement have appealed to the importance of:

- Bearing witness
- Helping to establish a historical record against efforts to deny, minimize, or justify the crime
- Demonstrating respect and empathy for the victims, acknowledging their suffering
- Avoiding a silence that could be seen as tantamount to denial

Sometimes these factors have been cited specifically when the determination that genocide occurred is announced, such as when Secretary Kerry said—when announcing his conclusion about ISIS’s responsibility for genocide in 2016—that he hoped his speech “will assure the victims of Daesh’s atrocities that the United State recognizes and confirms the despicable nature of the crimes that have been committed against them.”⁷¹ It is hard to quantify the importance of these kinds of factors, but they can clearly play a role as the issue is considered, and many victims groups and advocates consider such statements important and are appreciative when they are made.

The second category relates to the instrumental value such a statement can make to achieving other, more tangible goals. Supporters of making statements have at various times cited the prospect that doing so would help:

- Mobilize efforts by the United States, or help the US government mobilize international efforts, to stop and prevent atrocities

- Lay groundwork for efforts to ensure that those responsible for the atrocities are held to account or subjected to sanctions
- Shape the US or international narrative or lens through which a conflict or crisis and the parties involved in it are seen
- Deter individuals from joining with or supporting the perpetrators
- Address public or congressional pressure to pronounce on the issue or otherwise change policy
- Avoid situations in which the United States is isolated in multilateral forums in its unwillingness or inability to support statements that genocide has occurred, particularly when embedded in resolutions or statements that would be embarrassing to oppose

It is difficult, of course, to assess the degree to which these expectations have actually been fulfilled in practice. Especially in some of the key cases from the 1990s and early 2000s, however, advocates inside and outside the US government appear to have placed great stock in the possibility that a US acknowledgment that genocide was being committed would force the US government to undertake or press for more forceful efforts to prevent and punish the crimes, and in some cases to put military force behind that effort. For example, as reflected in the case studies, the issue of genocide language in Bosnia was strongly tied to questions about whether the US government should either lift the arms embargo that the Security Council had put in place, or should directly intervene militarily.

It seems evident that, at least on some occasions, US genocide statements prompted specific US actions, or at least had the effect of making it politically difficult to stand in the way of certain actions.

It seems evident that, at least on some occasions, US genocide statements prompted specific US actions, or at least had the effect of making it politically difficult to stand in the way of certain actions. For example, the US government's genocide statement on Darfur appears to have shaped the environment in a way that led to its later decision not to veto the Security Council decision to refer the situation in Darfur to the International Criminal Court (ICC).⁷² In addition, at least some of those who have been involved in the issue believe that the finding of genocide, reinforced by a subsequent ICC arrest warrant

against Sudanese President Omar al-Bashir for genocide and other crimes, was key to ensuring the durability of US government efforts aimed at isolating and stigmatizing Bashir.⁷³

More generally, pressure to acknowledge that genocide was occurring in Rwanda seems to have played a part in forcing the US government to shift from removing or cutting the UN peacekeeping mission there (as US policy restrictions initially dictated) to allowing the mission to be reinforced and focused on civilian protection, even if this shift came far too late to stop the killings.⁷⁴

Broader assessments of the impact of the Darfur determination are difficult to make. One scholar of international mobilization in response to the genocide in Darfur concluded that Secretary Powell's genocide statement "became the catalyst for the formation of a citizen-based Save Darfur movement that was able to mobilize and sustain unprecedented numbers of Americans intent on pushing the US government to stop the killings," and that this attention in turn corresponded to a greater degree of media coverage of the crisis and congressional willingness to appropriate funds for a costly peacekeeping intervention in Darfur.⁷⁵ Nonetheless, she concluded that the surge of private and official US attention was not sufficient to overcome, for example, the Sudanese government's intransigence and the diplomatic support it

received from China and Russia on the Security Council in the years that followed Secretary Powell's statement.⁷⁶ A number of activists with whom we spoke were also deeply disappointed with the overall effect of the 2004 determination on US policy and the situation on the ground. For their part, US policy makers have on several occasions averred that their pronouncements that genocide had occurred would not materially affect their future course of action, including for example Secretary Powell's statement — at the time of his Darfur testimony — that “no new action is dictated by this determination.”⁷⁷ There also appears to be greater recognition than in the past that the State Department does not view the fact that genocide is occurring as creating a legal obligation on the United States or others to intervene to stop the atrocities.

In a more general sense, advocates have also sought genocide determinations as a means of shaping the US or international narrative or lens through which a crisis—or the parties involved in it—are seen. In some situations, such as regarding the Anfal campaign in Iraq, advocates sought to increase the level of stigma associated with the perpetrator, and that same kind of consideration—together with a desire to ensure that the full gravity of the perpetrator's crimes is widely understood—continues to motivate supporters of a determination of the ongoing atrocities in Burma.⁷⁸ In both Rwanda and Darfur, advocates sought genocide language at least in part as a way to emphasize that an undue policy focus on peace negotiations between belligerent parties was an incomplete or even misguided approach to the crisis, in the face of the urgent need to improve security and provide protection for civilians under threat.⁷⁹ The degree to which a genocide determination in fact produces these types of effect is, however, difficult to assess.

3. What concerns and criticisms have been offered regarding pursuing genocide determinations, in specific cases or generally?

A number of advocates and policy makers have made broader criticisms of the US practice of making genocide determinations, including that seeking a genocide determination, or placing a special emphasis on genocide more generally, may:

- Undermine progress toward concrete action by shifting the policy debate from a place of analytic consensus (e.g., that a party is committing grave crimes) to the more contentious and legalistic ground of whether the atrocities specifically constitute genocide
- Spawn painfully legalistic debates, depend on information and evidence that is not possible to obtain, and turn on criteria that are confusing or applied unevenly
- Divert bureaucratic resources from other efforts for the duration of the often-lengthy process of gathering and assessing the information needed to evaluate a finding of genocide, and then consume decision-making bandwidth during the period of debating whether and how to publicize the conclusions
- Have insufficient impact on the US or international response to justify the effort
- Risk allowing the act of declaring that genocide has occurred to be seen as a substitute for other, more tangible actions
- Contribute to an unfortunate sense that atrocities that fall outside the specific legal definition of genocide do not require as robust a US response

- Risk distorting future debates by giving the impression to advocates that preventive action and international acknowledgment flow only (or more readily) when crimes are found to be genocide

4. How do others approach the issue of making genocide determinations?

Before offering recommendations about how the US government should approach the issue of genocide determinations in the future, it is worth noting how other actors have made or refrained from making pronouncements on whether genocide has occurred.

In particular, the UN secretary-general's special adviser for the prevention of genocide operates under a mandate that precludes making such a determination. The affirmative responsibilities of the special adviser include collecting information, acting as an early warning mechanism, making recommendations on actions to prevent or halt genocide, and liaising with other key actors in the UN system. But the special adviser's mandate provides that he or she would not make a determination on whether genocide within the meaning of the Convention had occurred. The purpose of the special adviser's activities, rather, would be practical and intended to enable the United Nations to act in a timely fashion.⁸⁰ This approach has the virtue of focusing policy attention squarely on prevention and punishment, saving political capital and bureaucratic resources for other tasks, and avoiding some of the perverse effects that can follow from a focus on terminology.

This is not a consistent practice across the UN system. The UN Security Council and Human Rights Council have often created ad hoc investigative mechanisms—variously known as commissions of inquiry, fact-finding missions, groups of experts, etc.—that are tasked with reporting on and analyzing various human rights abuses being carried out in specific conflicts or other crises. Many of these mechanisms have offered at least tentative conclusions as to whether the information they have collected supports a conclusion that genocide or other specific atrocity crimes have occurred.

As a recent example, the Independent International Commission of Inquiry for Syria concluded directly that “ISIS has committed the crime of genocide” in its report of June 2016.⁸¹ In another recent example, involving the Central African Republic, a Commission of Inquiry reported to the Security Council that “the threshold requirement to prove the existence of the necessary element of genocidal intent has not been established.”⁸² For its part, the African Union's Commission of Inquiry on South Sudan reported a similar conclusion about the violence in that country in 2015.⁸³

With respect to other governments, while it is beyond the scope of this report to do an assessment of how other governments handle these issues, two examples suggest a range of practices even among close US allies. The United Kingdom government, for example, has formally stated in responses to parliament that “[i]t is UK policy that any determination on whether genocide has occurred is a matter for competent judicial bodies, rather than for governments.” At the same time, there appears to be room for making strong—even if arguably not definitive—statements under this policy, as in the case of ISIS, with respect to which Prime Minister David Cameron stated that “there is a very strong case here for saying that it is genocide, and I hope that it will be portrayed and spoken of as such.”⁸⁴

On the other hand, in response to a question from parliament, the foreign minister of the Netherlands stated in December 2017 that sufficient facts had been established to conclude that the Islamic State had most likely committed genocide.⁸⁵ Such a statement was consistent with and seems to have been informed

by the report of an advisory commission that the Dutch government had asked the previous year to advise on the legitimacy of a government making such determinations. The commission concluded that such statements could be appropriate if made on the basis of rigorous analysis, but it also emphasized the importance of taking preventive action before such determinations are made.⁸⁶

Section 6 - Recommendations

This report, including the accompanying Case Studies, has been designed to shed light on how the US government decides to say, or not to say, that genocide has occurred in a country. In drawing conclusions about these experiences, we believe that two principles should be taken as fundamental:

- 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.
- Policy makers and advocates should in the first instance focus on identifying situations in which there is a serious *risk* of genocide—or any other mass atrocity—and act in response to that risk to prevent the crimes, before events proceed to the point where there is a question whether such crimes have occurred.

That said, these issues can be extraordinarily difficult to deal with in practice, and we set out in this section some recommendations that we hope can be useful going forward. Because of the nature of the report, the recommendations are directed primarily to Executive branch officials who deal with these issues, though we hope they are also useful for congressional, civil society, and other advocates in better understanding both the nature of the process and how it may fit into their strategies for promoting effective preventive action.

1. The US government should continue its practice of making genocide determinations.

Although policy makers and advocates should be realistic about the “instrumental impact of genocide determinations, acknowledgment that genocide has occurred can be important for “intrinsic” reasons (*e.g.*, bearing witness, helping to establish a historical record, demonstrating respect and empathy for the victims, and acknowledging their suffering) and at least in some cases for “instrumental” reasons (*e.g.*, helping to mobilize support for efforts to stop or prevent the atrocities, laying the groundwork for accountability efforts, or shaping the narrative through which a conflict is seen).

2. The US government should continue to be rigorous in analyzing whether the acts at issue constitute genocide, as defined by the Genocide Convention.

Notwithstanding frustrations frequently expressed about the definition in the Genocide Convention, determinations viewed as based on doubtful evidence or deviations from the internationally accepted legal definition will be less effective in helping to mobilize support for tangible action to address the atrocities, and the value of such determinations as a means to help establish a historical record or to bear witness will be eroded.

In appropriate cases, the US government should support the deployment of atrocity documentation teams, along the lines of the 2004 Darfur model. These efforts can be useful in substantiating the factual record, supporting efforts to stigmatize perpetrators, and laying groundwork for

accountability efforts, in addition to providing information that helps to assess whether genocide has occurred.

That said, the need for rigor does not imply a need for a one-size-fits-all process, and the process used in recent years for reaching conclusions may not be appropriate for all cases—e.g., cases such as Rwanda, in which the conclusion that genocide had been committed was self-evident.

[T]he need for rigor does not imply a need for a one-size-fits-all process, and the process used in recent years for reaching conclusions may not be appropriate for all cases.

The particularly difficult issue of establishing the specific intent of a perpetrator is unique to genocide. It is thus not clear that the kind of elaborate review process that has come to be associated with genocide should necessarily be used in cases in which the US government is considering making a statement about other atrocity crimes, such as crimes against humanity.

3. The US government should be prepared to explain publicly why it is able or unable to say that the crimes occurring in a country constitute genocide.

Its public statements should make clear that the definition of genocide under the 1948 Convention is narrow. It should be frank about what information it has and does not have, the standards it is applying, and the difficulties encountered in establishing the elements that must exist in order to show that genocide has been committed.

To the extent possible, it should seek to offer its conclusions in concert with other credible voices, especially those with a role to play in addressing the situation. Doing so helps reinforce the credibility and impact of its statements and may guard against perceptions the statements are exaggerated to serve political objectives. (That said, where the facts are compelling, the US government should not use the reluctance of others to make statements as a basis for disregarding its own conclusions).

4. The US government should work to empower others who can pronounce on and address the issue.

The intrinsic or instrumental impacts that advocates often hope to see flow from a genocide determination do not necessarily have to come from a US statement. The US government should accordingly continue to support and assist commissions of inquiry and other such mechanisms that are able to document and report on serious atrocity crimes, and it should offer briefings to other governments and international bodies.

In seeking transparency and persuasiveness, the US government should, to the extent consistent with national security requirements, declassify and share relevant materials.

Consistent with prioritizing prevention, relevant information should be shared as early as possible.

The US government should work to develop versions of the evidence it develops that can be shared with accountability mechanisms or other bodies that may later face the task of demonstrating that the various elements of genocide have been satisfied.

5. Consistent with the aim of the Genocide Convention to prevent genocide, US government efforts should be focused on identifying and warning about the risk of genocide.

In this regard, the US government could draw on formulations—such as those used during the Kosovo crisis of 1999—that focus on the existence of indicators or precursors of genocide, and make clear to its partners that those are sufficient to warrant meaningful preventive action.

Statements that warn of such risks should not be limited to the crimes that fall within the definition of the Convention, but to other mass atrocity crimes as well.

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Policy makers should ensure that the intelligence community continues to prioritize collection and analysis regarding atrocity risks to help ensure that truly preventive policy steps are possible.

Top officials should reinforce signals to the bureaucracy that they are prepared to support such proposals *before* atrocity crimes are committed and *before* they become sufficiently grave or widespread that consideration might be given to making legal determinations.

6. US government determinations should ordinarily be made at very senior levels.

Approval at senior levels—ordinarily by the secretary of state—enhances the gravitas and durability of a statement that genocide has occurred. Leadership is essential. If and when bureaucratic barriers arise that begin unduly to consume time and resources, senior officials should act decisively to ensure that the process does not get mired and to drive the process to conclusion.

7. The US government should not refrain from saying that genocide has occurred for the purpose of avoiding political pressure to respond.

If there are reasons not to take stronger measures than policy makers are willing to take, they should explain those reasons forthrightly. (In very particular cases, there may be reasons to delay making a public statement that genocide has been committed, such as where information about whether attacks on another group constitute genocide is still being gathered, or where a statement could put vulnerable groups at risk).

8. US government statements should highlight that individuals are responsible for genocide and should respect due process principles.

Statements should note that final decisions about guilt or innocence of any individuals should ultimately be decided by competent courts.

9. Separate from any particular crisis, the US 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.

This is particularly important with respect to crimes against humanity occurring on a massive scale or that involve an intent to destroy the identity of a group or make it impossible for its members to continue functioning as a group, even if there is no intent to physically or biologically annihilate its members in the manner that the Genocide Convention has been interpreted to require.

Supporting international efforts to develop an appropriate Crimes Against Humanity Convention and domestic crimes against humanity legislation could contribute in an important way to this effort.

The US government has repeatedly committed—under the “Responsibility to Protect” doctrine, various presidential policy statements, and more generally in embracing the principle of “never again”—to prevent such crimes. Each successive administration should continue to reaffirm the seriousness of these moral commitments.

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.

Factors that might strengthen the case for pursuing a determination include whether:

- Governments and the international community are reacting passively in the face of the atrocities.
- The perpetrators are actively working to conceal the gravity of their crimes, or the fact that their actions are motivated by ethnic or other group-related animus.
- Governments and the international community are focused on the crisis solely through the lens of conflict resolution or counter-terrorism, and failing to prioritize efforts to stop the abuses and punish those responsible.
- It would be feasible to gain access to the kind of information that would be needed to show clearly that the criteria for the crime are satisfied.
- It is a situation in which the voice of the United States will be seen as credible or carry particular weight.
- There are not other ways of spurring policy change or providing solace to victims that would be more effective.

This is not an exhaustive list—nor is it meant to suggest that a genocide determination should only be pursued if a particular set of factors are satisfied—but rather is intended to help inform the choices of advocates faced with limited resources and difficult decisions about what strategies to pursue.

At the end of the day, perhaps most important is the need to make clear that atrocities have policy consequences, whether or not the atrocities are named. Much of the frustration and alarm that can be felt from participants in the situations covered in this report emerges from variations on a similar concern: that not enough is being done to stop or prevent mass killings, and that this may be due in part to the fact that they are not being recognized as genocide, or, alarming in a different way, that this is so even when the crimes *are* recognized as such.

That concern is best addressed, of course, through preventive action before the atrocities have unfolded to such an extent that a diagnosis of genocide would even seem possible. Given the focus of this report, however, and the tendency of a determination process to serve as a natural prompt for policy review, the US government should develop and utilize a “playbook” of potential steps that it could review and

consider taking *both* when it identifies a serious risk of genocide or other mass atrocities *and* again when it is seriously considering determining whether such crimes have taken place.

To be clear, we do not believe it would be prudent to identify in advance particular policy consequences that flow automatically from a conclusion by the US government that genocide or other atrocity crimes have been committed or are threatened. Such automaticity inevitably creates pressure for policy makers to make—and for advocates to lobby for—decisions based on whether they want those consequences, rather than based on a candid assessment of the facts. That said, a “playbook” of steps that should at least be considered when grave risks are present or grave crimes are underway 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, supporting the creation of accountability mechanisms where existing institutions do not suffice, and supporting apprehension of fugitives)
- 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)

Within the Executive branch, leadership is essential to ensuring such steps are considered and appropriately implemented. When circumstances suggest that large-scale killings or other violence targeting particular groups may occur, the secretary should either assume responsibility directly or appoint and empower a senior official to review these and other additional policy steps. Any person that the secretary appoints should have sufficient authority and stature to ensure active cooperation and support from all relevant bureaus and other US government departments, as well as to obtain additional personnel or programmatic resources needed to support such actions. In all cases, the secretary and other top State Department officials should be regularly updated and informed.

For their part, congressional, civil society, and other advocates have an abiding interest in ensuring appropriate follow-up within the Executive branch, regardless of whether or not it is in the context of a review of a possible genocide determination. While the steps from the 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.

Appendix—Case Studies

This appendix provides a more detailed discussion of the situations referred to in the main report. It is based on publicly available documents concerning US policy statements and deliberations and interviews with individuals who were personally involved in the relevant situations, and focuses primarily, but not exclusively, on former and current US officials. The situations were chosen largely based on the availability of records that shine light on the relevant issues.

I. Cold War and Historical Cases

During the period between the 1948 adoption of the Genocide Convention and the end of the Cold War, senior US government officials publicly used the term genocide to characterize atrocities (in addition to the Holocaust) committed in Cambodia and Nicaragua, as well as historical atrocities committed before the Cold War in Armenian-populated areas of the Ottoman Empire and in the Soviet Union. Publicly available records suggest that there was also internal or public discussion about whether atrocities in a handful of other situations during this period—including Biafra, Bangladesh, Burundi, Guatemala, Afghanistan, and Iraq—constituted genocide.

A few observations about these cases are worth noting:

- *First*, the question of whether genocide had occurred was discussed—even if not always prominently or in strictly legal terms—even before the United States became a party to the Genocide Convention in 1988. Thus, even in the absence of any US obligations under the Convention, the word genocide was used to highlight the large scale and targeted nature of the atrocities.
- *Second*, there are few indications—at least in publicly available records—of extensive legal and factual analysis of whether the atrocities fell within the legal definition of genocide, and bureaucratic “oversight” of use of the term seems to have been limited.
- *Third*, as human rights issues began to play a more prominent role in US policy generally, advocates for action gradually began to press for public US government acknowledgments that genocide had occurred, including as a means to pressure the US government to take more assertive actions to stop ongoing atrocities or otherwise change its policy toward the perpetrators. We see the seeds of this trend toward the end of the period in connection with Cambodia and Iraq, as discussed below, although also in the earlier case of Biafra.⁸⁷
- *Fourth*, cases did arise in which—for various policy reasons—the US government faced and chose to resist pressure to characterize abuses as genocide, including most prominently in connection with the Armenian genocide issue. That said, no situation presented the United States with the precise combination of factors—pressure to pronounce on the issue in the face of compelling evidence of genocide combined with calls for US military intervention—that would lead to genocide language becoming such a sensitive issue in the early 1990s.

- *Fifth*, the US government appears to have used the term “genocide” relatively loosely in these Cold War cases, at least as compared to the cases—discussed in Sections II and III—that followed. By and large, “genocide” was treated like a word with weight and a particular stigma attached to it, but the use of the word did not carry expectations of military intervention. This may be partly attributable to the fact that, until late in the period, the United States was not a party to the Genocide Convention, so that any obligation that might exist under the Convention would not have applied to it. That said, in the later cases, notably Iraq and Cambodia, where advocates were moving to greater use of the word as a point of leverage, the leverage they sought seems to have been more moral than legal.

We provide below brief thumbnail sketches of these situations, recognizing that they fail to do justice to the historical complexities and contexts and each could be the subject of an entire study, but hoping to convey at least a sense of how the genocide issue was addressed within the US government.

A. The Most Prominent Historical Case: The Armenian Genocide

For many years, the State Department has avoided taking a position on whether World War I-era atrocities by Ottoman Turks against the Armenians constitute genocide and has resisted congressional efforts to do so.

Since at least as early as 1970, the Turkish government has pressed US government officials to dissuade Congress from characterizing the Ottoman abuses as genocide, indicating that such a statement would harm US-Turkish relations.⁸⁸ In 1975, the House of Representatives passed H.J. Res. 148, requesting that the president issue a proclamation to observe “a day of remembrance for all the victims of genocide, especially those of Armenian ancestry who succumbed to the genocide perpetrated in 1915, and in whose memory this date is commemorated by all Armenians and their friends throughout the world.” The resolution was passed only after a series of exchanges between its supporters in the House and the Ford Administration. In the floor debate, one of the resolution’s House sponsors noted that references to Turkey had been deleted from the text at the request of the State Department, in response to which another congressman quipped acerbically: “I assume the gentleman means our State Department and not the Turkish State Department.”⁸⁹ The resolution was never taken to a vote in the Senate.⁹⁰

A more intense dispute played out in connection with a similar resolution in 1984, passed by the House days after President Ronald Reagan announced his intention to seek US ratification of the Genocide Convention.⁹¹ Publicly released White House records from this period show a protracted, high-level interplay within the executive branch, refereed by the president’s chief of staff, between national security advisors concerned with relations with Turkey and domestically focused staff concerned with the views of Armenian-American voters.⁹² Following high-level requests from the White House, no further action was taken on the resolution after it was referred to the Senate Judiciary Committee.⁹³

Similar dynamics played out numerous times over the following years, including after the end of the Cold War.⁹⁴ The State Department’s responses to such legislative efforts have focused on the potential impact of such resolutions on US relations with Turkey, but other arguments have been put forward as well. These have included arguments that—while the massacres are indisputable—“scholars disagree on the nature of the killings and the root causes”; the “issue should be left in the hands of scholars and historians”; and “this is not something that can be mandated or legislated.”⁹⁵ Congressional advocates for acknowledging the atrocities as genocide, on the other hand, have argued that doing so was necessary to “preserve the truth about the Armenian Genocide”; that it was “important . . . for the people who have suffered so much,

namely the Armenians, to have an official acknowledgement”; and that “remembering the past hopefully prevents abuses in the future.”⁹⁶

Several presidential candidates have said that, if elected, they would recognize the atrocities against the Armenians as genocide, but have declined to do so after taking office. Presidents do routinely issue proclamations for Remembrance Day (April 24) that emphasize the gravity of the atrocities but the proclamations avoid the language of genocide.⁹⁷ There routinely are reports at the time of the proclamations alleging that the US government has succumbed to Turkish pressure.⁹⁸

Several presidential candidates have said that, if elected, they would recognize the atrocities against the Armenians as genocide, but have declined to do so after taking office.

The US government’s statements on the issue have not, however, been as uniform as is commonly understood today. For example, shortly after the Genocide Convention was adopted, the US government in 1951 characterized the Turkish massacres of Armenians as being one of a handful of “outstanding examples of the crime of genocide” in a formal submission to the International Court of Justice.⁹⁹ More prominently, President Reagan issued a Holocaust remembrance proclamation in 1981 that referred specifically to “the genocide of the Armenians”—a proclamation that is highlighted frequently by advocates in the Armenian community.¹⁰⁰

The Executive branch bureaucracy does not appear to have absorbed President Reagan’s statement. Not long after his statement—in August 1982—the *State Department Bulletin* contained an article about Armenian terrorism that included an accompanying “note” that stated:

Because the historical record of the 1915 events in Asia Minor is ambiguous, *the Department of State does not endorse allegations that the Turkish Government committed a genocide against the Armenian people*. Armenian terrorists use this allegation to justify in part their continuing attacks on Turkish diplomats and installations.¹⁰¹

The remark was not consistent with either a posture of not taking a position on whether the atrocities constituted genocide, or with President Reagan’s statement, and a backlash ensued. An “Editor’s Note” in the following month’s *Bulletin* sought to distance the State Department from the August 1982 entry by saying that the interpretive comments “did not necessarily reflect” an official State Department view,¹⁰² but the tentative wording only added to the turmoil. Several top State Department officials conducted written and in-person outreach to angered members of Congress and Armenian diaspora media outlets.¹⁰³ The department made a somewhat clearer retraction in April 1983, stating in yet another “Editor’s Note” that the August 1982 statements “were not intended as statements of policy of the United States” and that they did not “represent any change in US policy.”¹⁰⁴ Despite several requests, however, at no point in the controversy did the department reaffirm President Reagan’s statement.

The issue has remained charged well after the end of the Cold War, and underscores vividly how political considerations can intrude on an issue with such considerable moral and legal content. In 2005, for example, the US ambassador to Armenia, John Evans, was removed from his position after making a public statement that the atrocities in Armenia constituted genocide.¹⁰⁵ The ambassador’s situation had become even more tenuous when he submitted a statement for inclusion in an award that he had been scheduled to receive that “in all fairness this award should be given posthumously to President Ronald Reagan, who was the first American official to correctly term the events of 1915 a genocide, and not to me.”¹⁰⁶

B. Biafra

The Biafran war, in which Nigeria's southeastern region attempted from 1967 to 1970 to secede as an independent state, presents an early case in which the US government confronted persistent questions about whether ongoing abuses amounted to genocide. The war came to be associated with starvation and suffering on a large scale among the breakaway region's predominantly Igbo (sometimes spelled Ibo) population, against the backdrop of massive violence in 1966 during which thousands of Igbos were killed or driven out of the country's north. Biafran officials sought to mobilize international opinion on their side of the conflict in part by characterizing the Nigerian government's actions against them as genocide.¹⁰⁷

Allegations that the Nigerian government was responsible for genocide put particular pressure on the British government, which was supplying arms to Nigeria.¹⁰⁸ The British responded to domestic criticism in part by pressing the Nigerians to allow the presence of international observers whose reporting could take "the sting out of Biafran claims of genocide."¹⁰⁹ Nigeria did so in August 1968, inviting military officers from four countries and two international bodies to serve as observers, a subset of whom went on to produce periodic public reports reviewing, among other issues, the question of whether genocide was occurring. While the observers lacked legal training or guidance on the issue, they concluded on multiple occasions that "the use of the term genocide is in no way justified."¹¹⁰

Biafran efforts had some success on US audiences. Richard Nixon—then a candidate for president—released a statement in September 1968 calling on President Lyndon Johnson to take more steps to save lives in Biafra, noting Igbo fears "that surrender means wholesale atrocities and genocide" and warning that "genocide is what is taking place right now—and starvation is the grim reaper."¹¹¹ But both the Johnson and Nixon administrations sought to push back on congressional and humanitarian calls to become more actively involved in delivering aid or solving the conflict.¹¹² One observer later described the rebuttal of genocide allegations as having served to moderate expectations of international action to protect civilians beyond the provision of relief.¹¹³ US officials cited the findings of the observer team when offering public defenses of their policy,¹¹⁴ which remained largely unchanged under the Nixon administration¹¹⁵ despite occasional indications that Nixon wished to support the Biafrans.¹¹⁶

Publicly released documents suggest that US officials continued through the remainder of the conflict to weigh, generally with skepticism, the possibility that genocide was occurring, or, as Biafran forces began to lose territory, that it might ensue after a Nigerian victory.¹¹⁷ The war ended with Nigerian authorities regaining control of the region in 1970 and, while an estimated one million people reportedly starved or otherwise died in the conflict, no massacre ensued at its end.¹¹⁸

C. Bangladesh

The Nixon administration faced another crisis characterized by mass atrocities the following year. Following national elections in December 1970, the refusal of Pakistan's military government to recognize the victory of the opposition Awami League—the major political party from what was then East Pakistan and would soon secede as an independent Bangladesh—plunged the two-part country into crisis. In March 1971, government forces seeking to keep control in the east launched a massive and brutal military operation in which they killed hundreds of thousands of Bengalis, including many from the Bengali Hindu minority.¹¹⁹ The United States made little use of its close ties to the Pakistani government to try

to stop the bloodshed, and was unwilling to use the leverage it had as a long-time supplier of arms and economic assistance, or to complicate the secret back channel that Pakistan was providing at the time for negotiations to restore relations between the United States and China.¹²⁰

The US Consulate in Dhaka (Dacca, at the time) reported the unfolding atrocities to Washington in harrowing terms that emphasized the genocidal nature of the violence. In a series of telegrams—including one sent on March 28 entitled “Selective Genocide” and a formal dissent message sent April 6 that became known as the “Blood telegram,” after Consul General Archer Blood—consulate officials rebuked their superiors in Washington for their silence and their “moral bankruptcy” in failing to respond.¹²¹ Top State Department officials responsible for South Asian affairs seem to have come close to accepting the term genocide internally as well, referring to “something approaching genocide of the Hindus” in a policy memorandum submitted in May to the White House.¹²²

The most prominent of the Nixon administration’s outside critics, Senator Edward Kennedy, answered “yes” when asked by journalists if Pakistan was committing genocide, and he made similar characterizations before a panel of US officials during a hearing in October and on other occasions in the Senate.¹²³ Kennedy does not appear, however, to have pressed those officials for their view on whether the massacres amounted to genocide—nor are there indications that others pushing to change US policy, either inside or outside the government, pressed the US government for its assessment of whether the atrocities amounted to genocide as a means of advocating for such change.

The US government ultimately sustained a policy of near-total silence on the Pakistani abuses throughout the crisis, not just on the question of whether they amounted to genocide. This was in keeping with a remark that President Nixon made to Henry Kissinger about the Pakistani crackdown days after it began: “I wouldn’t put out a statement praising it, but we’re not going to condemn it either.”¹²⁴

D. Burundi

The US government’s response to mass killings the following year in Burundi was similarly limited. Since Burundi’s independence from Belgium in 1959, the country’s ruling Tutsi minority had used brutal violence to preserve its power, conscious of the experience of the Tutsi minority in neighboring Rwanda, where the Hutu majority had taken power years earlier.¹²⁵ Following a series of armed attacks by Hutu groups in April 1972, Burundi’s Tutsi-led security forces launched a campaign of abuse that the US embassy described at the time as an attempt “to kill every possible Hutu male of distinction over the age of fourteen” and characterized as “selective genocide.”¹²⁶ Others similarly made statements that genocide was occurring, including Belgium’s prime minister, a *Washington Post* reporter, and the authors of a US intelligence assessment.¹²⁷

A number of factors again combined to produce near-total silence from the US government in the face of unfolding slaughter. These included a fear of backlash for being seen to intervene in the internal affairs of newly independent African states,¹²⁸ as well as what one White House staffer described in an internal memorandum as the Nixon administration’s preference for “avoiding quixotic moral posturing.”¹²⁹

Once again, while some advocates for a more active US response used the term genocide in describing the unfolding atrocities, almost none sought to use it more actively to shape the terms of US policy. A senior State Department lawyer was sufficiently concerned with the US posture toward the ongoing massacres that he wrote a legal memorandum, apparently unsolicited, emphasizing that the United States had “obli-

gations under international law in the field of human rights” that “must be taken into account in devising and executing policy.”¹³⁰ But the memorandum made no mention of the Genocide Convention, or of genocide at all, and according to a report released in 1973 by the Carnegie Endowment, no policymaker asked for an opinion on “whether events in Burundi constituted genocide or any lesser violation of human rights.”¹³¹

The unlikely individual who did seize on the term was President Nixon himself.

The unlikely individual who did seize on the term was President Nixon himself. In response to a briefing memo on Burundi that he received late in the crisis, Nixon complained in a lengthy, hand-written note of a “double standard” under which the previous year’s crisis in Pakistan generated an internal and public outcry about his policy but his own State Department was unwilling to criticize an abusive African government.¹³² Nixon pressed his staff for recommendations on how to “show moral outrage,” and later insisted that the United States make “a strong statement . . . disapproving Burundi’s genocide” as a condition for his authorization to support a World Bank loan for the country.¹³³ The World Bank meeting in question was postponed for nearly one year, however, and State Department and NSC staffers did not implement Nixon’s instruction when the meeting was later rescheduled.¹³⁴ Nevertheless, internal documents suggest that the perception of the 1972 killings as genocide soon became accepted within the State Department, even if not publicly articulated.¹³⁵

E. Soviet and Central American Cases

Tensions between East and West during the Cold War provided the context for some of the US government’s most prolific use of genocide language during this period. Both sides invoked the term frequently to stigmatize the other. One scholar describes the Genocide Convention as having become, in the context of the rivalries of the Cold War, “a convenient tool with which to hit the ideological adversary,” albeit noting that “[w]hen it comes to the rhetorical application of the word genocide, the Soviets proved bigger offenders than the Americans.”¹³⁶

On several occasions, particularly during the Reagan administration, US statements contained direct allegations of Soviet genocide.¹³⁷ On others, including in statements as far back as the 1950s, US officials used genocide language more cautiously or indirectly, such as by citing the views of others who had alleged genocide against the Soviet or Chinese governments.¹³⁸ Such statements often focused on the Soviet Union’s occupation of Afghanistan, such as when the US ambassador to the United Nations noted a historian’s characterization of Soviet efforts to pacify the Afghan countryside as “migratory genocide.”¹³⁹ While US officials appear generally to have stayed away from clear pronouncements on whether the massive famine in which millions died in Ukraine and other areas of the Soviet Union (known as the Holodomor) constituted genocide, some US remarks appear to have alluded to the possibility.¹⁴⁰

For their part, the Soviets did not hesitate to make allegations of genocide. They frequently pointed to the failure of the United States to ratify the Convention, and pointed to historic mistreatment of Native Americans and discrimination against African-Americans as the reason for it.¹⁴¹ Indeed, the Reagan Administration pointed to the embarrassing position this created for the United States when it pursued ratification of the Convention in the 1980s.¹⁴²

Some of the US statements alleging Soviet genocide were made in the specific context of US efforts in the 1980s to generate or sustain political support for US assistance to the *contra* rebels in Nicaragua.

President Reagan and senior State Department officials also stated or suggested on several occasions that the Communist-aligned Nicaraguan government itself was committing genocide against the country's Miskito (or Mesquito) Indian population.¹⁴³ As with several of the other US statements during this period, it is difficult to discern the degree to which the statements alleging genocide against the Miskito were underpinned by legal and factual analysis. White House documents suggest the genocide allegation may have been prompted by a February 1982 report by Freedom House that was circulated among White House officials and concluded that "the possibility of genocide" against Miskito and other Indians should be investigated."¹⁴⁴ Secretary Haig described Nicaraguan policy toward the Indians as "genocidal" in a congressional hearing a few days later.¹⁴⁵ Americas Watch, a human rights group that documented abuses in Nicaragua during the period, concluded in reports published at the time that there was not a basis for the strongest US allegations of human rights abuses, including against the Miskito Indians.¹⁴⁶

There were also allegations of genocide in the 1980s in the context of Guatemala, where the US-backed military government committed abuses against indigenous Mayan and other civilian populations in the course of seeking to suppress an armed insurgency that was seen as supported by communist governments.¹⁴⁷ We have been unable to locate publicly-available documents that shed significant light on the US government's contemporaneous assessment of the validity of such allegations.¹⁴⁸ Reporting from the US embassy in 1982 makes clear that the US government was aware that some critics were describing the conduct of Guatemalan security forces as "genocidal,"¹⁴⁹ and an internal memo sent within the State Department's human rights bureau later that year suggests that some US officials were doubtful that the embassy's reporting—which was skeptical of allegations against government forces—provided a strong basis to assess some of those allegations.¹⁵⁰

F. Iraqi Abuses Against the Kurds

Toward the end of the Reagan administration, the Iraqi government launched a brutal counterinsurgency campaign—including chemical-weapon attacks on civilians—against the country's rural Kurdish population, which it saw as disloyal for having sometimes sided with Iran during the two countries' ongoing war. The chemical attack on the village of Halabja in March 1988 would become the most notorious, but a new Iraqi attack in August, after the war with Iran had ended, led to a moment of intense domestic scrutiny of US policy toward Iraq.¹⁵¹ While the US reaction to the attacks focused primarily on the chemical weapons issue,¹⁵² public and congressional pressure—including an extensive report prepared for the Senate Foreign Relations Committee by staffers Peter Galbraith and future Senator Chris Van Hollen¹⁵³—forced the administration to consider, at least briefly, the possibility that the Iraqi government's abuses constituted genocide.

Major newspaper columnists began to echo earlier statements by Kurdish officials that the attacks amounted to genocide.¹⁵⁴ In September 1988, shortly after Secretary George Shultz overrode internal objections and authorized the State Department to publicly confirm its assessment that Iraq had indeed used chemical weapons,¹⁵⁵ Senator Claiborne Pell, chairman of the Senate Foreign Relations Committee, introduced "the Prevention of Genocide Act." The bill included a finding that "Iraq's campaign against the Kurdish people appears to constitute an act of genocide" and would have specifically required the president to certify that "Iraq is not committing genocide against the Kurdish population of Iraq" before the executive branch could lift the various sanctions the bill would have imposed.¹⁵⁶

The State Department did not agree with Pell’s assessment of the crimes, stating on September 13 in a written response to the bill that “we could not characterize Iraqi actions as ‘genocide’ based on evidence available at this time.”¹⁵⁷ While the Senate had passed Pell’s legislation unanimously the day it was introduced, the text attracted greater scrutiny and resistance in the House, which declined to adopt even a watered-down version of the bill that did not contain either the genocide determination or the genocide-related certification requirement.¹⁵⁸

Saddam Hussein’s statements and actions in 1990, however, would fundamentally change the lens through which the US government viewed and described his abuses in the future. After an April speech in which Hussein called for the destruction of Israel, another US senator introduced a package of legislative restrictions on assistance to Iraq that, as with the 1988 bill, could only be lifted if the administration certified Iraq was “in substantial compliance with its obligations” under a variety of international treaties, including the Genocide Convention. After Iraq invaded Kuwait in August, Congress passed legislation that imposed a similar certification requirement.¹⁵⁹ While these provisions did not actually require a reassessment of the Anfal abuses, President George H.W. Bush—in his October address to the UN General Assembly—said what the US government had denied before: that Saddam Hussein’s government had conducted a “genocidal, poison-gas war waged against Iraq’s own Kurdish villagers.”¹⁶⁰

Despite this shift in language, the US government’s factual assessment of the Anfal crimes remained unsettled, and the issue would arise again in the 1990s as discussed in the next segment of the report.

G. Cambodia/Khmer Rouge

The Cambodia case is complicated. There is a widespread public understanding that the atrocities committed by the Khmer Rouge government during its 1975-1978 rule constituted genocide, but a large portion of its atrocities were directed against the “wrong” kinds of groups—political and social groups, as opposed to “national, ethnical, racial or religious” groups—to fit neatly into the definition of genocide in the 1948 Convention. Indeed, only over time did it become well-understood that some of the atrocities—such as those directed against the ethnic Vietnamese and Cham—fit within the Convention’s definition.¹⁶¹

State Department lawyers recognized early the potential gap between the abuses and the Genocide Convention, and they expressed doubts internally that, at least on the basis of the facts as then known, the Khmer Rouge atrocities constituted genocide.¹⁶² Nevertheless, in September 1978, they proactively sought to stir the British government’s interest in bringing a formal genocide case against Cambodia in the International Court of Justice, telling their UK colleagues that the negative publicity generated by an ICJ case could inhibit further atrocities.¹⁶³ In the end, the British lawyers concluded the substance of the allegation was too doubtful and declined to move forward with an ICJ case.¹⁶⁴ As the Carter administration faced pressure to make clear how its human rights policy applied to this gravest of cases, its rhetorical condemnation of the Khmer Rouge came to include, on a handful of occasions, statements that at least obliquely characterized Khmer Rouge abuses as genocide.¹⁶⁵

Vietnam’s invasion of Cambodia in December 1978 changed the geopolitical context. The Khmer Rouge were ousted and a government aligned with the Soviet Union was installed at a time when US ties with Moscow were fraught and relations with China were stronger. This shift in power created strong incentives for the United States to tamp down its rhetoric regarding the Khmer Rouge, as part of a broader decision by the United States to support the Cambodian opposition—which included the Khmer Rouge—

in opposing Vietnam's invasion as unlawful aggression. This extended to supporting the seating of Pol Pot's ousted regime to continue representing Cambodia in the United Nations.¹⁶⁶ Fearful of reinforcing Vietnam's argument that the Khmer Rouge's crimes had justified its invasion, Carter administration officials appear to have ceased alluding to the ex-regime's atrocities as genocide from early 1979, and in a number of instances instead used the term to describe the conduct of the Vietnam-backed successor government.¹⁶⁷ Reagan Administration officials did use genocide language regarding the Khmer Rouge from time to time thereafter, though usually in the context of general statements about atrocities or Communist rule, rather than statements focused on Cambodia.¹⁶⁸ Through all this, however, the State Department's Office of the Legal Adviser had never formally concluded that the Khmer Rouge atrocities in fact fell within the definition of genocide.¹⁶⁹

The US government ultimately confronted the issue in a more systematic way in connection with the Cambodian peace talks that began with a multinational conference held in Paris in 1989, and continued in New York, Beijing, Jakarta, and elsewhere. In preparing for those peace talks and the negotiations of arrangements for power sharing in a potential transitional government, the US participants anticipated that the Vietnamese and their Cambodian allies would take every opportunity to justify the invasion—and the exclusion of the Khmer Rouge from a future government—by claiming that the invasion had saved Cambodia from “genocide” while, for their part, the Cambodian opposition would insist on characterizing the main issue as Vietnamese “settlers”—those who had come to Cambodia after the invasion and symbolized Vietnamese hegemony over the country. The twin issues of “genocide” and “settlers” permeated much of the 1989 conference and, predictably, the two sides were unable to agree on mention of the words.¹⁷⁰ For its part, the United States saw no advantage in intervening in the debate and avoided stating a formal view on whether the atrocities constituted genocide.¹⁷¹

After the 1989 conference ended without an agreement, key members of Congress sharply criticized the administration's approach. They had expressed concern as early as 1979 that the Khmer Rouge were likely to fight their way back into power if Vietnam withdrew its forces from Cambodia without appropriate arrangements in place to exclude them.¹⁷² As Vietnamese withdrawal now loomed, they expressed alarm that the US government was not taking a sufficiently hardline posture in ensuring arrangements that would prevent the Khmer Rouge from regaining power. At a House Foreign Affairs Subcommittee hearing in September 1989, Chairman Stephen Solarz and Congressman Chester Atkins raised particular concerns that the United States in Paris had not supported draft language that the Khmer Rouge was responsible for genocide—the deletion of which Atkins, at least, saw as giving the group legitimacy and facilitating its entry into a transitional government.¹⁷³ They pressed Assistant Secretary of State for East Asian and Pacific Affairs Richard Solomon to say at the hearing whether “what happened in Cambodia between 1975 and 1979 can appropriately be characterized as genocide.” Solomon declined to provide a direct answer, saying that the legal definition was complex and that in any event there were practical concerns that using the word would bolster the Vietnamese negotiating position in the talks. Solomon's unwillingness to use the word “genocide” appeared to fuel the Congressmen's concerns about the US government's posture toward the Khmer Rouge's participation in a new government.¹⁷⁴

At a hearing two months later where Solomon's deputy and the department's deputy legal adviser testified, Solarz and Atkins pressed the point again, as it had been anticipated they would. US officials had discussed how to answer these questions after the September hearing, though different participants have different recollections of the decision-making process. Unlike the later cases in Bosnia and Rwanda, it appears that no formal memorandum was prepared for approval by the secretary of state.¹⁷⁵ In any event, the deputy legal adviser, Michael Young, testified that the Khmer Rouge had committed genocide,

but said that he wanted to qualify his answer to make clear that the term “genocide” “seemed somewhat under-inclusive for what [the Khmer Rouge] actually did.”¹⁷⁶ Apparently perceiving even Young’s remarks as evasive, an annoyed Congressman Atkins cut off the explanation, saying that he had had enough of “namby-pamby sensitivities.”¹⁷⁷

The resistance to what Congressman Atkins viewed as parsing of the words by the administration witness was in some ways a harbinger of what we will see in later situations in which advocates became impatient with anything they perceived as equivocation. In any event, the State Department provided a formal written answer after the hearing that made clear the point that the deputy legal adviser had wanted to make—i.e., that it was only the attacks against particular groups that constituted genocide. His answer stated —

The Convention’s definition of genocide does not, however, address the full extent of atrocities committed by members of the Khmer Rouge. Mass murder not intended to destroy any of [the groups mentioned] is not genocide under the Convention, regardless of the numbers killed. Because much of the Khmer Rouge slaughter was random, politically motivated, or the result of harsh conditions imposed on society at large, many acts would probably not constitute genocide as defined in the Convention.¹⁷⁸

II. Bosnia and Rwanda and Other Cases from the 1990s

The Bosnia and Rwanda experiences from the early 1990s are the clear antecedents of the process now used for making decisions about whether to say that genocide has been committed. They are remembered for the resistance shown by senior State Department leaders to embracing such conclusions, and the strong perception that the resistance was part of a broader strategy of avoiding pressure to take actions that they did not want to take. The sense of US evasiveness on the topic fueled a lasting impression that Executive branch pronouncements on these issues should be viewed with skepticism, and have led journalists and advocates to raise the issue frequently in subsequent crises. Later in the decade, in Kosovo, the evident US willingness to take strong preventive action seemed to mitigate the pressure on the US government to use the term.

A. Bosnia and Rwanda

Speaking before the separatist Bosnian Serb Parliament in May 1992—before he had become notorious for his brutality in the war that was just beginning to unfold—Bosnian Serb General Ratko Mladic cautioned his fellow Serbs:

We cannot cleanse, nor can we have a sieve to sift, so that only Serbs could stay, or that the Serbs would fall through and the rest leave....*People, that would be genocide.*¹⁷⁹

The Serbs eventually proceeded in precisely the way that Mladic described. Why, then, did it take the United States government two years to reach and state what Mladic himself had concluded?

In 1994, the US government took two months to acknowledge that the murders of Tutsi and other civilians in Rwanda constituted genocide—a much shorter delay, but nonetheless a delay that the State Depart-

ment’s senior human rights official has described by lamenting that “the strongest country in the world took two months to conclude the obvious...”¹⁸⁰ Why did this prove to be such a difficult question?

In both Bosnia and Rwanda, senior US officials believed that characterizing the atrocities as genocide would trigger pressure on the US government to take actions it was not prepared to take. US officials accordingly used a variety of formulations that avoided such a straightforward characterization. The eventual exposure of this approach became a source of significant embarrassment, and helped shape how the US government would handle genocide language in the future, and how the broader public perceived its significance.

Some skepticism of official pronouncements on these issues may be inevitable, in that the judgments that underpin such statements turn on facts and legal conclusions that are hard to establish, and inevitably arise in politically fraught contexts. But the sense that the US government had been less than forthright in the way it spoke about Bosnia and Rwanda has led to lasting skepticism about its willingness to speak candidly about the issue of genocide.

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How did this occur?

The Bush administration faces reports of Serb atrocities in Bosnia. As the war in former Yugoslavia intensified, the US government had been receiving reports since at least the spring of 1992 that Bosnian Serb forces were carrying out systematic abuses against civilians and captured soldiers—including running rape camps, executing prisoners, and detaining men in abusive conditions.¹⁸¹ Journalists like *Newsday*’s Roy Gutman brought the issue front and center with reports in early August that the Serbs had established “two concentration camps in which more than 1,000 civilians have been executed or starved and thousands more are being held until they die.”¹⁸² Within days of Gutman’s report, US and other audiences were confronted with televised images of the wasted bodies of men and boys crowded helplessly behind barbed wire fences.¹⁸³

The images from Bosnia conjured horrific memories of the Holocaust and seemed to test the international community’s oft-repeated commitment to “never again” allow such crimes to occur. Bush Administration officials, facing an increasingly serious challenge in the upcoming presidential election, sensed the imperative for action. Shortly after the images began reaching the public, President Bush spoke about “the terrifying violence that’s occurring in Bosnia” as evidence of “the need to deal with this problem effectively.” He drew the connection between the Bosnian Serb detention camps and the moral legacy of the Holocaust, saying that “[t]he shocking brutality of genocide in World War II in those concentration camps are burning memories for all of us.”¹⁸⁴ He told the press that he could not yet confirm that there was “a genocidal process going on there” while saying that genocide—“if that is proven”—would compound the problem.¹⁸⁵

But while all seemed to agree “that can’t happen again,” there were very different schools of thought about what the United States should do to stop it. Then-candidate Bill Clinton, who had also raised the parallels to the Holocaust, proposed air strikes against Bosnian Serb targets and lifting a UN arms embargo that was hindering Bosnian Muslims from obtaining weapons.¹⁸⁶ President Bush was more cautious, committing to ensure the delivery of humanitarian relief and to take further steps to isolate the Serbian government, but also emphasizing the need to verify the reports coming from the detention camps

as part of a broader pushback against the impulse to use military force. This fit in with the view, described later in Secretary of State James Baker's memoirs, that US vital interests were not at stake in the Yugoslavia crisis and that the US government needed "to make the Europeans step up to the plate."¹⁸⁷

Caught between these pressures, Bush administration officials developed what Samantha Power called "a spin on events in the Balkans that helped temper public enthusiasm for involvement."¹⁸⁸ This included focusing on the intractability of the conflict and the risks of intervention, but also included an effort to manage perceptions of the gravity of the crimes.

In early August, the administration seemed to walk back its initial statements confirming reports about the camps, leading one reporter to remark that he had never seen the State Department press corps so agitated. A sense of distrust about the administration's characterizations of the situation quickly set in.¹⁸⁹ On August 20, after Red Cross officials had been allowed into many of the camps, a journalist asked the State Department spokesperson, "Has the United States reached any conclusion about whether these are, in fact, concentration camps and whether there is a *systematic genocide* going on behind those doors?" The spokesperson said that "the horrible conditions that are in many of these places are amply demonstrated," but added that the Red Cross had not found "substantiated evidence of . . . systematic killing" and that the State Department had not been able to do so.¹⁹⁰ The questioner's use of the word "genocide" was not necessarily intended in a technical or legal sense, and it did not necessarily follow that the killings—even if done systematically—would necessarily have constituted "genocide" within the meaning of the 1948 Convention. In any event, the seeming reluctance of the administration to speak forthrightly reinforced the impression of evasiveness. That impression was further reinforced when, upon resigning in August 1992, one of the State Department's Yugoslavia desk officers complained to *The Washington Post* that "strong language and graphic reports of suffering in Bosnia were often deleted or watered down by mid-level officials seeking to minimize the pressure for US intervention."¹⁹¹

Three strands of the story thus quickly came together: reports of horrible atrocities that, at a minimum, had echoes of Nazi crimes that could not be allowed to repeat; a Bush administration that sought to deflect pressure for getting more deeply involved, at least in the sense of military intervention; and critics in the press and elsewhere that were suspicious of administration statements that appeared designed to temper the reports of atrocities. It was against this backdrop that use of the word genocide emerged as a significant issue, based on the hope for some, fear for others, that describing the atrocities as "genocide" would fuel political or legal pressure for more robust US action.

Steps toward justice and accountability. On a different track, State Department lawyers, intelligence analysts, and others began developing strategies for an international criminal tribunal to hold perpetrators of atrocities accountable. In the fall, then-Deputy Secretary Lawrence Eagleburger tasked the intelligence community to collect information on genocide and other international humanitarian law violations.¹⁹²

In December, after taking over as secretary of state and after President Clinton's election, Eagleburger spoke specifically about Serb atrocities at the International Conference on the Former Yugoslavia in Geneva. Eagleburger stated that we know "crimes against humanity occurred," and—more strikingly—that "we know, moreover, which forces committed those crimes, and under whose command they operated," and—more strikingly yet—that Milosevic, Karadzic, and Mladic bore "political and command responsibility for the crimes against humanity which I have described."¹⁹³

Eagleburger's decision to use the "crimes against humanity" language, and even to name names, appears to have been taken with little if any of the formal process that we have come to associate with statements that genocide has been committed. Eagleburger himself suggested that he made the decision to do so on the way to the Conference, after speaking with Elie Wiesel and deciding that "it was time we started."¹⁹⁴ There was apparently no long memorandum teeing up a decision on whether the atrocities fell within any legal definition of "crimes against humanity," and one of the lawyers involved at the time said the conclusion "just seemed obvious."¹⁹⁵ In any event, upon making his statement, Eagleburger went on to say that "for whatever period of time is left to us, that is until the 20th of January, this is going to be a theme. And I hope the next administration picks it up."¹⁹⁶

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As important as these statements were, Eagleburger did not utter the word genocide. The United States in December did support a resolution in the UN General Assembly that condemned the Serbian-led practice of ethnic cleansing and explicitly equated it with genocide, and another resolution in the UN Commission of Human Rights that called on governments to evaluate whether the atrocities occurring in Bosnia and Croatia amounted to genocide.¹⁹⁷ But saying the word was a line that the US government would not itself cross, much to the chagrin of lower level officials pushing for recognition of genocide and US military action to stop it. Two such officials submitted a dissent channel memorandum arguing that the Serbs were committing genocide. Eagleburger indicated that he found the memorandum persuasive, but said that he did not want to preempt the incoming Clinton Administration from making its own judgment.¹⁹⁸

What was at stake in publicly using the word "genocide"? Overall, there appear to have been at least three goals of those who wanted the State Department to label the Serb atrocities as genocide. Some saw it primarily as a question of speaking the truth, others affirmatively wanted to trigger a legal obligation to intervene (or at least public pressure that would make lack of action politically costly), and still others were focused on setting the stage for investigation and punishment of those responsible.¹⁹⁹

To the extent that this debate about genocide turned on whether the definition was satisfied, the contours of the legal arguments are not completely clear from the public documentation—e.g., the extent to which proponents were arguing that the number of Bosnian Muslims actually killed constituted a sufficient "part" of the group, that "destruction" of the group could occur by virtue of efforts to make it impossible to continue functioning as a group within Bosnia, or that at least some actors had the intent to physically annihilate virtually the entire Bosnian Muslim population, as opposed to simply driving them from the territory that the Serbs sought to control.

The Clinton Administration takes office. President Clinton made statements during his campaign that raised expectations regarding his Bosnia policy, but the question of whether the ongoing atrocities amounted to "genocide" does not seem to have played a major role as the new administration began to develop its approach. Soon after President Clinton's inauguration, and following a series of high-level meetings, Secretary Warren Christopher announced a series of new steps that the administration would take toward resolving the Yugoslavia conflict. Christopher laid out the stakes of the situation in forceful terms, and stated that "Bold tyrants and fearful minorities are watching to see whether 'ethnic cleansing' is a policy [that] the world will tolerate." The steps that Christopher announced, however, contemplated using US force only to help enforce a peace agreement, not to press the parties into one or to protect civilians in the absence of one.²⁰⁰

There were of course arguments for and against taking some of the specific steps being pushed by advocates. There was particular debate about proposals to lift the arms embargo on Bosnia, which would assist the Bosnian Muslims but which European governments indicated would prompt them to withdraw their peacekeepers, leaving the prospect that the United States would be seen as responsible for filling the gap. Whatever the rationale, many advocates within the State Department were disappointed in the new policy and continued to dissent.²⁰¹

In the following months, a familiar dynamic emerged in which the administration, faced with pressure to take strong steps, resisted making statements that genocide was occurring that would exacerbate that pressure. Christopher had spoken of “near genocidal, or perhaps genocidal conditions” in his confirmation hearing,²⁰² but by spring he was parrying a rolling series of questions from members of Congress about whether genocide was occurring. His responses followed a general pattern: embracing the questioner’s concern about the situation; stressing the importance of stopping the abuses, however they were labeled; but using the word “genocide” only in a hedged formulation, such as saying the atrocities were “tantamount to genocide” or that some of the acts “could constitute genocide,” and emphasizing the technical and legal character of the question.²⁰³

Christopher’s consistent use of hedged language made clear that it was not accidental. Indeed, after an April hearing at which Christopher said to Representative Frank McCloskey that he “would look into and get back to you” about whether the ethnic cleansing “meets the technical legal definition of genocide,”²⁰⁴ the State Department’s Bosnia desk officer was tasked with drafting and clearing a response. He prepared a draft that said that “the United States Government believes that the practice of ‘ethnic cleansing’ in Bosnia includes actions that meet the international definition of genocide as well as constitute other war crimes,” but senior State Department staff in consultation with Christopher did not approve the draft.²⁰⁵ Congressman McCloskey’s question was left unanswered.

At a hearing in May, Christopher took one step even further back, suggesting that the situation in Bosnia was different from the Holocaust by saying “I never heard of any genocide by the Jews against the German people, but here you have atrocities by all sides, which makes this problem exceedingly difficult to deal with.”²⁰⁶ The State Department spokesperson had to publicly clarify that the secretary was not suggesting the Bosnian government was committing genocide, and the acting assistant secretary for human rights submitted a memorandum that a State Department dissenter described as “reminding the secretary that Serb and Bosnian Serb forces were responsible for the vast majority of war crimes in Bosnia.”²⁰⁷ In June, State Department Counselor Tim Wirth answered a question from Representative McCloskey in June by stating, mistakenly, that the department had already said that what was occurring was genocide. When McCloskey asked for a copy of that statement by the next afternoon, Wirth said “[w]e will get that right back to you.”²⁰⁸ But no such statement existed for the State Department to submit.

Knowing that Christopher was unwilling to refer to genocide without caveats, there were efforts to develop a compromise formulation for responding to McCloskey, which the relevant bureaus submitted to Christopher by memorandum dated October 1. It was pursuant to that memorandum that Christopher approved statements that “acts of genocide” had occurred in Bosnia.²⁰⁹ Christopher withdrew his approval, however, after McCloskey called on him to resign in an October 24 op-ed that, among other things, cited that Christopher had “steadfastly refused to describe Serbian atrocities in Bosnia as genocide.”²¹⁰ As a result, the State Department did not submit the “acts of genocide” compromise language to Congress until mid-November, when it submitted a response to the House subcommittee under Wirth’s name.²¹¹ “Acts of genocide” thereafter became the department’s phrase of choice, and was for example the

phrase that it used in the Bosnia section of its annual Human Rights Report, which it published in January 1994.²¹² The exact meaning of the phrase attracted some scrutiny from journalists in February, though most of their questions focused on an account of Christopher's reversal that had been leaked through McCloskey's office to the press.²¹³

Slaughter begins in Rwanda. That is where the situation stood when the plane carrying Rwanda and Burundi's presidents was shot down on April 6 and Hutu militias in Rwanda began a campaign of mass killings of Tutsi and politically moderate Hutu civilians. The aversion to saying the word "genocide" was by this point firmly implanted within the US government. It was widely understood that use of the word "can increase the political expectation that the [US government] will 'do something,'" and that "for this reason, decisions on whether to use the 'genocide' label in the former Yugoslavia have been taken personally by the Secretary."²¹⁴

If anything, this view applied even more strongly to the Rwanda crisis. As has been widely noted, the killings of US military personnel serving in a UN mission in Somalia in October 1993 had devastated already weak congressional support for participating in or even funding UN peacekeeping missions. The administration's initial response to the Rwanda crisis reflected a singular focus on demonstrating its commitment to restraint in the face of pressures to support UN peacekeeping responses, especially in situations seen as marginal to core US interests and in which there was no clear path to strategic success.²¹⁵ After completing the evacuation of US citizens and embassy personnel from Rwanda, the administration—encouraged by key members of Congress who stressed that the United States had no interests at stake in Rwanda²¹⁶—proposed the total withdrawal of the UN peacekeeping mission (UNAMIR).²¹⁷ The Security Council had deployed the mission the previous year to support implementation of a power-sharing agreement between the Hutu-dominated government and a Tutsi-led rebel force.

The recognition that the killings might constitute genocide appears to have come quickly within the US government.²¹⁸ Pressure for the administration to say so emerged from outside as well. The State Department's press spokesperson initially demurred, saying more study was needed, especially on the question of genocidal intent,²¹⁹ but there was mounting pressure for a response. The Vatican asked the United States to join a public statement calling the killings "genocide" and asking for concerted action to stop them.²²⁰ The US Committee on Refugees called for the United States "to declare formally that the massacres in Rwanda constitute genocide" as "an important step necessary for establishing the moral, legal, and political context for forceful action by the international community."²²¹ In the Security Council, member states pressing for steps aimed at stopping the genocide sought to include language that at least alluded to genocide in a statement as a way to emphasize the gravity of the situation and strengthen their position.²²²

In mid-May, an initiative by Canada to hold a special session of the United Nations Human Rights Commission on Rwanda forced the United States to consider how it would deal with the genocide language that would inevitably be proposed for any final resolution of the session.²²³ Relevant bureaus drafted a memorandum for the secretary's approval to authorize a State Department position saying that "genocide" had occurred.²²⁴

The final version of the memorandum—dated May 20—is particularly important for our purposes as the only publicly available memorandum that actually embodies the process that this report addresses—i.e., that is the actual vehicle for recommending that the secretary approve characterizing the relevant atrocities as "genocide." By the time the final version of the memorandum had been submitted, a compromise had been struck, so the memorandum itself does not set out the differences of views that had been

expressed. As the final memorandum recommended, Secretary Christopher authorized only that State Department officials could say publicly that “acts of genocide” had occurred but, in international fora such as the UN Human Rights Commission, US delegations would be authorized to support resolutions that said more broadly that “genocide” had occurred.²²⁵

The exact sequence of events leading to the compromise is not entirely clear, but supporters of the unadorned “genocide has occurred” language were severely disappointed. In his memoirs, Assistant Secretary for Democracy, Human Rights and Labor John Shattuck—one of the senders of the memorandum—described the use of the “acts of genocide” formulation as a low point, and commented that he was “sickened by this debate over terminology.” In his words:

the strongest country in the world took two months to conclude the obvious, during which time it avoided what was arguably an international legal responsibility ‘to actually do something’ about a genocide in progress.²²⁶

As the May 20 memorandum indicates, the question of whether genocide had occurred was not itself a close call. The department’s legal adviser said there was a “strong basis” to conclude that the killings and abuses have been committed with the intent to destroy the Tutsis in whole or in part, and that the “part” of the Tutsi population being targeted “can readily be considered substantial.”²²⁷ In support of the recommendation, the bureaus appealed to the need for the US government to be in a position “to press for a strong resolution condemning the violence and calling for action,” but also advanced a more defensive argument about the importance of preserving US credibility in the eyes of those “who may question how much evidence we can legitimately require before coming to a policy conclusion.”²²⁸

Unlike in Bosnia, when formal criminal prosecutions were eventually brought, the UN Tribunal for Rwanda readily concluded that genocide had been committed. The only issue that seems to have triggered conceptual questions was whether the Hutus and Tutsis actually were distinct “ethnic groups” within the meaning of the Genocide Convention. The Tribunal eventually concluded that they were,²²⁹ but it is interesting that this issue was not even considered as part of the State Department’s decision-making process at the time, and certainly was not something on which slow decision-making could be blamed.

The understanding of the phrase “acts of genocide.” It is not clear what Christopher or others in the State Department saw as the difference between “genocide” and “acts of genocide,” although the distinction was taken seriously. The phrase is not inherently suspect or evasive—indeed, UN and other official bodies have referred to “acts of genocide” in pronouncements on the subject without attracting a perception that they are equivocating²³⁰—but it came to have specific connotations for the United States in the Bosnia and Rwanda crises.

For his part, Christopher suggested in June 1994 that he preferred the phrase “acts of genocide” because it was the term used by the relevant international treaties²³¹—presumably in the sense that Article III of the Genocide Convention makes certain “acts” punishable, such as “conspiracy to commit genocide” or “complicity in genocide.” That said, it is no less true that “genocide” itself is also one of those punishable acts, and indeed the core language of the Convention says that “genocide” is a crime under international law and “genocide” is what the parties to the Convention undertake an obligation to prevent and to punish.

Other explanations are possible as well. Publicly released US documents also suggest that the use of “acts of genocide” was variously intended:

- To signal that *some but not all* the killings occurring amounted to genocide²³²
- To emphasize individual as opposed to collective responsibility for the crimes that were occurring²³³
- To emphasize that Article II of the Convention defines genocide as certain “acts” (e.g., killing or causing serious bodily or mental harm) committed with the intent to destroy a group²³⁴
- To avoid an implication that a conclusion had been reached that Bosnia’s or Rwanda’s leadership was responsible²³⁵

These distinctions are not implausible but none seem to truly require the insistence upon referring to “acts of genocide.” Among other things, it seems tautologically true that—if “acts of genocide” have occurred in a country—then “genocide” must have occurred in that country. Indeed, as noted above, in April 1993, Secretary Christopher reportedly rejected a formulation regarding Bosnia that the United States believed the ethnic cleansing “includes actions that meet the international definition of genocide,” as well as a similar formulation in September.²³⁶ Those formulations would seem to have satisfied a concern for making clear that only some of the acts were being characterized as genocide. Perhaps most tellingly, a guidance document prepared for officials in the State Department’s Africa Bureau late in the Rwanda crisis stated straightforwardly that “There is no legal significance to the use of the term ‘acts of genocide’ instead of ‘genocide.’”²³⁷

Abandoning the distinction. It thus seems clear that the term was seen as stopping short of a line that senior administration officials did not want to cross for fear of the consequences that would flow from saying “genocide.” Yet the formal legal advice provided to policymakers, including in the May 20 memorandum, stated clearly that there would not be “any particular legal consequences” for the United States of finding that genocide occurred. Even if policymakers clearly understood that—and there are some indications they did not²³⁸—it is clear that Secretary Christopher and others perceived that saying “genocide” would as a political matter unleash significant pressure. Indeed, that was the understanding of both those who wanted to avoid the pressure and at least many of those who saw pushing for clear language as a means of creating pressure.

Not surprisingly, given the various and shifting rationales that appeared in internal documents, the State Department’s spokespersons could not offer a clear explanation for the “acts of genocide” distinction.²³⁹ Journalists soon established what was happening. On June 10, a front page *New York Times* article reported: “Trying to avoid the rise of moral pressure to stop the mass killing in Rwanda, the Clinton Administration has instructed its spokesmen not to describe the deaths there as genocide, even though some senior officials believe that is exactly what they represent.” The article noted specifically that “the State Department and the National Security Council have drafted guidance instructing spokesmen to say merely that ‘acts of genocide may have occurred.’”²⁴⁰ The phrase became an object of suspicion and derision. At the State Department press briefing that day, a reporter asked incredulously, “How many acts of genocide does it take to make genocide?”²⁴¹ It is hard to imagine at that point what a persuasive response would have been.

The phrase [acts of genocide] became an object of suspicion and derision. At the State Department press briefing that day, a reporter asked incredulously, “How many acts of genocide does it take to make genocide?”

At a press availability that evening in Istanbul, Christopher finally relented. Asked point-blank if “the events that are now occurring in Rwanda constitute genocide or not,” he replied: “They certainly are acts

of genocide. I think that is the operative term that is used from a legal standpoint. If there is any particular magic in calling it genocide, I have no hesitancy in saying that.”²⁴² Even after a similar piece ran the next day on *The Washington Post*’s front page, it appears to have taken time for Christopher’s statement to be taken as a signal that the State Department could drop the “acts of” language.²⁴³ Christopher eventually put a more emphatic end to the issue, for both Bosnia and Rwanda, at a Senate hearing on June 30. In response to a passing reference to the genocide terminology issue, Christopher defended the use of “acts of genocide” as appropriate but reemphasized his comfort with the unqualified term “genocide,” making clear for the first time that that comfort extended to Bosnia as well.

With respect to Rwanda, I’d like to see if I couldn’t dispel this fog about the issue of genocide. The international treaties use the word “acts of genocide,” and it’s for that reason that we have used, with respect to both Bosnia and Rwanda, the phrase “acts of genocide.” But if the question is asked to me, as it was when I was overseas a couple of weeks ago, whether there was genocide, I have no hesitation in saying that there was genocide in Rwanda and had been genocide, is genocide, in Bosnia as well.²⁴⁴

The secretary went on to emphasize that the US government was discharging its obligations to prevent and punish, citing in particular the progress being made on a Yugoslavia tribunal.

From this point on, US references to genocide in Bosnia and Rwanda were generally made without the “acts of” parsing. But these events had an impact that continued long after the atrocities themselves. David Halberstam’s *War in a Time of Peace* and Samantha Power’s *A Problem from Hell* feature the famous State Department press conferences as part of broader critiques of the Clinton administration’s foreign policy and the US government’s history of responding to genocide, respectively.²⁴⁵ PBS Frontline’s *Ghosts of Rwanda* miniseries similarly brought the Rwanda experience to the attention of a large public audience. Fairly or unfairly, this coverage helped cement the perception for future situations that nuances or vagueness in the way that the State Department spoke about genocide were suspect—a signal that it was acting in bad faith to avoid responsibilities for addressing a crisis.²⁴⁶ The incidents made such an impression that journalists would still invoke them 20 years later, when a US administration was hesitant to use genocide language even as it was conducting airstrikes to defeat the ISIS perpetrators in northern Iraq.²⁴⁷

Subsequent Assessments by International Courts and Tribunals. One of the most important responses to the atrocities was the creation by the Security Council of the International Criminal Tribunal for Former Yugoslavia and the International Criminal Tribunal for Rwanda. Virtually all the atrocities prosecuted in those Tribunals could have been prosecuted as crimes against humanity, but the US lawyers and others working on the tribunals made sure that its jurisdiction would also cover genocide. To the extent that one of the objectives for using genocide language is to establish a predicate for accountability, accountability for genocide was in fact being pursued, regardless of whatever the State Department was saying publicly about whether it had been committed.

In practice, there have been numerous convictions for genocide in the Rwanda Tribunal, where it was far more straightforward to establish the critical element of genocidal intent. In the words of Tribunal Prosecutor Serge Brammertz:

The reasons for this are obvious. The 1994 genocide in Rwanda bears many of the hallmarks of historical genocides such as the Holocaust: a clear policy or plan to physically destroy the

targeted group; hundreds of thousands killed and subjected to physical or mental harm during a sustained campaign of destruction engulfing most of the country; and men, women, and children targeted for destruction without distinction. The events in Rwanda fit the historical genocide formula so indisputably that the ICTR has taken judicial notice of the 1994 genocide in Rwanda, thereby recognizing it as a fact of common knowledge.²⁴⁸

The situation in Bosnia was more difficult. In the end, the Yugoslavia Tribunal did reach convictions for genocide in several cases related to the Srebrenica massacre in 1995, but not for the atrocities from 1992 to 1994 that were the objects of the debates discussed above. For its part, in reaching similar conclusions, the International Court of Justice applied a similarly high bar for deciding whether genocide had occurred, suggesting that—because of the gravity of the charges—the facts must be such that there is no other inference that could be drawn than that the perpetrators intended to destroy the relevant group.²⁴⁹

The Level of Proof. The ICJ’s use of such a “high bar” derives largely from the role the ICJ judges believe that the court should play in the affairs of the international community, and it does not necessarily follow that states—the responsibilities of which include *preventing* genocide, presumably before it happens—should self-impose a similar reluctance when deciding whether to use the word in their national capacities. With respect to the International Criminal Court, while the ICC may not *convict* a person if there is any reasonable doubt about the person’s intent, a prosecutor would essentially stand up and charge that genocide has occurred upon showing that there are “substantial grounds” to believe that the person committed the crime.²⁵⁰

In considering all this, three conclusions seem on point. First, given the difficulties of establishing the requisite intent, efforts to demonstrate that genocide has occurred are notoriously difficult. This is reflected in the comments of the former ICTY prosecutor about being judicious in bringing genocide charges, and the increased difficulties presented in attempting to prosecute genocide as opposed to crimes against humanity. Second, given the criminal nature of the charges ultimately at stake, it is appropriate for policymakers to underscore that they are leaving decisions about the guilt or innocence of any particular individuals to appropriate courts and tribunals. This is in line with what Secretary Eagleburger said when “naming names” in Geneva in December 1992, and with the statements—discussed below—made by Secretary Powell about Darfur in 2004 and Secretary Kerry about ISIS in 2016. Third, concerns about the ramifications of straightforward statements that genocide had occurred played an unmistakable role in decision-making about how to characterize the atrocities in public statements. The fact that Secretary Christopher was willing to say that “acts of genocide” had occurred—as well as the State Department’s observation that there really was no meaningful difference between the two phrases—strongly points to the conclusion that its fear about unleashing pressure for action, and not simply doubts about the strength of the underlying evidence, helped drive decision-making.

Generating the evidence to establish whether genocide had occurred. Especially with respect to Bosnia, there were strong accusations that the Executive branch was not doing enough to develop the information that would be needed to determine whether genocide, or other crimes linked to Serb leadership, had occurred.²⁵¹ Regrettably, there seems to have been little real infrastructure put in place at the time to pursue and, except occasionally (as in the lead-up to Eagleburger’s naming of names in December 1992), there were few signals of strong interest by senior State Department officials in seeing the results.²⁵²

That said, in thinking about the process for addressing these issues in future cases, there were important steps taken, including Secretary Eagleburger's approval of a tasking to the CIA and the intelligence community to focus specifically on genocide and other atrocity crimes. Also important were steps taken in multilateral fora that created calls for information and evidence from the United States and others, and that helped empower those pushing for developing and analyzing information and evidence. In this connection, the Security Council—after adopting a resolution in July underscoring the principle of individual criminal accountability for atrocity crimes—called upon states to submit “substantiated information” to the United Nations secretary-general, who would report to the council “recommending additional measures that might be appropriate.” Soon thereafter, the council moved to establish “an impartial Commission of Experts to examine and analyse the information” and to have the Commission report back its conclusion on the evidence of international law violations.”²⁵³ According to INR analyst Jon Western:

Between October 1992 and July 1993, the intelligence community working in conjunction with the Bureau of Human Rights and Humanitarian Affairs compiled, declassified, and submitted reports to the United Nations containing extensive evidence of atrocities and war crimes. These reports were made available to the press with the intention that the exposure of these reports would put the perpetrators—most notably the Serb and Bosnian Serb leaderships in Belgrade and Pale—on notice that the international community was moving toward the development of an ad hoc tribunal that would hold them accountable.²⁵⁴

Even if imperfectly, these mechanisms were useful as action-forcing events to encourage collection of evidence. For its part, in February 1993 the Security Council moved to establish the Yugoslavia Tribunal and in July 1994 to establish the Rwanda Tribunal, and the United States provided extensive information, evidence, and other support to the tribunals over the course of many years.²⁵⁵

Things that were not said. The relevant statements eventually made for both Rwanda and Bosnia were that “genocide had occurred.” Such language thus does not speak to the question of which individuals or which groups are thought to be responsible for the genocide and, indeed, at least on its face, even to the groups from which the main perpetrators are thought to be drawn. In a case like Bosnia, for example, there were very different narratives about the relationship between various groups involved in the conflict, including famously about the relationship between the Serbian leadership in Belgrade and the ethnic Serb leadership in Bosnia. It thus could not easily be inferred who the US government was saying was responsible when it said that genocide (or acts of genocide) had occurred in Bosnia.

The statements were ambiguous in another way as well. Genocide as defined in the Genocide Convention is a crime perpetrated by individuals. A statement that genocide has occurred might mean that the leadership of, for example, the ethnic Serbs had drawn up a plan at senior levels, but it could just as easily be true even if only particular individuals—possibly even low-level individuals—had acted with the requisite genocidal intent.

Particularly in the case of Bosnia, where the Security Council had already established an international criminal tribunal for most of the period during which there was an open question of whether to say that genocide had occurred, there seems to have been little emphasis on using the creation of the tribunal as a separate reason not to pronounce on the question. One can easily imagine an administration in such circumstances saying that, given the establishment of a tribunal, the characterization of the crimes in question should be left in the tribunal's hands.

The risk of focusing on identifying the risk of genocide (as opposed to whether genocide has already occurred). Finally, there is something disconcerting about the idea that it is a finding that genocide has occurred that should be the trigger for more assertive policies. The underlying idea of the 1948 Convention is that states have an obligation to prevent, as well as to punish, genocide. The idea of prevention necessarily implies readiness to act *before* genocide has occurred. The International Court of Justice has addressed this point as follows:

The idea of prevention necessarily implies readiness to act *before* genocide has occurred.

[T]he obligation to prevent genocide [does not only come] into being when perpetration of genocide commences; that would be absurd, since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act. In fact, a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, *the existence of a serious risk that genocide will be committed*....[A] State may be found to have violated its obligation to prevent even though it had no certainty, at the time when it should have acted, but failed to do so, that genocide was about to be committed or was under way; for it to incur responsibility on this basis it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed.²⁵⁶

As discussed in the report to which these cases studies are appended, the US government has not agreed that the Genocide Convention creates a legal obligation to take action in a foreign country, but the ICJ's logic applies as compellingly to whatever moral responsibility to take action is at stake. The key point is that policymakers should be seeking to identify the point at which there is a "serious risk that genocide will be committed," and there seems little doubt that that such a risk existed from the early stages of both the Bosnia and Rwanda crises.

B. Burundi

The State Department's 2004 Darfur memorandum cited Burundi as one of four cases—the others being Rwanda, Bosnia, and Cambodia—where the department had, as of 2004, carefully considered the facts of a situation and concluded that genocide had occurred.²⁵⁷ However, we have been unable to confirm when, how, or even if the secretary of state in fact made such a decision regarding Burundi. Although there is ample evidence that the question of genocide language was considered in US policy toward Burundi in the 1990s, the issue clearly had a far lower profile than regarding neighboring Rwanda.

As discussed above in connection with the massacres in 1972, Burundi's post-independence history has been marred by large-scale ethnically targeted killings of civilians. Opposite the pattern that played out in Rwanda, many of the instances of such violence in Burundi were committed against the country's majority Hutu population by militias and state security forces defending the power of the country's long-ruling Tutsi minority.²⁵⁸ In October 1993, shortly after he took office as the first Hutu president of Burundi, Melchior Ndadaye was assassinated by officers from the Tutsi-led army. Ndadaye's killing ushered in a new phase of brutal political violence, beginning with several days of seemingly organized anti-Tutsi pogroms that soon expanded to include killings of civilians on both sides of the ethnic divide.²⁵⁹

The initial wave of killings does not appear to have prompted immediate discussion by the US government of whether the crimes amounted to genocide. Indeed, coming in the immediate aftermath of the

October 3-4 “Black Hawk Down” incident in Somalia, the Clinton administration did not face pressure to intervene, but rather to show that it could resist supporting the kind of humanitarian mission that would have been required to mitigate the slaughter.²⁶⁰ In Burundi, though, the assassination was a seminal moment, setting in motion a long period of conflict and negotiation among Burundi’s political parties that led to a consensus on the need to shed light on the events of October 1993. Those parties agreed to request an international judicial fact-finding mission into what they had “agreed to call genocide.”²⁶¹

The political talks took place against the backdrop of growing conflict and continued killings, particularly the killings of Hutu by Tutsi militias that were suspected of ties to the security forces. The US ambassador to Burundi, former US Senator Robert Krueger, became increasingly alarmed by these killings, which he documented through extensive travel in the country. In his cables to Washington and in public remarks, Krueger in the spring of 1995 began to characterize the abuses as genocide, but there was an aversion in the State Department to doing so.²⁶² The department’s policy coordinator for Burundi and Rwanda at the time recalls being tasked with urging Krueger to reconsider his statements regarding genocide,²⁶³ and Krueger’s memoir describes a friend at the department advising him, “Bob, you could fill your cables with the F-word and cause less consternation than by calling the Burundi killings genocide.” Krueger also recorded that a department attorney acknowledged that the abuses he had reported could be described with the term “acts of genocide,” although department officials do not appear to have stated this at the time.²⁶⁴

It is not clear to what extent this conclusion, or others described in this section, was reviewed or endorsed by policymakers. While the department had eventually set aside the “acts of genocide” distinction in the Rwanda and Bosnia contexts, its reappearance in the Burundi context appears to have sprung from the same concerns that had led to its earlier use. One former official in the State Department’s Africa bureau recalled that the substantial internal debate over the term’s applicability in Burundi turned, at least in part, on the perception that using the word would increase pressure for US action.²⁶⁵

The US policy context for Burundi changed dramatically in 1996 as fears grew that the country could become “another Rwanda.” The Clinton Administration took a number of steps aimed at preventing a new catastrophe, sending cabinet-level visitors to the country, appointing a former congressman as a special envoy to participate in regionally facilitated peace negotiations, and offering to airlift regional peace-keepers in the event of emergency.²⁶⁶ In that context, the atmosphere toward the use of genocide language appears to have become more permissive. In the spring of 1996, Assistant Secretary John Shattuck stated in an op-ed that it was time “to call what’s happening by its proper name: mutual acts of genocide,” and David Scheffer, serving then as Ambassador Albright’s deputy in Washington, simply referred to “genocide in Burundi and Rwanda” in a *Foreign Policy* article.²⁶⁷

Around this time, in August 1996, a UN commission of inquiry that had been established at Burundi’s request completed its report on the 1993 events and concluded that “acts of genocide against the Tutsi minority took place in Burundi on 21 October 1993, and the days following.”²⁶⁸ Citing the terms of its mandate and its limited resources, however, the commission said nothing about the subsequent violence that had been heavily aimed at Hutus.²⁶⁹ A State Department analyst recalls being immediately wary of how such a one-sided finding would be received in a country where *both* sides had a reasonable basis to feel they had been victims of eliminationist violence. This concern was deepened because the commission had released its report into the aftermath of a coup by Tutsi former President Pierre Buyoya, which reversed years of halting progress toward power-sharing and once again removed a Hutu president from power. A finding of genocide, however valid, seemed likely to empower the Tutsi hardliners who were

pressing Buyoya to resist international efforts aimed at restoring constitutional rule, and who sought to justify their ongoing abusive crackdown against Hutu groups.²⁷⁰

There are few indications that the US government made statements on the issue from this point on—with one exception. The State Department’s next annual human rights report, released in January 1997, contains what appears to be a carefully calibrated statement that acknowledged the commission’s finding of genocide in 1993, while avoiding doing so in terms that would repeat the commission’s sole focus on crimes against Burundi’s Tutsis. The report said: “Tens of thousands of people, both Hutu and Tutsi, have been massacred in ethnic violence since independence, especially in 1972, 1988, 1993, and since 1995. As the U.N. Commission of Inquiry in Burundi concluded in 1996, much, but not all, of the ethnic violence in Burundi since 1993 constituted genocide.”²⁷¹ Journalists at the press conference where Albright released the report in her new capacity as secretary of state asked no questions about the genocide language, or more generally about the crisis in Burundi, which the emergence in October 1996 of a broader war in neighboring Zaire had come to overshadow.²⁷²

C. Iraq

In the summer of 1995, Secretary Christopher approved a memorandum concluding that the Iraqi government had committed genocide against Iraq’s Kurdish citizens, in particular in 1988 during the course of its “Anfal” campaign. Few US officials appear to have clear recollections of Christopher’s decision, which was not publicized at the time, and which had such a low profile that Iraq was not even included in the State Department’s 2004 memorandum that identified cases in which the department had made genocide determinations. It is nevertheless a unique and interesting episode—the only case in which the US government made a genocide determination specifically to facilitate legal action under the Genocide Convention, and the only instance in which the State Department kept its decision largely private save for discussions in diplomatic channels. While the fact that Iraq had become an adversary clearly facilitated the genocide finding, the US government appears to have approached the issue with considerable rigor.

The determination grew out of an effort by the Middle East-focused component of Human Rights Watch (HRW) to identify a group of countries that could bring a claim against Iraq in the International Court of Justice for violating the Genocide Convention. There had been extensive efforts to develop the factual record. After the Gulf War, the establishment of a no-fly zone over northern Iraq by a US-led coalition helped allow the Kurds to establish a significant measure of autonomy over areas in the north where Iraq had committed atrocities. In turn, the Kurds had seized possession of large numbers of Iraqi documents from abandoned offices and archives of Iraq’s security forces during the Kurdish uprising against the Iraqi government in March and April 1991, then worked with US Senate staff to make arrangements to safely transfer the documents to the United States.²⁷³ The documents formed the basis of a number of reports in which Human Rights Watch concluded in 1993 and 1994 that Iraq had committed genocide against the Kurds.²⁷⁴ On this basis, and as part of a broader effort to promote justice for victims of the Iraqi government, HRW sought to enlist one or more governments that would be willing to bring a claim before the ICJ.²⁷⁵

HRW officials specifically sought to avoid the geopolitical light that a US role in any legal proceedings would have cast on the effort. They instead focused their attention on recruiting a geographically diverse group of governments that were seen as having strong human rights records and lacking political interests in the region that the Iraqi government or others could point to as a means of discrediting the effort.²⁷⁶

Current and former HRW staff who were involved in the effort recall that the government of the Netherlands was receptive to the proposal, but that the Dutch foreign ministry did not want their country to have bear the risks and burdens of bringing the claim alone.²⁷⁷

The concerns that arose in response to HRW's continued outreach proved to be stubborn. To address one common point of pushback, the group commissioned and shared a detailed legal analysis describing how the partial destruction of Iraq's Kurds constituted genocide under the terms of the Genocide Convention, even if the Anfal did not look like the kind of total extermination that the term conjured in the minds of many government officials.²⁷⁸ Other sources of reluctance were more difficult to address, including the concern that pursuing Iraq in court would be costly and might prompt violent retaliation against the countries bringing the claim.²⁷⁹

In 1994, as a final step before abandoning the effort, Human Rights Watch officials approached the US State Department and asked if it would be willing to use its influence, quietly and behind the scenes, to encourage potential claimant governments.²⁸⁰ As discussed above, the department in 1988 had explicitly rejected the idea that the Anfal killings and other abuses could have amounted to genocide, but US officials became more open to the possibility after Iraq's invasion of Kuwait had shattered US relations with Baghdad.²⁸¹ Claiborne Pell, chairman of the Senate Foreign Relations Committee, had asked Christopher at his January 1993 confirmation hearing if the United States would support "a genocide case against Iraq in the ICJ." Christopher responded affirmatively, though he remained noncommittal on the details of how such a case would be pursued,²⁸² and it does not appear that the State Department took steps at that time toward doing so.

Without the 1995 decision memo that Secretary Christopher ultimately approved, it is difficult to say with confidence how HRW or the department's bureaus presented these issues to the secretary, or how the various arguments for and against a genocide determination were weighed against each other.²⁸³ An HRW official recalls, though, that the group's advocacy focused in large part on persuading State Department lawyers on the merits that the Iraqi government had intended to kill a sufficiently substantial part of Iraq's Kurdish population to fit the terms of the Genocide Convention.²⁸⁴ As a matter of broader Iraq policy, two participants in the State Department's deliberations recall arguments being made that a genocide determination would help reinforce the broader US effort to sustain international support for a campaign of maximal pressure on the Hussein government—which included sanctions by the Security Council and the participation of states in enforcing no-fly zones in northern and southern Iraq.²⁸⁵ While Christopher himself had been personally reluctant to use genocide language regarding Bosnia and Rwanda just the year before, the fact that the Iraq determination was envisioned as a component of confidential diplomatic outreach, rather than a public statement, likely lowered the perceived stakes of invoking the word.

HRW's efforts at persuasion proved successful, and the State Department in 1995 conveyed to the group its intention to support their advocacy.²⁸⁶ US embassies in a handful of countries were instructed to reach out to their host governments and encourage them to join a multi-party complaint at the ICJ.²⁸⁷ Consistent with concerns that a visible US role could be harmful, US officials appear generally to have kept the fact of their support and the details of their outreach low-profile, though it was not kept entirely private.²⁸⁸ A former State Department official recalls that the US outreach went on well into 1996, albeit with diminishing priority and intensity as time passed without securing the support of any additional governments, and as other themes arose for applying pressure on Iraq (such as the defection of senior regime officials in August 1995), and new crises distracted from the effort entirely (such as the eruption of fighting between the two Kurdish factions).²⁸⁹

Ultimately, the US government and HRW both ceased their efforts. An HRW official later assessed that the US government “expended no real energy and no government joined the club” of potential claimants, and that “the case died in the mid-1990s.”²⁹⁰ Secretary Christopher’s determination appears to have had a limited effect even on the US government’s own use of genocide language regarding the Iraqi government’s abuses, which appeared variously with and without caveats for the remainder of the Clinton administration, as US officials continued to draw attention to the Iraqi government’s abuses.²⁹¹

Many years later, in 2007, the Iraqi High Tribunal in Baghdad convicted five defendants for genocide in connection with the Anfal campaign, though the participation of Saddam Hussein in the trial had been terminated following his conviction and execution in another case, and there were charges that the trials were unfair.²⁹²

D. Kosovo

Conflict in the former Yugoslavia entered a new phase in 1998 as long-standing tensions in Kosovo between Serbs and the province’s ethnic Albanian majority yielded to open conflict. As tensions intensified, there was grave concern about the excessive and indiscriminate use of force by Serbian security forces and the reported displacement of more than 230,000 persons from their homes.²⁹³ As the situation grew worse, and following the breakdown of negotiations in the French town of Rambouillet, NATO countries commenced a campaign of air strikes in March 1999 to halt Serbian armed attacks in Kosovo and the unfolding humanitarian catastrophe. Serbian security forces responded with a heightened campaign of violence and repression to expel Kosovo’s ethnic Albanians from the country.²⁹⁴

As these events unfolded, the US government took a different approach to the use of genocide language. US officials used statements about “indicators of genocide” and similar formulations to signal a risk that genocide would occur or might be occurring, while avoiding legalistic debates about whether each of the elements necessary to demonstrate that genocide had been committed had been established. The robustness of the NATO air strikes and the US response in general to the atrocities in Kosovo undoubtedly increased the political space for such an approach, as advocates had less need to persuade the US government to pronounce on the issue as a means of achieving greater US attention to the atrocities.

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For the purposes of this report, the situation differed dramatically from the other case studies earlier in the decade, in that the US government was seeking to mobilize a response to Serbian atrocities, rather than resisting steps that might generate pressure to take stronger action. The question of whether genocide was occurring arose nonetheless in the days following the first air strikes. The German defense minister on March 28 stated to the press that “genocide has begun” in Kosovo, prompting a journalist the next day to ask the White House spokesperson, “Are we using the word ‘genocide’ here?”²⁹⁵ Anticipating the issue, State Department officials had reviewed the evidence regarding the unfolding abuses and appear to have settled on a pragmatic response: they would emphasize the crimes that the US government could assess with confidence that the Serbian forces were committing—e.g., crimes against humanity and war crimes—and stress that there was a risk of genocide as well, while acknowledging that uncertainty existed with respect to that crime’s unique criteria.²⁹⁶

This approach had two aims. One was to manage the pressure to pronounce on genocide. That pressure was rooted in the lasting public skepticism of US statements (or silence) with respect to the term—a skepticism that the US government had arguably earned through its reluctance to use the word in connection with Bosnia and Rwanda, but that in the following years had broadened into what David Scheffer subsequently described as “the obsessive interest of some to immediately brand mass killings as ‘genocide,’ and to label the US government as encouraging genocidal behavior when it delays in the use of the term.”²⁹⁷ This context made it difficult for US officials simply to stick to describing the facts of the Serbian abuses when answering press questions, as one State Department official reportedly proposed, as opposed to engaging in legal characterizations.²⁹⁸

To address this pressure, US officials in public statements or in response to press queries repeatedly used variations of the formulation Scheffer used at a press conference on April 9: “[I]f you take the totality of this information that we have acquired so far, we believe that it creates the basis for stating that there are *indicators of genocide* unfolding in Kosovo.”²⁹⁹ Scheffer recalls in his memoir that, by providing “a credible acknowledgment that genocide might be unfolding,” the use of this formulation put an end to media questions about genocide language, without either evading the question or overstating what was known.³⁰⁰

The second aim was to make clear that the crimes being committed were grave. As a theme in US policy toward Kosovo, this effort extended beyond merely using atrocity-crime terminology, as shown by the State Department’s issuance of periodic “Ethnic Cleansing in Kosovo” reports that compiled and publicized new incidents of Serbian abuses,³⁰¹ as well as statements drawing attention to the plight of Kosovar refugees and the criminal liability facing specific Serbian army and police commanders.³⁰² In that context, US officials also repeatedly emphasized that the case for the ongoing military action against Serbian forces did not depend on a finding, either in the moment or after the fact, that genocide had occurred.³⁰³ This message reflected a preexisting US concern that a focus on genocide not lead the international community to “ignore the severity of crimes against humanity,” which along with genocide “should be regarded with outrage by civilized peoples.”³⁰⁴

US officials likely had political space to take and defend a more-nuanced approach to genocide language in part because of the government’s active posture. While one reporter seemed to suspect that the tentative use of the term was serving to enable the United States to avoid certain actions under the Genocide Convention,³⁰⁵ the active US military response was also coupled with robust support for accountability. The prosecutor of the UN’s tribunal for the former Yugoslavia had made a public statement the previous year that the court’s jurisdiction extended to cover crimes in Kosovo and that she was monitoring the situation.³⁰⁶ The US government was gathering and sharing with the tribunal a variety of information about the ongoing crimes, even if its efforts were slowed by bureaucratic hurdles and there were mixed feelings about the likely effect of the tribunal indicting President Milosevic himself.³⁰⁷ It would thus have been difficult to describe the US response to the crisis as being passive with respect to either prevention or punishment.

Indeed, if anything, this kind of situation raised an additional challenge not present in Bosnia or Rwanda, but arguably familiar from earlier periods—ensuring that, if genocide language were to be used, it was used with rigor. While the tentative “indicators of genocide” language was widely used, there were a handful of occasions during the bombing campaign when top US officials instead referred to genocide more directly.³⁰⁸

Although the US government did not ever conclude that genocide had been committed in Kosovo, it did assert that “[c]learly there are crimes against humanity.”³⁰⁹ As with Secretary Eagleburger’s statement that Serb forces were committing crimes against humanity in Bosnia in 1992, a far less formal process than that we have come to associate with genocide appears to have been undertaken before this statement was made, again presumably reflecting that the conclusion was not considered difficult.³¹⁰

III. Darfur and Thereafter

The process leading to the US statement in 2004 about genocide in Sudan’s Darfur region represented a new approach. Unlike in the Bosnia and Rwanda cases, the administration was not in the posture of resisting a conclusion that would generate political pressure to take actions that it did not want to take. Indeed, the United States consciously sought to mobilize other governments by showing, on the basis of extensive research and a rigorous if contested analysis, that genocide was occurring. In the years that followed, the perception of at least some advocates that pursuing a public statement that genocide had occurred is necessary or useful seems to have diminished, but it has continued to play a role for others.

A. Darfur

In January 2008, after meeting with senior US officials focused on Sudan, President George W. Bush gave brief remarks to the press highlighting the US government’s appointment of a new special envoy to the country. Speaking about Darfur, where the Sudanese government and affiliated militias had begun killing and committing other abuses against the region’s non-Arab population several years before, President Bush said, “My administration called this a genocide. Once you label it ‘genocide’ you obviously have to do something about it.”³¹¹

President Bush’s statement thus embraced a logic that previous administrations had feared—that an acknowledgment or accusation of genocide came with high expectations of tangible government action. Indeed, far from lagging behind others, the US government beginning in September 2004 was ahead of the international community in its willingness to apply the term genocide (and, several months earlier, the phrase “ethnic cleansing”) to the atrocities in Darfur. Rather than resisting pressure from lower-level officials as had been done in Bosnia and Rwanda, the State Department’s leadership actively sought out additional information about the atrocities, at least partly in order to consider such a finding. US officials generally wanted to attract attention to the crisis, were less concerned that a statement about genocide would unleash pressure for action that they did not want to take, and believed that genocide language could be useful in marshaling congressional, public, and international support.

The results were ultimately mixed. The inaccessibility of the region and the possibility that the abuses were “merely” aimed at displacing the targeted civilians led to great uncertainty over whether the evidence could satisfy the criteria contained in the definition of genocide—which, in turn, made for a protracted internal and international debate that some said distracted from the actual response to the crisis. In turn, the US government’s ability to convince others of its conclusion, and mobilize action on the basis of it, was undermined by skepticism of the trustworthiness of US pronouncements growing out of revelations that US statements about Iraq’s weapons of mass destruction had not been substantiated. The US statement about genocide in Darfur appears to have had some impacts on the US government’s own

policy toward the Darfur crisis and the degree of domestic interest in it, but the impression among many advocates is of disappointment for what the statement did not accomplish.

Increasing US concerns about Sudan. Following the September 11 attacks, the United States had strong interests in securing the Sudanese government's cooperation on counter-terrorism efforts. At the same time, however, there was strong concern, including among Christian and African-American constituencies in the United States, about Sudan's human rights abuses against the predominantly Christian, ethnically African population in the country's south.³¹²

In late 2003, against the backdrop of negotiations to end the north-south conflict, US officials began to focus on reports that the Sudanese government was brutalizing another portion of its population, this time in the course of fighting an insurgency in the Darfur region on the country's western flank. Sensing that a shortage of information about these abuses stood in the way of a more energetic US and international response, senior officials in the Department of State's human rights bureau and its office for war crimes issues began in March 2004 discussing ways to gather testimonial evidence from refugees who had fled Darfur into neighboring Chad.³¹³ The department's top officials sent signals internally that they would welcome unfiltered reports about the situation.³¹⁴

As the crisis continued, and the ethnically targeted nature of the abuses attracted more attention, op-ed writers, senior US officials, and United Nations leaders faced and posed questions whether the abuses constituted genocide.³¹⁵ Commemorations in April of the tenth anniversary of the onset of Rwanda's genocide reinforced the tendency to see the Darfur crisis through the lens of genocide prevention.³¹⁶

While US officials did not immediately face pressure to answer that question, an early US effort to mobilize international alarm—at the April 2004 session of the UN's Human Rights Commission—raised the general issue of how to characterize the atrocities. A State Department official from the human rights bureau who was involved in preparing for US participation in the session recalls feeling that the anodyne vocabulary available to describe the abuses (“violence,” “atrocities”) played into Sudan's efforts to downplay their gravity, and the bureau proposed referring to them instead as “ethnic cleansing.” Following internal discussion, a senior administration official approved doing so shortly before the session began.³¹⁷ The US government's ethnic cleansing language prompted interest from other governments and provided an opportunity for US officials to provide information that the situation was, indeed, “that bad.”³¹⁸ In the event, the US delegation was disappointed with the session. Over the US delegation's lone objection, the Human Rights Commission adopted a resolution containing precisely the kind of muted language that the US delegation had hoped to move beyond.³¹⁹

As in other crises, ethnic cleansing would serve in some ways as a gateway term, easier for the US government to demonstrate and deploy than genocide, given the latter's stricter definition and the perception that the stakes of employing it were much higher.³²⁰ The possibility that Sudanese forces and proxies intended merely to displace those populations through brute force stood perversely as a possible “defense” against allegations of genocide. Lack of access to the areas in question compounded the difficulty of reaching firm conclusions regarding the perpetrators' intent.³²¹ State Department interest in gathering information about the abuses came to include a sharper focus on answering these questions.

The State Department takes up the “genocide” question. In June, Secretary Powell confirmed that US lawyers and policymakers were reviewing the issue of genocide.³²² At a congressional hearing later that month, Ambassador-at-Large for War Crimes Issues Prosper used the formulation that David Scheffer had

employed during the Kosovo crisis, saying that the US government saw “indicators of genocide, and there is evidence that points in that direction,” but also saying that better access to Darfur would be required for the US government to be “in a position to confirm.”³²³ State Department bureaus had begun making more concrete preparations to deploy what would later be called an Atrocities Documentation Team of investigators organized and implemented by a nonprofit group to conduct a rigorous survey of Darfuri refugees in Chad.³²⁴ By the time the department sent the team in late June, its terms of reference included questions specifically aimed at eliciting information that might shed light on the intent of the perpetrators, which in turn would be needed to assess whether the atrocities fell within the definition in the Genocide Convention.³²⁵

The mere fact of deploying the team would attract attention and put pressure on the department to speak to its eventual conclusions, even though US officials could not know in advance in what direction the survey’s findings would lead. Deputy Secretary Richard Armitage, who ultimately authorized deployment of the team, accordingly requested a memo to ensure that he understood the legal landscape and implications of what he would be authorizing.³²⁶ In that memo, State Department lawyers emphasized the limited character of the US government’s legal obligations under the Genocide Convention, giving the same advice their predecessors had given regarding Bosnia and Rwanda: that the convention obligated its parties to “prevent and punish acts of genocide *in their territory*” and that “a determination that genocide has occurred in Darfur would have no immediate legal—as opposed to moral, political, or policy—consequences for the United States.”³²⁷ It is not fully clear why, but this advice about the limits of US obligations seems to have been more fully absorbed than it was a decade before. In addition, concerns about the implications for the US government’s broader Sudan policy appear to have been overcome in part because Powell—who had been actively involved in pressing for a successful conclusion to the north-south peace talks—had grown frustrated with Sudan’s lack of responsiveness to calls for it to change its approach to Darfur.³²⁸

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Not everyone agreed that focusing on the question of genocide was a useful approach. Samantha Power’s 2002 book had brought the US government’s failures in preventing genocide to a wide audience, and specifically criticized the lengths to which US officials had gone to avoid the word “genocide” in earlier crises. But on different occasions during the Darfur crisis, she emphasized that the international community “need not focus” on definitional matters and had already been distracted by “the debate over semantics” from “the more important debate about how to save lives.”³²⁹ Powell himself sought to downplay the significance of the issue next to the need to mobilize action and press the Sudanese government to change its behavior.³³⁰

While these debates proceeded, domestic actors began to apply pressure. The two houses of Congress passed a concurrent resolution in late July that declared that “the atrocities occurring in Darfur, Sudan, are genocide” and called on the Bush Administration to do so as well.³³¹ Shortly afterwards, the US Holocaust Memorial Museum issued a “genocide emergency” statement, described in the press as indicating the assessment of the Museum’s Committee on Conscience that “genocide is imminent or occurring.”³³²

After the survey team returned home, some in the State Department saw the decision to conclude that genocide was being committed as a close call. The department’s Legal Adviser said that, with the available facts, “[w]e can justify it one way, or we can justify it the other.”³³³ Ambassador Prosper, on the

other hand, recalled finding the evidence of genocide to be overwhelming,³³⁴ although on the question of genocidal intent, he recalled that the most compelling evidence came from a source other than the survey team's data.³³⁵ A package of materials was presented to the secretary—informally, rather than as a consensus action memo laying out the positions and recommendations of key bureaus. Powell reviewed the materials closely and discussed them at length with top advisors before deciding that genocide had occurred, although a scholar who interviewed him, in describing the full range of factors that he considered, concluded that “he decided to call it genocide because he believed that would push the UN Security Council to respond.”³³⁶

The way in which Powell presented his findings reflected the tensions between the desire to rally support and the need to guard against inflated expectations, as well as the difficulty of persuading those skeptical of the conclusion. In order to raise the profile of his conclusion, Powell decided to make his announcement in formal testimony on Sudan policy before the Senate Foreign Relations Committee³³⁷—a striking departure from how the State Department provided responses to genocide questions in previous crises. In his testimony, Powell discussed the specific findings of the survey team, and ended with a statement that, based on the evidence before him, “we concluded, I concluded, that genocide has been committed in Darfur and that the Government of Sudan and the Jinjaweit bear responsibility—and that genocide may still be occurring.” However, his testimony and the supporting material released along with it contained very little discussion of the thorniest elements of the definition—simply stating, without further analysis, his conclusion that “the evidence corroborates the specific intent of the perpetrators to destroy ‘a group in whole or in part’” and that this intent “may be inferred from their deliberate conduct.”³³⁸ Powell also called for a formal UN investigation of the atrocities, framing US action as implementation of its responsibilities under the Genocide Convention, Article VIII of which provides that parties to the convention “may 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 [genocide].”

Impact. While Powell's statement undoubtedly attracted international attention, it also failed in key respects to persuade some international audiences of its conclusions. It is possible Powell could not provide more detail on the question of genocidal intent because his conclusion relied on intelligence information but, whatever the reason, this was precisely the issue that would prompt UN experts to disagree with Powell's conclusion. The UN Commission of Inquiry that was launched following Powell's proposal concluded in January 2005 that “the Government of the Sudan has not pursued a policy of genocide” and “the crucial element of genocidal intent appears to be missing, at least as far as the central Government authorities are concerned.”³³⁹ More broadly, a number of observers have recalled that the skepticism of US policy in the region and of US assessments after the failure to find weapons of mass destruction in post-invasion Iraq made it more difficult to persuade others of the merits of the allegations of genocide in Darfur.³⁴⁰

Views differ as to the broader impact of Powell's statement on US policy and the crisis itself. Most concretely, Powell's statement appears to have led to the US government's own decision the next year to allow the Security Council to refer the situation in Darfur to the prosecutor of the International Criminal Court (ICC), in spite of the US government's generally hostile policy to the ICC.³⁴¹ In terms of the statement's broader impact, one scholar concluded that it “became the catalyst for the formation of a citizen-based Save Darfur movement that was able to mobilize and sustain unprecedented numbers of Americans intent on pushing the US government to stop the killings.”³⁴² This attention, in turn, corresponded with a greater degree of media coverage of the crisis and congressional willingness to appropriate funds for a costly peacekeeping intervention in Darfur.³⁴³

On the other hand, that surge of private and official US attention was not sufficient to overcome the Sudanese government's intransigence and the diplomatic support it received from China and Russia on the Security Council in the years that followed Secretary Powell's statement.³⁴⁴ Even in the immediate aftermath of Powell's statement, one US official recalled that the worsening post-war crisis in Iraq acted as a restraint on whatever additional resources and attention the administration might otherwise have diverted to Darfur.³⁴⁵ More generally—and particularly given the caveat in Powell's statement that “no new action is dictated by this determination” and that “we have been doing everything we can to get the Sudanese Government to act responsibly”—some observers have suggested that steps like Powell's genocide statement may have served as a low-cost form of action in lieu of more concrete steps that would have been more difficult.³⁴⁶ Ultimately, a number of activists took away a lasting sense of disappointment and a perception that the statement did not produce the change for which they had hoped.³⁴⁷

One consequence of Powell's statement would only become apparent in the following years—namely, the ongoing interest of advocates, journalists, and members of Congress in pressing the US government for a view on whether the genocide that Powell had concluded in 2004 “may still be occurring” was, in fact, still occurring.³⁴⁸ Aspects of the conflict in Darfur changed in some ways, although there was debate over whether this changed the character of the ongoing suffering of civilians.³⁴⁹ As time passed since Powell's determination, debates over US statements on this question often appeared to serve in part as a proxy for other issues—such as whether the US government could signal a pragmatic willingness to negotiate on other issues related to peace in Sudan or US-Sudan relations, and whether the US government was sufficiently keeping in view the fact that its partner in those talks was a brutal and genocidal regime.³⁵⁰ As a practical matter, it might have been difficult to periodically repeat the kind of analysis necessary for the State Department to evaluate whether the Sudanese government was continuing to act with genocidal intent in its treatment of non-Arab civilians. In any event, on more than one occasion, remarks by US officials that declined to affirm that Powell's conclusion applied to ongoing atrocities generated a significant outcry and were followed by an affirmation that genocide was ongoing.³⁵¹

B. ISIS

Iraqi ethnic and religious communities have been targets of abuse for decades, and we have discussed above the Anfal campaign by Saddam Hussein's government against the Kurds. The rise of ISIS (the so-called Islamic State in Iraq and Syria, sometimes referred to as ISIL or Daesh) added a new dimension, and led to a statement by Secretary of State Kerry in March 2016 that the group had committed genocide against several specified groups in areas under its control.

ISIS attacks on Mosul, Iraq, and the surrounding area began in early June 2014, and it quickly moved against Yezidi, Christian, Shia, and other communities. Harrowing accounts emerged of displacement, forced religious conversion, torture, kidnapping, murder, and the sexual enslavement of women and girls.³⁵² Soon thereafter, approximately 50,000 Yezidis who had fled to Mount Sinjar became trapped as ISIS fighters encircled the mountain, and President Obama authorized military intervention to prevent what he described as a “potential act of genocide” against the Yezidi people.³⁵³ In a similar vein, Secretary Kerry said that the “grotesque and targeted acts of violence bear all the warning signs and hallmarks of genocide.”³⁵⁴ Both statements focused on the risk of genocide without dwelling on whether ISIS actions did or did not fall within the definition in the Convention. Together with the military strikes at Mount Sinjar, and with the broader military and other efforts to defeat ISIS, this was consistent with the idea that states should work to prevent genocide before it happens.

The president had said that the United States “cannot and should not intervene every time there’s a crisis in the world,” and had described the particular circumstances that he concluded justified US action in this case.³⁵⁵ But questions quickly ensued. The State Department press spokesperson was asked whether, having spoken about the potential for genocide in this case, the United States was also prepared to “get directly militarily involved” elsewhere—as if military involvement automatically ensued from use of the word “genocide.”³⁵⁶ Soon thereafter, she was being asked whether genocide had been committed against other groups—most notably Christians—in Iraq or, indeed, anywhere else in the world.³⁵⁷

In some respects, the president’s August 7 statement might itself be viewed as tantamount to a statement that ISIS was responsible for genocide against the Yezidis. Clearly, ISIS had committed the requisite acts—murder among others—and all that might be in doubt was whether ISIS fighters acted with intent to destroy the Yezidis as a group. And on this point, the president’s statement left little doubt, as he had stated specifically that ISIS forces “have called for the systematic destruction of the Yezidi people.” In this sense, there was little left to “prove” in order to establish that genocide had been committed.

In any event, consideration began within the State Department of whether to state that genocide had in fact occurred. The ISIS case was in many ways atypical in that the United States was already fully committed to defeating ISIS militarily, and by extension—it was hoped—thereby preventing further atrocities. But supporters of a formal statement of genocide hoped that it would prompt the administration to prioritize atrocity prevention and response alongside its counter-terrorism strategy. They also appealed to the intrinsic importance of speaking the truth in the face of atrocities of such large scale, establishing a historical record, avoiding a silence that would be tantamount to an act of denial, and responding to the needs of victim groups for affirmation of their suffering. From the perspective of broader policy, the administration had announced “nine lines of effort” in its strategy to counter ISIS, and supporters argued that labeling ISIS as responsible for genocide would contribute strongly to the sixth line of effort, which was exposing ISIS’s true nature, and that the tarnishing of ISIS would undercut its disturbingly successful efforts to recruit foreign fighters, including from Western countries.³⁵⁸

Meanwhile, others raised questions, including about the selectivity issues on which the press spokesperson had been questioned. The press reported that a decision was being delayed by “what the government says, if anything, about [ISIS] atrocities aimed at Christians and other small minorities.”³⁵⁹ Many appeared to believe that tangible benefits—e.g., military intervention to directly protect endangered communities, provision of arms to local self-defense units, or even eventual reparations—would flow from a statement that genocide had been committed. There was considerable public concern that the suffering of Christian groups in Iraq would not be appropriately recognized if, for example, the atrocities committed against them were characterized “merely” as crimes against humanity. For their part, US embassy and regional experts expressed concerns about pitting victims within Iraq against each other and setting back efforts to improve Sunni/Shia relations. Others raised concerns about making a statement that did not simultaneously speak to the atrocities being committed by the regime of Bashar al-Assad in neighboring Syria.³⁶⁰

The State Department sought to shift the focus away from “abstract” questions about how ISIS atrocities should be characterized, and toward the fact that the US government had and was taking tangible action to defeat ISIS. While logical, this was plagued by perceptions of the department’s history of evasion on these issues, as evidenced by this exchange with the department’s deputy spokesperson:

Question: ...I think the reason you get so many questions about this is that there's a history here over the State Department and one of your predecessors not playing straight with the question of whether or not a genocide had occurred and where the spokesperson at the time said that acts of genocide had been committed, but would not say that genocide had been committed...And it was—it has been viewed by historians as a transparent dodge, that phrasing, “acts of genocide,” and by the end of the day, Warren Christopher acknowledged that he would use the word “genocide.” ...

Mr. Toner: ...We're looking at it, studying it closely. We have not made that determination yet. But again, I think it's important to not lose sight of the basic fact or the fundamental fact—and frankly, this happened last year in August 2014, when President Obama authorized military, humanitarian assistance to save the Iraqi Yezidis who were trapped on Mount Sinjar. And that support for the Yezidi people continues as we take the fight to ISIL.³⁶¹

There was also strong congressional interest, much of it focused on fears that the administration would not find that genocide had also been committed against Christians. Importantly, in December 2015, Congress included language in the 2016 Consolidated Appropriations Act that, among other things, required the Secretary to submit to Congress within 90 days (i.e., by March 17):

“an evaluation of the persecution of, including attacks against, Christians and people of other religions in the Middle East by violent Islamic extremists..., including whether [the] situation constitutes mass atrocities or genocide.”³⁶²

The new congressional reporting requirement acted, even if imperfectly,³⁶³ as an action forcing event, as did a prominent report by the US Holocaust Memorial Museum issued in November that concluded that ISIS was responsible for genocide against the Yezidis and brought the genocide issue to the front burner.³⁶⁴

In the interim before Secretary Kerry's statement in March, the administration continued to deflect questions, saying that lawyers were considering whether the term applied while downplaying the idea that the decision would affect the US response.³⁶⁵ In February, in response to pointed questions during testimony before the Senate Foreign Relations and House Foreign Affairs Committees, Secretary Kerry said that he shared the concerns being expressed about persecution of Christians and had asked for “some reevaluation,” thus implying that the evaluation so far had suggested that the violence against Christians did not constitute genocide. A 278-page study submitted jointly by the Knights of Columbus and In Defense of Christians (the “Genocide Against Christians report”) made clear the conclusion shared by many Christian advocacy groups and others about how the administration should decide the issue.³⁶⁶ And a House resolution adopted on March 15—stating that ISIS atrocities “against Christians, Yezidis, and other religious and ethnic minorities in Iraq and Syria constitute war crimes, crimes against humanity, and genocide,” and that the United States (and others) “should call ISIL atrocities by their rightful names”—expressed strongly the prevailing congressional view.³⁶⁷

The issue was complicated. There was widespread acknowledgment that the atrocities against the Yezidis constituted genocide, and it was relatively easy to establish the requisite genocidal intent on the basis of the nature of ISIS's attacks, its systematic killing of men and enslaving of women from large population centers, its readiness to starve the entire Yezidi population at Mount Sinjar, and its own public statements and doctrine—including that Yezidis should be killed or forced to convert to Sunni Islam. The barbarity of

ISIS against Christians was also clear for all to see, including for example reports of price lists for Yezidi or Christian women and girls as spoils of war,³⁶⁸ and horrifying scenes of beheadings of Coptic Christians on Libyan beaches for which ISIS publicly claimed credit in apocalyptic tones that echoed the hatreds of the Crusades. At the same time, ISIS doctrine purported different treatment for “people of the book”—including Christians—who were said to have the option to pay a “*jizya*,” which was said to be a traditional tax on non-Muslims for protection under Sharia law, in order to avoid the choice of conversion or death that faced the Yezidis.³⁶⁹ There was the inevitable concern that, if the facts did not fit the definition of the term, characterizing the atrocities as genocide could dilute the power of the word, or bind future administrations with a precedent they would not want to follow in a future case involving different facts and perpetrators.

Did providing the opportunity to pay the *jizya* belie an intent to physically or biologically destroy Christian groups? Supporters of a determination that the atrocities constituted genocide argued no. For example, the *Genocide Against Christians* report argued forcefully that the tax was not anything like the traditional *jizya*, and that the Christians saw the tax as basically a ploy to keep Christians in a position where they could be further abused and taken advantage of; that in many cases the *jizya* was imposed after the local churches and its belongings had already been destroyed or desecrated, thus undermining

the idea that the *jizya* was genuinely for protection; that scholars had characterized ISIS’s *jizya* to be more a “publicity stunt than a careful recreation of the *jizya* as practiced by the early Caliphs”; and that for nearly a decade the ISIS caliph had admitted that Christians no longer qualify for the protection.³⁷⁰

In the end, Secretary Kerry concluded that Christians, as well as others, had been victims of genocide in areas under the control of ISIS. He caveated that he was neither judge, prosecutor, nor jury and that, ultimately, the full facts needed to be brought to light “through formal legal determination made by a competent court or tribunal.”

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- The decision was based purely on conclusions about intent, in the sense of a conclusion that at least some of the perpetrators harbored an intent to murder all Christians, even if the perpetrators may not have felt enabled to do so in the immediate moment.
- The decision was based on a view that the use of murder (and other acts described in Article II of the Genocide Convention) to make it impossible for the group to survive as such in ISIS-controlled areas should be considered to constitute genocide, even if many of the members would not be prevented from leaving in order to escape their own deaths.
- The decision was based on a view that the *part* of the larger group of Christians in Iraq that was unable or unwilling to convert, live under the oppressive *jizya*, or flee represented a sufficiently significant *part* of the larger group that an intent to murder the members of that *part* would be sufficient to establish genocide.

- The decision was based on the fact that, in the circumstances prevailing in northern Iraq, different members of ISIS doubtless acted with different intents, at least some of them surely had the requisite intent, and ISIS—having incited their actions—was responsible for their actions.

In addition to concerns about groups other than Yezidis targeted by ISIS, there were concerns that statements about ISIS atrocities might seem to relegate ongoing atrocities by others to a kind of second tier status. In particular, the risk of being seen as giving a “pass” to atrocities in neighboring Syria might be seen as in significant tension with the overall posture and policy of the US government toward the Assad regime. Similarly, recalling that the report required by Congress’s December 2015 legislation was also to cover Burma, silence about the nature of the crimes being committed there could be uncomfortably conspicuous.

In the end, there was an unavoidable risk that some groups or situations, left uncovered, might be characterized as relegated to a “second tier.” Secretary Kerry’s determination might be seen as attempting to deal with this in four ways:

- By being specifically limited to ISIS and explaining the special dangers that ISIS posed—and taken together with the fact that the congressional reporting requirement did not cover Syria—the statement helped minimize any implication that might otherwise be drawn about atrocities in other countries.
- By specifying that, in addition to genocide, ISIS was also responsible for crimes against humanity against “Sunni Muslims, Kurds, and other minorities,” the suffering of other groups in Iraq was being recognized, even if there was not sufficient information to conclude that they were victims of genocide.
- By noting that lack of access to information and “inability to compile a complete record” limited the administration’s ability to draw conclusions, that the United States would continue efforts to develop evidence, and that the relevant questions were ultimately for a court or tribunal to decide, the statement helped clarify that the record remained open to the possibility of further allegations.
- By stating that he was speaking about genocide against groups “including Yezidis, Christians, and Shia Muslims,” the statement sought to minimize the perception that the listing of groups was exhaustive.

The public reaction to Secretary Kerry’s statement was generally positive,³⁷² but questions about selectivity continued, including for example questions about whether the Kurds were the victims of genocide.³⁷³

The ISIS situation presented one additional complication following the change from the Obama to the Trump Administrations. Incoming Secretary Tillerson responded during his confirmation hearing that he supported the conclusion that ISIS is committing genocide against Yezidis, Christians, and others in the areas where they operate.³⁷⁴ There nevertheless emerged a concern in some quarters that, in view of the fact that the previous secretary had characterized his conclusion as being “in my judgment,” the new administration should not rely on it as a conclusion of the US government. In March, Secretary Tillerson stopped short of making such a statement on the anniversary of Secretary Kerry’s statement and there were press reports of concern by advocacy groups that “lawyers” were removing references to genocide by ISIS while awaiting a decision by Tillerson.³⁷⁵ The State Department’s press spokesperson denied the reports and proceeded to also say that the secretary “firmly believes that that was genocide.”³⁷⁶ Secretary Tillerson delivered a formal statement to that effect at the time of the release of the department’s international religious freedom report in August 2017.³⁷⁷

C. Burma (or Myanmar)

The US government's consideration of using genocide language regarding the Burmese government's abuses against Burma's Muslim Rohingya minority was reportedly ongoing when this report went to press. There is accordingly relatively little publicly available information that sheds light on the internal decision-making processes to this point. Nevertheless, it appears that there have been three basic phases of US consideration: first, the US government's response to a provision of a 2015 law requiring the State Department to submit an evaluation to Congress of the persecution against the Rohingya, including whether the situation constituted "genocide or mass atrocities"; second, the events leading to the secretary of state's statement in November 2017 that a new wave of abuses against the Rohingya constituted ethnic cleansing; and third, the State Department's commissioning and issuing in September 2018 of a report documenting the ongoing abuses without offering any legal characterizations of them.

US efforts under the Obama Administration to persuade Burma's government to undertake meaningful reforms aimed at addressing the Rohingya's plight met with little success, and the group remained subject to deeply discriminatory policies, broadly held anti-Muslim sentiment, and periodic outbursts of targeted mob violence.³⁷⁸ A few weeks after the historic November 2015 election in which Burma's primary opposition party won sweeping majorities in the country's parliament, the US Congress passed an annual appropriations act—the same one discussed above that applied to ISIS—containing a provision that required the secretary of state to submit an evaluation of attacks against religious groups by ISIS and the Rohingya people in Burma, "including whether either situation constitutes mass atrocities or genocide."³⁷⁹ Unlike the 2009 reporting requirement regarding Sri Lanka discussed in the next section, the 2015 law used legally binding language contained in legislation, as opposed to a directive in a committee explanatory statement.

Congressional staffers recall that the Rohingya part of this requirement—which received less attention than the part that applied to ISIS—was included in the law as a way of ensuring that serious atrocity risks and vulnerable populations in regions other than the Middle East also received attention.³⁸⁰ By way of context, several groups issued reports during the period before the November 2015 election that cautioned that the early warning signs of genocide against the Rohingya were visible,³⁸¹ although fewer observers appear to have alleged conclusively at this point that genocide had occurred as a legal matter.

The State Department's response to the dual ISIS-Burma tasking took the form of a report that was released alongside Secretary Kerry's March 17, 2016, statement that ISIS was responsible for genocide. The department appears not to have interpreted the statutory language as requiring the secretary to characterize the atrocities, at least so long as it provided and evaluated relevant information. The report thus included a discussion of a variety of acts of violence that nonstate actors had committed against the Rohingya, as well as a range of discriminatory government restrictions and policies that focused on the group, but did not discuss whether the attacks against Rohingya could be characterized as either "genocide" or even "mass atrocities."³⁸² The avoidance of such language came during a period in which the United States remained hopeful of improvements under the new government and, indeed, the US government eased longstanding sanctions on the country shortly thereafter in May 2016.³⁸³

Abuses against the Rohingya intensified during the next two years. After attacks by a Rohingya militant group against police and army posts in both October 2016 and August 2017, state security forces conducted massive "clearance operations" in which they carried out egregious attacks against the Rohingya population, killing and raping civilians, burning villages, and displacing some 700,000

Rohingya from Rakhine State.³⁸⁴ These atrocities prompted a variety of statements and activity aimed at describing and documenting the violence, including a decision by the UN Human Rights Council in March 2017 to create an independent fact-finding mechanism.³⁸⁵

The wave of abuses that began in August 2017 also appear to have prompted a number of US steps to establish the details of the crimes, including consideration of using the term ethnic cleansing. After the UN high commissioner for human rights invoked the term early in September,³⁸⁶ senior US officials quickly came under congressional pressure to acknowledge the appropriateness of the term themselves.³⁸⁷ Secretary of State Tillerson, shortly after completing a visit to Burma in November, issued a statement concluding that “it is clear that the situation in northern Rakhine State constitutes ethnic cleansing against the Rohingya,” and highlighting that he had done so after “a careful and thorough analysis of available facts.”³⁸⁸

In early 2018, State Department bureaus commissioned a nongovernmental organization to conduct a “large-scale and comprehensive human rights documentation investigation mission” among Rohingya refugees who had fled to neighboring Bangladesh. The project was similar to the studies described in other sections of this report regarding abuses in Darfur and Sudan’s Two Areas. According to the organization that carried out the survey, the aim of the project was “to provide an accurate accounting of the patterns of abuse and atrocity crimes perpetrated against the Rohingya in Burma’s Rakhine State and to help inform the policy decisions of the US government related to accountability in Myanmar.”³⁸⁹

While the findings under the survey were still under review, the UN fact-finding mission issued a report in late August 2018 that concluded that Burma’s security forces were responsible for abuses including “the gravest crimes under international law,” and recommending that senior army officials be investigated and prosecuted “so that a competent court can determine their liability for genocide...”³⁹⁰ A subsequent report containing the Fact-Finding Mission’s “detailed findings,” released in September 2018, went further, stating:

The Mission therefore concludes, on reasonable grounds, that the factors allowing the inference of genocidal intent are present. It is now for a competent prosecutorial body and court of law to investigate and adjudicate cases against specific individuals to determine individual guilt or innocence.³⁹¹

The US ambassador to the United Nations had stated that the results of the US-commissioned survey were “consistent with” the UN body’s report, raising expectations that the State Department, too, would pronounce on the issue of genocide or other atrocity crimes.³⁹² The department published on its website a detailed report of the survey team’s findings in September that contained a variety of details and conclusions regarding the Burmese military’s abuses, but it did not offer legal characterizations of the crimes.³⁹³

On December 3, the organization that conducted the survey for the State Department released its own legal analysis of the survey findings, and concluded that genocide had been committed against the Rohingya. The US Holocaust Memorial Museum announced a similar conclusion the same day.³⁹⁴ Ten days later, the US House of Representatives adopted a resolution stating the sense of the House that the atrocities against the Rohingya “constitute crimes against humanity and genocide” and encouraging the Secretary of State also to make a determination on that question.³⁹⁵ As of the date this report went to publication, the State Department had noted that its earlier statement on ethnic cleansing “in no way prejudices any potential further analysis on whether mass atrocities have taken place, including genocide or crimes against humanity,” but had not indicated whether it had conducted or would release such analysis.³⁹⁶

D. Other Cases Involving Mass Atrocities

In a number of recent mass-atrocity situations that involved abuses that targeted ethnic or other groups protected under the Genocide Convention, the US government did not use genocide or other atrocity-crime language, and its posture did not become an issue for significant public debate or criticism. While it is difficult to systematically research things that did not happen, it is worth reviewing a few illustrative cases to explore why some situations have prompted consideration of US statements to legally characterize the violence and others have not.

In at least two cases—South Sudan (during the country’s civil war from late 2013 onward) and the Central African Republic (during the period after armed groups overthrew the government in early 2013)—potential advocates within the State Department considered but decided not to advocate for a statement that certain atrocity crimes were occurring. The abuses that were occurring in both countries involved large-scale atrocities committed along ethnic or sectarian lines, and an atrocity-crime statement could have played some role in a broader effort to prevent further violence.

In both of these cases, US officials involved at the time recall that a number of practical concerns discouraged them at various moments from proposing to explore such a statement. In addition to uncertainties about whether there was sufficient evidence to support a conclusion that genocide had occurred, these officials had concerns about how time and resource-consuming the effort would be—as was evident from the then-contemporaneous effort to reach a conclusion about ISIS’s crimes in northern Iraq. There were other concerns, based on recollections of the Darfur experience, that the effect of such a statement on the situation on the ground would be minimal. Another official recalled that a group of working-level officials specifically discussed the issue with respect to the Central African Republic in 2013 and made a tactical judgment that it was better to concentrate their efforts on other aspects of the response to the crisis than on pursuing an atrocity-crime assessment.³⁹⁷

Other sources of potential pressure also did not materialize in a persistent way. In both cases, there was little public or congressional pressure to label the atrocities genocide, and little press interest in the issue. In South Sudan, UN officials issued warnings about the risk of genocide, but UN and NGO reports concluded only that war crimes and crimes against humanity had occurred,³⁹⁸ and the Commission of Inquiry established by the African Union specifically concluded in October 2015 that it “did not have any reasonable grounds to believe that the crime of genocide was committed.”³⁹⁹

In the Central African Republic, while UN officials made statements warning about the risk of genocide,⁴⁰⁰ a United Nations Commission of Inquiry concluded in December 2014 that “genocidal intent has not been established in relation to any of the actors in the conflict.”⁴⁰¹ This reinforced a prevailing sense, recalled by two US officials, that the violence was not sufficiently organized or in other ways did not entail the intent to destroy opposing religious groups that would have been required to determine that genocide had been committed.⁴⁰²

Pressure to pronounce on atrocity crimes was not totally absent in these cases, but its limits are telling. A House subcommittee in 2014 held a hearing entitled “The Central African Republic: From ‘Pre-Genocide’ to Genocide?” at which a senior official in the State Department’s Africa Bureau was asked directly whether genocide was occurring. He responded:

Mr. Chairman, we really haven’t considered the question of whether it is genocidal or not. The fact is, horrible atrocities are taking place and we know that at least 2,000 people have died. I

don't think it matters what word we use, but the situation is horrible and we are doing everything we can to reverse it.⁴⁰³

The response in some ways recalled responses in earlier cases that had been perceived as evasive. In this case, however, while the subcommittee chairman countered that he thought that the terminology did matter, he did not press the point, nor did others at the hearing. Criticism of the US response to the crisis was generally specific and targeted, rather than calling into question its overall seriousness,⁴⁰⁴ perhaps reflecting the extensive and costly efforts the US government had been undertaking to deploy additional peacekeepers to the country.

In Sri Lanka, a 26-years civil war between Sri Lanka's government and the Tamil Tigers—a separatist army that sought independence for the country's ethnic Tamil minority and that had long been included on the State Department's list of foreign terrorist organizations—ended in May 2009 with the Tigers' complete military defeat. The war had long been characterized by mass-casualty suicide attacks by the Tigers, and torture and forced disappearances on the government's part. In the waning months of the conflict, Sri Lankan forces cornered Tiger forces on an isolated peninsula, along with tens of thousands of civilians who were either seeking the Tigers' protection or were forcibly kept with the group's forces on pain of death as human shields. The tactics of the Sri Lankan forces have been roundly condemned, including their systematic targeting of hospitals and firing of heavy weapons into areas that had been designated as safe zones for civilians.⁴⁰⁵

In the aftermath, key Senate Appropriations Committee members and staff were frustrated by what they saw as the State Department's passive response to the brutality at the war's conclusion.⁴⁰⁶ To press the US government to give more attention to these abuses, the Senate Appropriations Committee directed the State Department to submit a report "detailing incidents during the recent conflict in Sri Lanka that may constitute violations of international humanitarian law or crimes against humanity, and, to the extent practicable, identifying the parties responsible."⁴⁰⁷ After undertaking an extensive effort to assemble and review relevant information, the department submitted a final report in October 2009.⁴⁰⁸ The report provided 49 pages of discussion of abuses that both government and Tamil Tiger forces had allegedly committed, but it did not reach legal conclusions about how to characterize the crimes. The report also noted some of the difficulties in reaching such conclusions,⁴⁰⁹ and one US official involved in the process recalled that no serious consideration was given to doing so. With respect to genocide in particular, a Tamil activist group pressed for the department to conclude that the Sri Lankan government had committed genocide, but a senior US official did not think that conclusion was supported by the available facts.⁴¹⁰ More generally, these deliberations occurred against a backdrop of concerns that sharp criticism of Sri Lanka could endanger US strategic interests by encouraging the country's drift toward China.⁴¹¹

In one instance—involving the abuses being committed by Sudanese government forces in connection with a conflict that began in 2011 in Sudan's "Two Areas" (Southern Kordofan and Blue Nile states)—the State Department undertook an inquiry to document and provide an assessment of ongoing atrocities, similar to the effort undertaken in 2004 for Darfur, but ultimately did not publicize the results.⁴¹²

Around the time of South Sudan's independence in mid-2011, an armed conflict began between the Sudanese government and another set of Sudanese armed groups—opposition forces that had aligned with southerners during the north-south war but were being "left behind" in Sudan after South Sudan's July 2011 secession. US officials sought ways to publicize and discourage the abuses, for which the government was disproportionately responsible and that were leading to food shortages and starvation among

targeted communities.⁴¹³ US officials made a variety of statements that condemned government air strikes on towns hosting refugees from the fighting and highlighted reports of the “targeting of individuals based on their ethnicity, political, or religious affiliation; and, indiscriminate bombing of civilians.”⁴¹⁴

Having sought unsuccessfully to generate enough support for the launch of a UN investigation of these abuses in late 2011,⁴¹⁵ the State Department quietly launched an investigation of its own, funded and overseen by the human rights bureau. This effort generally followed the template established by the department’s 2004 documentation project regarding Darfur, with an outside nonprofit organization receiving State Department funds to conduct interviews of individuals who had been displaced as a result of the abuses under review and could provide details about them. State Department officials involved in the project recalled that the data and analysis that the project developed were useful in demonstrating details and establishing patterns in the Sudanese government’s abuses, but that the findings were seen internally as less grave in kind and scale than the Sudanese government’s atrocities in Darfur.

The department decided not to make public use of the project’s findings or to pursue a statement concluding that named atrocity crimes had occurred. This decision was informed by several considerations, including concerns that the Sudanese government would retaliate against a public report or statement, either by impeding sensitive US humanitarian assistance aimed at preventing starvation or by singling out refugees or communities that had participated in the US study for violent reprisals. The fact that the US government had previously named the Sudanese government as responsible for genocide in Darfur may have in one sense made it easier to contemplate making similar allegations in a different context, but in another sense was seen to make it less likely that the narrower conclusions about abuses in the Two Areas would have had a significant additional shaming effect.

Still interested in making use of the project’s findings to emphasize the gravity of the Sudanese abuses and spur a greater sense of urgency behind regional efforts to broker an end to the conflict, US officials ultimately decided to share the project’s findings privately with key international partners. This included providing briefings to UN human rights bodies and officials based in Geneva, and to the top African Union officials facilitating the complex Sudanese peace negotiations.⁴¹⁶ We could not establish through our interviews or the public record whether these presentations included legal characterizations of the Sudanese government’s alleged abuses in the Two Areas.

Endnotes

- 1 Transcript, “The Crisis in Rwanda,” Hearing before Subcommittee on Africa, House Committee on Foreign Affairs, May 4, 1994, 22, <https://babel.hathitrust.org/cgi/pt?id=pst.000023482173>.
- 2 Memorandum to the Secretary from Assistant Secretary George Moose, Assistant Secretary Richard Shattuck, Assistant Secretary Douglas Bennet, and Legal Adviser Conrad Harper for the Secretary, “Has Genocide Occurred in Rwanda?,” May 21, 1994, <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB53/rw052194.pdf>.
- 3 Memorandum to the Deputy Secretary from Legal Adviser William Taft IV, Assistant Secretary Lorne Craner, Ambassador Pierre Prosper, and Acting Assistant Secretary Donald Yamamoto, “Genocide and Darfur,” June 25, 2004, https://nsarchive2.gwu.edu/NSAEBB/NSAEBB356/20040625_darfur.PDF. The memorandum attached, by way of illustration, two other decision memorandums on genocide in Bosnia dated February 10, 1993, and October 1, 1993, that have not been publicly released. It is not clear why the Rwanda memorandum was not similarly attached. Requests for release of the two Bosnia memoranda, and for the release of additional memoranda concerning Iraq, were pending when this report went to press.
- 4 See, e.g., Rebecca Hamilton, *Fighting for Darfur: Public Action and the Struggle to Stop Genocide* (London: Palgrave Macmillan, 2011), 38.
- 5 See, e.g., John Shattuck, *Freedom on Fire: Human Rights Wars & America’s Response* (Cambridge: Harvard University Press, 2003), 55-56.
- 6 Deputy Secretary of State Richard Armitage appears to have requested the 2004 Darfur memorandum as a last step before authorizing the deployment of the Atrocities Documentation Team, as discussed below. Author interview with Ambassador Pierre-Richard Prosper.
- 7 The term “atrocities crimes” was used by former US Ambassador David Scheffer in the 2000s as a category to include genocide, crimes against humanity, and war crimes, the three types of crime over which international tribunals since the Cold War typically have had jurisdiction. See David Scheffer, “Genocide and Atrocity Crimes,” *Genocide Studies and Prevention: An International Journal* 1(3) (December 2006), 229-250.
- 8 For example, Secretary of State Eagleburger stated in December 1992 that Bosnian Serb forces had committed crimes against humanity in Bosnia (“The Need to Respond to War Crimes in Yugoslavia, Secretary Eagleburger, Statement at the International Conference on the Former Yugoslavia,” December 16, 1992, *US Department of State Dispatch* Vol. 3:923, <http://web.archive.org/web/20170405094916/http://dosfan.lib.uic.edu/ERC/briefing/dispatch/1992/html/Dispatchv3no52.html>); US officials stated beginning in March 1999 that Serbian government forces had done so in Kosovo (State Department daily press briefing, March 29, 1999, <https://1997-2001.state.gov/briefings/9903/990329db.html>); the State Department report that accompanied Secretary Powell’s testimony on genocide in Darfur in September 2004 referred to crimes against humanity as well (State Department, “Documenting Atrocities in Darfur,” September 9, 2004, <https://2001-2009.state.gov/g/drl/rls/36028.htm>); and Secretary John Kerry’s March 2016 statement regarding ISIS alleged crimes against humanity as well as genocide (Secretary of State press conference, “Remarks on Daesh and Genocide,” March 17, 2016, <https://2009-2017.state.gov/secretary/remarks/2016/03/254782.htm>).
- 9 As examples, Ambassador David Scheffer repeatedly described the actions of Saddam Hussein’s government in Iraq and Kuwait as constituting war crimes. See, e.g., David Scheffer, “The Continuing Criminality of Saddam Hussein’s Regime,” October 29, 1999, https://1997-2001.state.gov/policy_remarks/1999/991029_scheffer_un_iraq.html, and David Scheffer, “The Case for Justice in Iraq,” September 18, 2000, https://1997-2001.state.gov/policy_remarks/2000/000918_scheffer_iraq.html. See also John Kerry, “Syria: Weighing the Response,” September 10,

2013, <https://2009-2017.state.gov/secretary/remarks/2013/09/214049.htm> (characterizing Syrian President Bashar al-Assad's slaughter of his own people as "war crimes by almost any standard").

10 For example, State Department officials embraced the term when it was first being used to describe Bosnian Serb conduct in spring 1992 (State Department daily press briefing, May 14, 1992, https://permanent.access.gpo.gov/partnerships/DOSFAN/dosfan.lib.uic.edu/ERC/briefing/daily_briefings/1992/9205/075.html); the department stated in April 2004 that ethnic cleansing was occurring in Darfur, months before Secretary Powell's genocide statement (State Department fact sheet, "Sudan: Ethnic Cleansing in Darfur," April 27, 2004, <https://2001-2009.state.gov/g/drl/rls/31822.htm>); in January 2008, a State Department assistant secretary referred to Kenya's post-election violence in 2007-2008 as constituting ethnic cleansing (State Department press release, "Ethnic Cleansing in Kenya," January 31, 2008, <https://2001-2009.state.gov/p/af/rls/rm/2008/99894.htm>); and Secretary Rex Tillerson concluded that abuses against Burma's Rohingya population constituted ethnic cleansing in August 2017 (Secretary of State press statement, "Efforts to Address Burma's Rakhine State Crisis," November 22, 2017, <https://www.state.gov/secretary/20172018tillerson/remarks/2017/11/275848.htm>).

11 Author interviews with current and former State Department officials.

12 Henry Kissinger, "Burundi—population 2.5 million," Memorandum for the President, September 20, 1972, <https://2001-2009.state.gov/documents/organization/53879.pdf>.

13 Samantha Power, *A Problem from Hell: America and the Age of Genocide* (Harper Perennial, 2002), 198, 218-19. See also William Safire, "Stop the Iraqi Murder of the Kurds," *The New York Times*, September 5, 1988; Jim Hoagland, "Make No Mistake: This is Genocide," *The Washington Post*, September 8, 1988.

14 S. 2763, Prevention of Genocide Act of 1988 (100th Cong. 2d Sess.).

15 Memorandum from Stephen M. Schwebel to other State Department officials, "Should the U.K.—Or the United States—Charge Cambodia or Uganda before the World Court?," September 27, 1978 ("The acts complained of approach being genocidal in character, though, since they apparently have been aimed not at destroying, in whole or in part, 'a national, ethnical, racial, or religious group' but rather at those whom Cambodian authorities deem to be politically unsympathetic, probably these acts do not transgress the terms of the Genocide Convention"), on file with the authors.

16 See Appendix, pages 40-42. See also Benjamin Whittaker, *Revised and updated report on the question of the prevention and punishment of the crime of genocide*, U.N. Doc. No. E/CN.4/Sub.2/1985/6, July 2, 1985, 10, n. 17 ("Even under the most restricted definition, [the Khmer Rouge atrocities] constituted genocide, since the victims included target groups such as the Chams (an Islamic minority) and the Buddhist monks"); Hurst Hannum, "International Law and Cambodian Genocide: The Sounds of Silence," *Human Rights Quarterly*, Vol. 11, No. 1 (February 1989), 82-138.

17 See, e.g., Statement of Ambassador Marc Grossman, *H. Res. 398, The United States Training on and Commemoration of the Armenian Genocide Resolution, Hearing Before the Subcommittee on International Operations and Human Rights of the Committee on International Relations, House of Representatives*, September 14, 2000, 24, <https://chrissmith.house.gov/uploadedfiles/armenian%20genocide%20resolution%20hearing%202009-2000.pdf>.

18 See James A. Baker III, *The Politics of Diplomacy* (New York: Putnam Adult, 1995), 635-37; Power, *A Problem from Hell*, 282-83 (resistance to efforts to characterize atrocities as genocide was part of a broader effort "to temper public enthusiasm for involvement").

19 International Commission of Inquiry for Burundi, *Final Report*, attachment to Letter dated July 25, 1996 from the Secretary-General addressed to the President of the Security Council, UN Doc. No. S/1996/682, http://www.un.org/ga/search/view_doc.asp?symbol=s%2F1996%2F682&Submit=Search&Lang=E.

20 John Shattuck, "More Than Words are Needed to Stop Terror in Burundi," *Christian Science Monitor*, June 24, 1996, https://www.csmonitor.com/1996/0624/062496_opin_opin.1.html; David J. Scheffer, "International Judicial Intervention," *Foreign Policy*, No. 102 (Spring 1996), 34.

21 Power, *A Problem from Hell*, 511.

- 22 Raphael Lemkin, *Axis Rule in Occupied Europe; Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington: Carnegie Endowment for International Peace, Division of International Law, 1944), 79.
- 23 Scott Straus, *Fundamentals of Genocide and Mass Atrocity Prevention* (Washington, D.C.: United States Holocaust Memorial Museum, 2014), 29. Karen E. Smith describes the difference as being between a “social norm” and a “legal norm,” the former of which reflects a broader definition of the crime. Karen E. Smith, *Genocide and the Europeans* (Cambridge: Cambridge University Press, 2011), 6, 20.
- 24 For example, the 2004 Darfur memorandum refers to Article II of the Convention as “the internationally accepted definition.”
- 25 Claus Kress, “The Crime of Genocide under International Law,” *International Criminal Law Review*, Vol. 6 (2006), 461, 499.
- 26 See, e.g., Statute of the International Criminal Tribunal for Former Yugoslavia, Article 4; Statute of the International Criminal Tribunal for Rwanda, Article 2; Rome Statute of the International Criminal Court, Article 6.
- 27 See, e.g., William A. Schabas, *Genocide in International Law* (Cambridge University Press 2009).
- 28 United Nations General Assembly resolution 96(I), October 11, 1946, https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/033/47/IMG/NR003347.pdf?OpenElement_preamble_paragraph_2 (noting that “[m]any instances of such crimes of genocide have occurred when racial, religious, political, and other groups have been destroyed, entirely or in part”) and paragraph 1.
- 29 Beth Van Schaack, “The Crime of Political Genocide: Repairing the Genocide Convention’s Blind Spot,” *Yale Law Journal*, vol. 106 (1997), 2259.
- 30 United States Holocaust Memorial Museum, Cambodia 1975-79, <https://www.ushmm.org/confront-genocide/cases/cambodia/introduction/cambodia-1975>.
- 31 For completeness, it is worth noting arguments that the Cambodian people themselves qualify as a group under the definition of the Genocide Convention, so that killings of large number of Cambodians could constitute genocide even if the perpetrators were members of the same group. But significant doubts were raised about the credibility of such a theory of “auto-genocide.” For example, the Group of Experts appointed by the UN Secretary General to assess the situation in Cambodia in 1999 were doubtful it could be shown that the crimes would have been directed against ethnic Cambodians (in the words of the Genocide Convention) “as such”—i.e., because of their ethnicity, as opposed to because of the social, economic, or other position victims may have had in Cambodian society. See Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135, UN Doc. No. A/53/850, S/1999/231, paragraph 65. The genocide charges subsequently brought in the Cambodia Tribunal established by agreement with the United Nations—the Extraordinary Chambers in the Courts of Cambodia—were based on atrocities directed against on minority and religious groups, as opposed to those directed against ethnic Cambodians. Extraordinary Chambers in the Court of Cambodia, “First Genocide Charges to be heard at ECCC,” <https://www.eccc.gov.kh/en/articles/first-genocide-charges-be-heard-eccc>.
- It is also worth noting that, in dealing with real world cases, tribunals have shown flexibility in assessing whether a group falls within the definition. For example, the UN’s Rwanda Tribunal treated Tutsis and Hutus as distinct “ethnic” groups, notwithstanding many similarities between the two groups, pointing to a “subjective element” that took into account how the groups *perceived* each other. See *Prosecutor v. Kayishema*, ICTR-95-1-T, Judgment, May 21, 1999, paragraph 98.
- 32 Lemkin, *Axis Rule*, 91.
- 33 1994 Rwanda memorandum, Attachment 2.
- 34 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *I.C.J. Reports 2007 (“Bosnia v. Serbia”)*, paragraph 190. In the court’s words:

“Neither the intent, as a matter of policy, to render an area ‘ethnically homogeneous,’ nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide: the intent that characterizes genocide is ‘to destroy, in whole or in part’ a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement.”

35 It should be noted that not everyone agrees that the definition in the 1948 Convention should be interpreted in this way. The contrary view was expressed forcefully in the dissenting opinion of Judge Mohamed Shahabuddeen in the *Krstic* case that came before the UN’s Yugoslavia Tribunal:

“The proposition that the intended destruction must always be physical or biological is supported by much in the literature. However, the proposition overlooks a distinction between the nature of the listed ‘acts’ and the ‘intent’ with which they are done. From their nature, the listed (or initial) acts must indeed take a physical or biological form, but the accompanying intent, by those acts, to destroy the group in whole or in part need not always lead to a destruction of the same character...It is not apparent why an intent to destroy a group in a non-physical or non-biological way should be outside the ordinary reach of the Convention on which the Statute is based, provided that that intent attached to a listed act, this being of a physical or biological nature....A group is constituted by characteristics—often intangible—binding together a collection of people as a social unit. If those characteristics have been destroyed in pursuance of the intent with which a listed act of a physical or biological nature was done, it is not convincing to say that the destruction, though effectively obliterating the group, is not genocide because the obliteration was not physical or biological....The intent certainly has to be to destroy, but, except for the listed act, there is no reason why the destruction must always be physical or biological.”

Krstic, Dissent of Judge Shahabuddeen, paragraphs 48-51.

For his part, Lemkin’s concept was open to cultural genocide and did not require “the immediate destruction of a nation” but rather was focused on destruction of “the essential foundations of the life of national groups, with the aim of annihilating the groups themselves.” He characterized the objectives of a genocidal plan as being the “disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups.” There is some ambiguity about exactly what Lemkin meant by “destroy” and “annihilate,” but he says specifically that the imposition of the “national pattern” of the oppressor “may be made upon the oppressed population which is allowed to remain” and thus suggests that “cultural genocide” is included in his understanding of genocide. Lemkin, *Axis Rule*, 79.

36 Resolution of Ratification, Senate Consideration of Treaty Document 81-15, February 19, 1986, <https://www.congress.gov/treaty-document/81st-congress/15/resolution-text> (emphasis added).

37 18 US Code section 1093(8), <https://www.law.cornell.edu/uscode/text/18/1093>.

38 *Bosnia v. Serbia*, paragraph 198.

39 *Prosecutor v. Krstic*, IT-98-33-A, Judgment, April 19, 2004, <http://www.icty.org/x/cases/krstic/acjug/en/krs-aj040419e.pdf> (“*Krstic*”), paragraph 8.

40 The factors included the strategic importance of Srebrenica, the importance that Bosnian Serb leaders accorded to Srebrenica because of its physical proximity to Serbia, the fact that it had become a refuge for Bosnian Muslims in the region, its designation as a UN safe area, the effect that the elimination of Muslims in the area would have in demonstrating to all Bosnian Muslims their vulnerability and defenselessness, and other evidence that they “had a special significance or were emblematic in relation to the protected group as a whole.”

The Yugoslavia Tribunal further said that, in assessing the relevant “group,” it also needed to consider “the area of the perpetrators’ activity and control” and noted in this regard that Nazi Germany itself “may have intended only to eliminate Jews within Europe alone” and the genocidaires in Rwanda “did not seriously contemplate the elimination of the Tutsi population beyond the country’s borders.” The tribunal reasoned that the analysis of whether genocide

has been committed should be informed by the fact that the oppressor's intent "will always be limited by the opportunity presented to him."

41 *Krstic*, paragraphs 12-31. In an article commenting on the issue, the ICTY Prosecutor noted:

The Appeals Chamber was not persuaded that the transfer of the women and children out of Srebrenica negated genocidal intent. The Chamber considered that, in combination, the forcible transfer of the women and children and the execution of the men had "severe procreative implications" for the Srebrenica Muslims, "potentially consigning the community to extinction." From a pragmatic point of view, the Appeals Chamber also noted that the international community was monitoring the events in Srebrenica, which limited the perpetrators' capacity to engage in a more comprehensive killing campaign.

Serge Brammertz, "Reflections on Genocide: The ICTY's Contribution to the Law of Genocide," 40 *Stud. Transnational Legal Policy* 57, 64-65 (2009).

42 *Prosecutor v. Ntakirutimana*, ICTR-96-10-A and ICTR-9-17-A, Judgment, December 13, 2004, paragraph 501.

43 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, paragraph 178; *Bosnia v. Serbia*, paragraphs 209-210.

44 *Croatia v. Serbia*, paragraph 148 (emphasis added).

45 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, I.C.J. Reports 2015 ("Croatia v Serbia"), paragraph 178, citing *Corfu Channel (United Kingdom v. Albania)*, *Merits*, Judgment, I.C.J. Reports 1949, 17."

46 International criminal courts also apply the principle that any ambiguities in the definition of the crimes should be resolved in favor of the defendant. See Rome Statute, Article 22(2) ("The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favor of the person being investigated, prosecuted, or convicted.").

47 Lemkin, *Genocide as a Crime under International Law*, 4 U.N. Bull. 70 (1948).

48 Lemkin, *Axis Rule*, 91.

49 *Krstić* Appeals Chamber, paragraph 36.

50 Power, *A Problem from Hell*, 358.

51 Report of the Independent inquiry into the actions of the United Nations during the 1994 genocide in Rwanda, attachment to Letter dated December 15, 1999 from the Secretary-General Addressed to the President of the Security Council, S/1999/1257, <https://undocs.org/S/1999/1257> (emphasis added).

52 Eric A. Heinze, "The Rhetoric of Genocide in US Foreign Policy: Rwanda and Darfur Compared," *Political Science Quarterly*, Vol. 122, No. 3 (Fall 2007), 383.

53 Hamilton, *Fighting for Darfur*, 109.

54 Kate Cronin-Furman and Michael Broache, "Should We be Using the G-word in Burundi?," *The Washington Post*, November 15, 2015, <https://www.washingtonpost.com/news/monkey-cage/wp/2015/11/15/should-we-be-using-the-g-word-in-burundi>.

55 W.A. Schabas, *Genocide in International Law*, 2d ed. (Cambridge: Cambridge University Press, 2009), 11.

56 *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-A, Judgment, June 1, 2001, paragraph 367, quoting Article 1 of the Statute of the ICTR.

57 Report of the International Commission of Inquiry on Darfur to the Secretary-General, UN Doc. No. S/2005/60, February 1, 2005, paragraph 522.

58 David J. Scheffer, "The United States: Measures to Prevent Genocide and Other Atrocities," address at the Conference on Genocide and Crimes Against Humanity: Early Warning and Prevention, US Holocaust Memorial

Museum, Washington, D.C., December 10, 1998, https://1997-2001.state.gov/policy_remarks/1998/981210_scheffer_genocide.html.

59 To be sure, more work remains to be done on crimes against humanity, as reflected in various ongoing efforts to enact domestic crimes against humanity legislation and to put forward a multilateral treaty that deals with crimes against humanity in a manner parallel to the way that the Genocide Convention deals with genocide, along the lines of the draft treaty being worked on by the International Law Commission. But—while it remains true that there is no treaty obligation to prevent genocide akin to the obligation under Article I of the Genocide Convention—it has become widely accepted that, like genocide, crimes against humanity are a matter of legitimate concern to the international community; that, like genocide, crimes against humanity are crimes for which perpetrators must be held to account; and that, like genocide, crimes against humanity are prosecutable even if committed in peacetime.

60 See “Dear Colleague,” Letter from United States Permanent Representative to the United Nations John Bolton, August 30, 2005, http://www.responsibilitytoprotect.org/files/US_Boltonletter_R2P_30Aug05%5B1%5D.pdf.

61 M.K. Albright and W.S. Cohen, Co-Chairs, Genocide Prevention Task Force, *Genocide Prevention: A Blueprint for US Policymakers* (2008), xxi.

62 *Presidential Study Directive on Mass Atrocities* (Presidential Study Directive/PSD-10), August 4, 2011 (emphasis added), <https://obamawhitehouse.archives.gov/the-press-office/2011/08/04/presidential-study-directive-mass-atrocities>.

63 Two other provisions are also worth noting. Article VIII allows, but does not require, states to “call upon the competent organs of the United Nations to take appropriate actions to prevent and suppress genocide,” though states would be free to do so even without this provision. Article IX provides that disputes between parties about the interpretation, application, or fulfillment of the Convention can be referred to the International Court of Justice, but the US reservation to Article IX essentially makes this provision inapplicable to any dispute that the United States may have with other states.

It is also worth noting that there can be implications under US domestic law. As an example, under section 212 of the Immigration and Nationality Act, an alien who orders, incites, or otherwise participates in genocide may become ineligible to receive visas and be admitted to the United States. Such provisions would, however, be unlikely to appreciably affect US government decisions on whether to make statements that genocide has occurred.

64 18 US Code section 1091, <https://www.law.cornell.edu/uscode/text/18/1091>. It is worth noting that the fact that the obligations may be modest in terms of the obligations of third states does not render them unimportant—e.g., in ensuring that states adopt legislation so that genocide can be punished under their own domestic law and that they can cooperate with the efforts of other states to punish the crime.

65 The court has said that Article I of the Convention “is not to be read merely as an introduction to later express references to legislation, prosecution, and extradition. Those features support the conclusion that Article I, in particular its undertaking to prevent, creates obligations distinct from those which appear in the subsequent Articles.” *Bosnia v. Serbia*, paragraph 162.

66 *Bosnia v. Serbia*, paragraph 430 and 438.

67 *Bosnia v. Serbia*, paragraph 431.

68 June 2004 Darfur memorandum, 3.

69 May 1994 Rwanda memorandum, page 2. This view is also reflected in Secretary Powell’s statement that genocide was occurring in Darfur. Powell, Testimony Before the Senate Foreign Relations Committee (September 9, 2004), <https://2001-2009.state.gov/secretary/former/powell/remarks/36042.htm> (“[N]o new action is dictated by this determination. We have been doing everything we can to get the Sudanese Government to act responsibly. So let us not be too preoccupied with this designation.”).

70 “Dear Colleague,” Letter from United States Permanent Representative to the United Nations John Bolton, August 30, 2005, http://www.responsibilitytoprotect.org/files/US_Boltonletter_R2P_30Aug05%5B1%5D.pdf.

71 John Kerry, “Remarks on Daesh and Genocide,” Washington, D.C., March 17, 2016, <https://2009-2017.state.gov/secretary/remarks/2016/03/254782.htm>.

72 UN Security Council Resolution 1593 (March 31, 2005), <http://unscr.com/en/resolutions/doc/1593>. See also USUN cable 2674, January 7, 2005, <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB335/Document4.PDF>, paragraph 7 (arguing that previous United States use of the term genocide may render it politically untenable for the United States to resist efforts for an ICC referral by the Security Council); Hamilton, *Fighting for Darfur*, page 68 (“Powell’s genocide determination effectively constrained the Americans from vetoing the referral; legally and politically the first state in history to invoke the Genocide Convention could hardly veto a resolution designed to punish the perpetrators.”).

73 Author interviews with former State Department officials.

74 See UN Security Council Resolution 912 (April 21, 1994), <http://unscr.com/en/resolutions/doc/912>; and UN Security Council Resolution 918 (May 17, 1994), <http://unscr.com/en/resolutions/doc/918>.

75 Hamilton, *Fighting for Darfur*, xvii, 48, 100, and 102.

76 For examples, see Hamilton, *Fighting for Darfur*, 112-14.

77 Colin Powell, “Crisis in Darfur,” Testimony Before the Senate Foreign Relations Committee, September 9, 2004, <https://2001-2009.state.gov/secretary/former/powell/remarks/36042.htm>.

78 See, e.g., Kate Cronin-Furman, “The World Knew Ahead of Time the Rohingya Were Facing Genocide,” September 19, 2017 (arguing that the terms crimes against humanity and ethnic cleansing “do not capture the full extent of the attack on the Rohingya population. Failure to correctly identify genocidal violence when it is clear what is happening has grave consequences. Not only for the victims, who risk annihilation, but for citizens of all the repressive states whose leaders are watching, and may be emboldened by international inaction.”), <https://foreign-policy.com/2017/09/19/the-world-knew-ahead-of-time-the-rohingya-were-facing-genocide>.

79 See, e.g., the 1999 report of the independent commission on United Nations actions during the 1994 Rwanda genocide, which describes this shift in framing but emphasizes the contribution that a letter from the UN secretary-general made toward achieving it:

Boutros-Ghali’s letter to the Security Council of 29 April (S/1994/518) provided an important shift in emphasis—from viewing the role of the United Nations as that of neutral mediator in a civil war to recognizing the need to bring to an end the massacres against civilians, which had by then been going on for three weeks and were estimated to have killed some 200,000 people.

Report of the Independent inquiry into the actions of the United Nations during the 1994 genocide in Rwanda, attachment to Letter dated December 15, 1999 from the Secretary-General Addressed to the President of the Security Council, S/1999/1257, <https://undocs.org/S/1999/1257>.

80 Outline of the mandate for the Special Adviser on the Prevention of Genocide, Annex to Letter dated July 12, 2004 from the Secretary-General to the President of the Security Council, http://www.responsibilitytoprotect.org/files/US_Letter_Mandate_SAPG.pdf. See also United Nations Office on Genocide Prevention and the Responsibility to Protect, “When to refer to a situation as ‘genocide,’” <http://www.un.org/en/genocideprevention/documents/publications-and-resources/GuidanceNote-When%20to%20refer%20to%20a%20situation%20as%20genocide.pdf>.

81 Independent International Commission of Inquiry for the Syrian Arab Republic, “‘They came to destroy’: ISIS Crimes Against the Yezidis,” UN Doc. No. A/HRC/32/CRP.2, https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A_HRC_32_CRP.2_en.pdf.

82 Final Report of the International Commission of Inquiry for the Central African Republic, Annex to Letter dated December 19, 2014 from the Secretary-General addressed to the President of the Security Council, UN Doc. No. S/2014/928, 25, http://www.un.org/ga/search/view_doc.asp?symbol=S%2F2014%2F928&Submit=Search&Lang=E.

83 Final Report of the African Union Commission of Inquiry on South Sudan, October 15, 2014, paragraph 805 (the Commission “did not have any reasonable grounds to believe that the crime of genocide was committed during the conflict that broke out on December 15, 2013”), <http://www.peaceau.org/uploads/auciss.final.report.pdf>.

84 See Prime Minister Cameron’s statement in 2016 with reference to ISIS crimes. House of Commons, Oral Answers to Questions, May 4, 2016, <https://hansard.parliament.uk/Commons/2016-05-04/debates/16050453000002/OralAnswersToQuestions>. See also the Foreign Office’s response to a parliamentary question in 2004 regarding Darfur that “[w]e and the UN agree that what is happening in Darfur cannot be described as genocide,” quoted in Karen E. Smith, *Genocide and the Europeans*, 227.

85 Vaststelling begroting Ministerie van Buitenlandse Zaken 2018, original in Dutch, <http://www.rijksbegroting.nl/2018/kamerstukken.2018/1/8/kst240697.html>

86 Advisory Committee on Issues of Public International Law and External Adviser on Public International Law, “Advisory report on the scope for and the significance and desirability of the use of the term ‘genocide’ by politicians,” The Hague, March 2017, https://cms.webbeat.net/ContentSuite/upload/cav/doc/Vertaling_CAVV_EVA_Advies_Engels.pdf. The report stated:

“Although both governments and parliaments are at liberty to speak out about genocide and crimes against humanity, restraint is in order....A thorough investigation of the facts is essential and in the absence of sufficient and reliable findings of fact, restraint is to be preferred.” “Given the Netherlands’ commitment to advancing the international legal order, the preferred course of action is to support international determinations, but this need not be a reason to delay making national determinations....A determination that genocide or crimes against humanity are being or have been committed is a necessary first step in activating obligations, such as the obligation to prevent.”

87 We can also see the seeds of this trend in legislation adopted by Congress in 1978 that found that the Ugandan government under Idi Amin had committed genocide, and expressed its sense that the US government should take steps to “dissociate itself from any foreign government which engages in the international crime of genocide.” Section 5 of Public Law 95-435 (1978). Because we have not yet been able to locate publicly available records of executive branch use of the term “genocide” or discussions of its applicability in Uganda, however, we do not cover this case.

88 See, for example, Anton Weiss-Wendt, *A Rhetorical Crime: Genocide in the Geopolitical Discourse of the Cold War* (noting that in June 1970, a Turkish embassy official reacting to a statement by Senator William Proxmire “warn[ed] that any mention of massacres of Armenians by Turks during and after the First World War in connection with the Genocide Convention would produce an ‘unfortunate effect’ in contemporary Turkey”), 129.

89 *Congressional Record* 9244-45, April 8, 1975.

90 A Senate version of the resolution was subsequently bottled up in committee at the State Department’s request. *State Department Bulletin* excerpt from December 15, 1975, press conference by Henry Kissinger.

91 H.J. Res 247 (passed by House September 10, 1984).

92 See documents contained in Reagan Library collections, e.g., in Collection: “Cicconi, James W.: Files,” Box 6, File Folder: “Armenian-Americans (1),” <https://www.reaganlibrary.gov/sites/default/files/digitalibrary/smf/cos/cicconi/box-6/40-94-6914308-006-008-2016.pdf>.

93 <https://www.congress.gov/bill/98th-congress/house-joint-resolution/247/all-actions>.

94 A Congressional Research Service report provides a list of congressional committee reports of resolutions that have used the word “genocide” to describe the atrocities. See Jim Zanotti and Clayton Thomas, Congressional Research Service, *Turkey: Background and US Relations*, August 26, 2016, Appendix D.

95 See, e.g., Statement of Ambassador Marc Grossman, *H. Res. 398, The United States Training on and Commemoration of the Armenian Genocide Resolution, Hearing Before the Subcommittee on International Operations and Human Rights of the Committee on International Relations, House of Representatives*, September 14, 2000,

(“September 2000 hearing”), 24, <https://chrissmith.house.gov/uploadedfiles/armenian%20genocide%20resolution%20hearing%2009-2000.pdf>.

96 September 2000 hearing, 7, 15.

97 See, e.g., Statement by President Donald Trump on Armenian Remembrance Day, April 24, 2017, <https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-armenian-remembrance-day-2017>; Statement by President Obama on Armenian Remembrance Day, April 22, 2016, <https://obamawhitehouse.archives.gov/the-press-office/2016/04/22/statement-president-armenian-remembrance-day>. President Jimmy Carter made a statement that arguably went further, at a reception in 1978 honoring Armenian-Americans, saying that in 1916 that “there was a concerted effort made to eliminate all the Armenian people” and “I feel very deeply that I, as President, ought to make sure that this is never forgotten.” Jimmy Carter, Reception Honoring Armenian Americans Remarks at the White House Reception, May 16, 1978, <http://www.presidency.ucsb.edu/ws/index.php?pid=30804>.

98 See, e.g., Harut Sassounian, *Armenian Weekly*, “Trump Succumbs to Turkish Pressures by not Recognizing the Armenian Genocide,” April 25, 2017, <https://armenianweekly.com/2017/04/25/trump-succumbs-to-turkish-pressures/>.

99 The case involved a request from the General Assembly for an advisory opinion from the court on the question of whether states could use reservations in ratifying the Genocide Convention. The relevant statement by the US government was: “The practice of genocide has occurred throughout human history. The Roman persecution of the Christians, the Turkish massacres of Armenians, the extermination of millions of Jews and Poles by the Nazis are outstanding examples of the crime of genocide. This was the background when the General Assembly of the United Nations considered the problem of genocide.” Written Statement of the Government of the United States of America in *Pleadings, Oral Arguments, Documents: Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of May 28th 1951*, 25 (emphasis added), <https://www.icj-cij.org/files/case-related/12/11767.pdf>.

100 Ronald Reagan, “Proclamation 4838 — Days of Remembrance of Victims of the Holocaust,” April 22, 1981, <http://www.presidency.ucsb.edu/ws/index.php?pid=43727>.

101 *State Department Bulletin*, “Armenian Terrorism: A Profile,” August 1982, 35.

102 The Editor’s Note said: “The article, ‘Armenian Terrorism: A Profile,’ which appeared in the feature on terrorism in the August 1982 issue of the Bulletin, does not necessarily reflect an official position of the Department of State, and the interpretive comments in the article are solely those of the author.” *State Department Bulletin*, Editor’s Note, September 1982 (emphasis added).

103 See various documents contained in Ronald Reagan Presidential Library Digital Library Collections, Collection: “Fortier, Donald: Files,” Folder Title: “Turkish Armenian File: [US Department of State Remarks on the Armenian Genocide],” Box: RAC Box 19, including letter from Spokesman John Hughes to Speaker Tip O’Neill, at 52-53, and letter from Under Secretary Lawrence Eagleburger to Congressman Charles Pashayan, 70. In November 1982, in the midst of this controversy, a State Department official in the counter-terrorism office appears to have corresponded with an Armenian-American woman who objected to his reference, during an unspecified interaction, to the “alleged” Armenian genocide. In his official capacity and on State Department letterhead, the official defended that formulation as “the position taken by the Department of State,” apparently paying no heed to the department’s September 1982 correction. See Letter from Norman Antokol to Rose Akgulian, November 16, 1982, in the same collection, 58.

104 *State Department Bulletin*, April 1983, Editor’s Note.

105 *The Association for Diplomatic Studies and Training Foreign Affairs Oral History Project, Interview of Ambassador John M. Evans*, October 19, 2009, <https://www.adst.org/OH%20TOCs/Evans,%20John%20M.toc.pdf?ga=2.23960442.115888008.1537543708-1218243193.1537543708>, 226-235. Evans said he made the statement after reading Samantha Power’s *A Problem from Hell* (and other works) on the nature of genocide. *Ibid.*, 218.

106 *Evans interview*, 233. As Evans noted, the Senate subsequently declined to confirm the nominee to replace Ambassador Evans after the nominee referred to the “alleged genocide,” and then-Senator Barack Obama wrote to Secretary Condoleezza Rice, “When State Department instructions are such that an ambassador must engage in strained reasoning—or even an outright falsehood—that defies a common sense interpretation of events in order to follow orders, then it is time to revisit the State Department’s policy guidance on that issue.” Letter from Senator Barack Obama to Secretary of State Condoleezza Rice, July 28, 2006, http://armeniansforobama.com/common/pdf/Obama_letter_to_Rice_July_26_2008.pdf.

107 John J. Stremmlau, *The International Politics of the Nigerian Civil War, 1967-1970*, (Princeton: Princeton University Press, 1977), 38 (quoting participant as saying, “The genocide propaganda was designed to confirm and instill in the public’s mind that nothing short of a sovereign Biafra could guarantee security of life and property. . . . It terrorized the home public and alarmed and alerted the entire world for it conjured up an image of the Nazi regime and its Jewish victims”), and 112-113.

108 For example, British Foreign Secretary Michael Stewart said on June 12, 1968 that “If we make the supposition that it were the intention of the Federal Government not merely to preserve the unity of Nigeria but to proceed without mercy either with the slaughter or the starvation of the Ibo people, . . . then the arguments which justified the policy we have so far pursued would fall, and we would have to reconsider, and more than reconsider, the action we have so far taken”). Quoted in Karen E. Smith, *Genocide and the Europeans* (Cambridge: Cambridge University Press, 2010), 72-73.

109 Smith, *Genocide and the Europeans*, 73-77.

110 Smith, *Genocide and the Europeans*, 77-80.

111 Richard M. Nixon, “Call for American Action on Biafra,” September 10, 1968, in A.H.M. Kirk-Greene, ed., *Crisis and Conflict in Nigeria: A Documentary Sourcebook 1966-1970* (Oxford: Oxford University Press, 1971), 334-335.

112 See Stremmlau, *The International Politics of the Nigerian Civil War*, page 280; Henry A. Kissinger, “Status Report on the Nigerian Civil War,” Memorandum to the President, April 8, 1969 (noting that the appointment of a special coordinator for relief “seems to have satisfied amply its public relations role here at home. The congressional critics and public lobbies on Biafran relief have been tolerably quiet for the first time in months”), <https://2001-2009.state.gov/r/pa/ho/frus/nixon/e5/54854.htm>.

113 Susan M. Mowle, “Infringements of Human Rights in Biafra and the Response of the United States and the United Nations,” Library of Congress Foreign Affairs Division Staff Reports, September 11, 1973, quoted in “International Protection of Human Rights: The Work of International Organizations and the Role of US Foreign Policy,” Hearings before the Subcommittee on International Organizations and Movements, House Foreign Affairs Committee, 1974 (With the rejection of the genocide charges, “the major powers and international organizations took the position that, although clearly deplorable, the civilian deaths were the result of a political and military struggle which they deemed outside their legal and political ability or responsibility to resolve. They deemed the only appropriate international interest in regard to human rights lay in the field of humanitarian relief; and, as a result, the problem was turned over to relief organizations, both public and private”).

114 See C. Robert Moore, Deputy Assistant Secretary for African Affairs, Testimony before Senate Foreign Relations Committee, Subcommittee on Africa, October 4, 1968 (“The ‘Biafran’ authorities have reaffirmed their belief that genocide against the Ibo people is the Federal Government’s objective. However, the [Federal Military Government] has firmly disavowed this and invited an international observer group, composed of representatives of the UN, OAU, the UK, Canada, Sweden, and Poland, to satisfy itself that Federal forces are behaving with discipline and restraint. . . . The first three prepared a report dated October 2, which has been made public. This report states that there is no evidence of any intent by the Federal troops to destroy the Ibo people or their property, and the use of the term ‘genocide’ is in no way justified”), *Department of State Bulletin*, v. 59, November 4, 1968, 485; Nicholas Katzenbach, Under Secretary of State for Political Affairs, “The Tragedy of Nigeria,” Remarks at Brown Univer-

sity, December 3, 1968 (“The Biafrans fear another massacre, one on an even bigger scale. Their fear, while understandable in view of recent history, is, we believe, unfounded in the present context. Outside observers . . . found no evidence to support the charge of genocide. There are some who believe that the Biafrans’ objective is to continue the struggle long enough to hang this frightful charge around the neck of their enemy in world councils”), *Department of State Bulletin*, v. 59, December 23, 1968: 653-658.

115 Strelau, *The International Politics of the Nigerian Civil War*, 292.

116 See marginal note from Richard Nixon to Henry Kissinger on April 8, 1969 memorandum (“I have decided that our policy supporting the Feds [i.e., the Nigerian government] is wrong. They can’t make it—let’s begin to get State off this kick”), <http://web.archive.org/web/20100223100341/http://www.state.gov/documents/organization/54600.pdf>.

117 See, e.g., Embassy Abuja telegram, August 5, 1969 (“We also fail [to] understand [the] conviction [of a Red Cross official] and others that FMG pursuing policy genocide. We do not repeat not believe this [is the] case...”), <https://history.state.gov/historicaldocuments/frus1969-76ve05p1/d99>; Consulate Lagos telegram, January 10, 1970 (“Reports of imminent Biafran collapse put out by persons arriving Libreville from enclave, which seem in turn to have prompted rather frantic French moves to stave off ‘genocide’ by federal [sic] forces, suggest that report on situation as seen from Lagos may be in order. . . . As regards threat to Biafran population we make no predictions but we do point out that in recent days well over 100,000 residents of enclave, including some 60,000 Ibos, have come under federal control. We have hard evidence from competent US observers that they are being well cared for and humanely treated by federal troops and Nigerian Red Cross.”), <https://2001-2009.state.gov/documents/organization/53985.pdf>. But see also memorandum from Roger Morris to Henry Kissinger, January 10, 1970 (“The unspoken Federal war aim, in this collapse as in the starvation blockade, remains the elimination of the Ibos as a tribe. . . . Anything short of a strong approach to Lagos will be de facto acquiescence in some degree of genocide”) <https://history.state.gov/historicaldocuments/frus1969-76ve05p1/d153>.

118 Smith, *Genocide and the Europeans*, 67, 79.

119 Gary Bass, *The Blood Telegram: Nixon, Kissinger and a Forgotten Genocide* (New York: Alfred A. Knopf, 2013), xiii-xiv and 24-27.

120 Bass, *The Blood Telegram*, xiv-xv, 4-5, 67-68, 113, and 157-158.

121 “Selective Genocide,” telegram from US Consulate General Dacca to the Department of State, March 28, 1971, <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB79/BEBB1.pdf>; and “Dissent From US Policy Toward East Pakistan,” telegram from US Consulate General Dacca to the Department of State, April 6, 1971 (“But we have chosen not to intervene, even morally, on the grounds that the Awami conflict, in which unfortunately the overworked term genocide is applicable, is purely internal matter of a sovereign state”), <https://history.state.gov/historicaldocuments/frus1969-76v11/d19>. See also “Specific Areas of Dissent with Current US Policy toward East Pakistan,” telegram from US Consulate General Dacca to the Department of State, 1971 Dacca 1249, April 10, 1971 (“Aside from international moral obligations to condemn genocide (of Pakistani Hindus, although by Webster’s [sic] definition term likewise seems applicable to Awami League followers who being hunted down with vengeance), geographical realities also enter equation”), <https://history.state.gov/historicaldocuments/frus1969-76ve07/d130>.

122 “Contingency Study for Indo-Pakistan Hostilities,” Memorandum from the Executive Secretary of the Department of State to the President’s Assistant for National Security Affairs, May 25, 1971, <https://history.state.gov/historicaldocuments/frus1969-76ve07/d133>.

123 Bass, *The Blood Telegram*, 230 and 234-235; and “Relief Problems in East Pakistan and India, Part III,” Hearing before the Subcommittee to Investigate Problems Connected with Refugees and Escapees, US Senate Committee on the Judiciary, October 4, 1971, 391.

124 Bass, *The Blood Telegram*, xiv and 64.

125 Gérard Prunier, *The Rwanda Crisis: History of a Genocide* (Columbia: New York, 1995), 60.

126 Michael Bowen, Gary Freeman, and Kay Miller, *Passing By: The United States and Burundi, 1972* (Washington, D.C.: Carnegie Endowment for International Peace, 1973), 5-6.

127 *Ibid.*, 6-7.

128 See, e.g., Herman Cohen, US Department of State, testimony at “U.N. and US Response to Massacre: Burundi,” hearing of the US House of Representatives, Committee on Foreign Affairs, Subcommittee on International Organizations and Movements, September 19, 1973, 79. “In the African situation, a public statement in our view would have coalesced all of the African governments against us, and the reaction would be that here is a great power telling us what to do, and where has the United States supported us on human rights in southern Africa. So, we would have been cast immediately into sterile debate with the Africans while the situation in Burundi was continuing. Our feeling was that the best possible chance of ending the killings was to work quietly with African governments. African governments don’t like to be denounced publicly. That is a failing on their part.”

129 “We could contemplate a public statement denouncing events, but this would have little or no positive effect in Burundi, except to subject our Embassy to official wrath—perhaps including closure of the Mission—and would result in African accusations that we are meddling in their affairs. For these reasons, a public statement would be contrary to our policy of avoiding quixotic moral posturing.” “Burundi: Kennedy Criticizes Administration,” memorandum from Melvin H. Levine of the National Security Council Staff to the President’s Assistant for National Security Affairs (Kissinger), Washington, June 26, 1972, <https://history.state.gov/historicaldocuments/frus1969-76ve05p1/d220>.

130 “Memorandum of Law: US Government’s Obligations Regarding Human Rights of Individuals outside the United States,” from Assistant Legal Adviser for African Affairs Keith Huffman, August 23, 1972, in Bowen, Freeman, and Miller, *Passing By*, 31-33.

131 The Carnegie report also included an interview with an unnamed US official who specifically argued the Burundian government’s abuses had not amounted to genocide, apparently based on a misunderstanding of the term that would have excluded anything but an attempt at the annihilation of the country’s entire Hutu majority. “‘Genocide’ is a specific, legal term with a precise meaning. It boils down to trying to kill a whole people. The Burundian government didn’t try to do that; they couldn’t. You can’t kill off 80 percent of your population. Perhaps they engaged in mass murder; they weren’t guilty of genocide.” Bowen, Freeman, and Miller, *Passing By*, 18-19.

132 “This is one of the most cynical, callous reactions of a great government to a terrible human tragedy I have ever seen. When Paks [sic] try to put down a rebellion in East Pakistan, the world screams. When Indians kill a few thousand Paks, no one cares. Biafra stirs us because of Catholics; the Israeli Olympics because of Jews; the North Vietnam bombings because of Communist leanings in our establishment. But when 100,000 (one-third of all the people of a black country) are murdered, we say and do nothing because we must not make blacks look bad (except, of course, when Catholic blacks are killed). I do not buy this double standard.” Memorandum from the President’s Assistant for National Security Affairs (Kissinger) to President Nixon, Washington, September 20, 1972, <https://history.state.gov/historicaldocuments/frus1969-76ve05p1/d222>.

133 Nixon approved the State Department’s plan to authorize the loan but added, “But with a strong statement by the US disapproving Burundi’s genocide. The statement is to be broadly publicized. Say our not objecting to the loan does not reflect approval of their policy. ... I consider this an opportunity to get out the horrible story of what happened there.” “World Bank Loan to Burundi,” Memorandum from the President’s Assistant for National Security Affairs (Kissinger) to President Nixon, Washington, December 2, 1972, <https://history.state.gov/historicaldocuments/frus1969-76ve05p1/d230>.

134 See Jordan Taylor, “The US Response to the Burundi Genocide of 1972,” master’s thesis at James Madison University, 52, <https://commons.lib.jmu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1360&context=master201019>. (“When the vote finally came, the State Department convinced Nixon’s NSC that it would be

untimely to make such a strong statement because the Burundi government had shown signs of attempting to peacefully reconcile its ethnic troubles. The State Department determined that such a strongly worded condemnation would be counterproductive to the national reconciliation the US Embassy in Bujumbura was encouraging. There is no evidence, however, that anyone consulted Nixon on this decision.”).

135 See, e.g., “Burundi Problem—The Response of African Leadership,” from Thomas Pickering, State Department Executive Secretary, to Henry Kissinger, National Security Advisor, August 8, 1973, <https://2001-2009.state.gov/documents/organization/66759.pdf> (“In accordance with our policy to persuade African leaders and the OAU to take responsibility for finding a lasting political solution to the genocidal conflict in Burundi...”), or “Burundi Ambassador Conversation with Asst. Sec. Newsom,” telegram 122179 from the Department of State to the Embassy in Burundi, June 22, 1973, <https://history.state.gov/historicaldocuments/frus1969-76ve06/d61> (“Genocide by anyone in Africa is still genocide and must be condemned as such by all African leaders”).

136 Anton Weiss-Wendt, *A Rhetorical Crime: Genocide in the Geopolitical Discourse of the Cold War* (New Brunswick: Rutgers, 2018), 3 and 7.

137 See, e.g., Ronald Reagan, Presidential Proclamation 5667—Baltic Freedom Day, June 13, 1987, <https://www.reaganlibrary.gov/research/speeches/061387b> (“Historians of the 20th century will chronicle many a tragedy for mankind—world wars, the rise of Communist and Nazi totalitarianism, genocide, military occupation, mass deportations, attempts to destroy cultural and ethnic heritage, and denials of human rights and especially freedom of worship and freedom of conscience. The historians will also record that every one of these tragedies befell the brave citizens of the illegally occupied Republics of Estonia, Latvia, and Lithuania”); “Remarks to Jewish Leaders During a White House Briefing on United States Assistance for the Nicaraguan Democratic Resistance,” March 5, 1986, <http://www.presidency.ucsb.edu/ws/?pid=36953> (“Some of us have been around long enough to know that disinformation has a long history. I remember the reports of Walter Duranty from Stalin’s Russia, who denied the existence of the forced famine, even though he had witnessed first-hand Stalin’s genocide”).

138 See, e.g., Adrian S. Fisher, Legal Adviser, “Good Faith vs. Empty Promises in the War of Ideas,” State Department *Bulletin*, no. 669, April 21, 1952, 618-622 (“In the Genocide Convention the USSR shouts for the outlawing of genocide, but objects to provisions which would permit the world to determine whether this heinous crime has been committed on the Estonians, Letts, and Lithuanians.”); Remarks of James W. Barco, US representative to the UN General Assembly, October 9, 1959, in State Department *Bulletin*, no. 1063, November 9, 1959, 683 (quoting an eminent jurist as having told a news conference that a *prima facie* case existed that the Chinese Communists in Tibet had committed atrocities amounting to genocide).

139 “Unable to pacify or control the countryside, the Soviets—with clinical precision—have, in some areas, resorted to tactics aimed at depopulating the land. ... Migratory genocide is how one historian has described it,” in “UN Calls for Soviet Withdrawal from Afghanistan,” Amb. Vernon Walters remarks to the UN General Assembly, November 12, 1985, in State Department *Bulletin*, no. 2107, February 1986, 20. As another example: “‘Genocide’ is a term which means ‘the systematic killing of, or a program of action intended to destroy, a whole national or ethnic group.’ It is unconscionable that in today’s world a situation exists that might justify being characterized as approaching genocide. Despite considerable efforts by the Soviet Union and the Kabul regime to restrict and manipulate news coverage of the war, no one—certainly no one in this forum—can claim to be ignorant about what is happening in Afghanistan,” in “Situation in Afghanistan,” statement by Herbert S. Okun to the UN General Assembly, November 4, 1986.

140 See Reagan, “Remarks to Jewish Leaders.”

141 Weiss-Wendt, 55.

142 See, e.g., Elliott Abrams, Hearing before the Committee on Foreign Relations, United States Senate, Ninety-ninth Congress, first session, on the prevention and punishment of the crime of genocide (March 5, 1985), 11 (testifying that non-ratification puts the United States on the defensive: “It is a constant in Pravda and Tass, and in

fact at the time of the hearing last fall there was immediate mention in the Soviet press about the possibility of US ratification of the Genocide Convention.”).

143 See press accounts of statements from Secretary of State Alexander Haig in March 1982 (“Theirs is a harrowing tale and the basis of Secretary of State Alexander M. Haig Jr.’s charges before a House subcommittee on March 4 that Nicaragua was pursuing a ‘genocidal’ policy against its unfortunate Miskito Indian minority”), “Accounts by Indians Differ on Miskito-Sandinista Clash,” *The Washington Post*, April 30, 1982, <https://www.washingtonpost.com/archive/politics/1982/04/30/accounts-by-indians-differ-on-miskito-sandinista-clash/c804d6ec-f54b-4227-b7fd-29c48d56e944>); and the US ambassador to the Organization of American States in November 1984 (“[Ambassador William] Middendorf went on to charge the leftist Sandinista government with the ‘genocide of a whole race of Indians on a great scale,’” in “US denounces ‘genocide’ in Nicaragua, insists on true election,” United Press International, November 15, 1984, <https://www.upi.com/Archives/1984/11/15/US-denounces-genocide-in-Nicaragua-insists-on-true-election/6031469342800>. Some texts that were prepared for President Reagan’s use in March 1986 also contain references to genocide against the Miskito Indians, although it is not clear whether these statements were actually used. See presidential taping scripts at <https://www.reaganlibrary.gov/sites/default/files/digitalibrary/smf/counsel/roberts/box-011/40-485-6908381-011-025-2017.pdf>, 14 and 20. President Reagan did cite “the travail of the Mesquito Indians in Nicaragua” alongside the Holocaust and Cambodia as illustrating the lesson that “if free men and women remain silent in the face of oppression we risk the destruction of entire peoples” in his September 1984 remarks announcing his administration’s intent to ratify the Genocide Convention (<https://www.reaganlibrary.gov/research/speeches/90684a>), referred to “an attempt to wipe out an entire culture, the Miskito Indians, thousands of whom have been slaughtered or herded into detention camps, where they have been starved and abused” in a May 1984 address to the nation (<https://www.reaganlibrary.gov/research/speeches/50984h>), and referred to the abuses against the Miskito as “virtual genocide” in remarks in May 1985 (<https://www.reaganlibrary.gov/research/speeches/52485c>).

144 See Reagan White House files, <https://www.reaganlibrary.gov/sites/default/files/digitalibrary/smf/dcos/deaver/box-005/40-137-7065105-005-019-2016.pdf>, 7-19.

145 See *The Washington Post*, “Accounts by Indians Differ on Miskito-Sandinista Clash.”

146 Americas Watch, “Human Rights in Nicaragua: Reagan, Rhetoric, and Reality,” July 1985, 2-5, 50 (“The Administration’s accusations against Nicaragua rest upon a core of fact; the Sandinistas have committed serious abuses, especially in 1981 and 1982, including arbitrary arrests and the summary relocation of thousands of Miskito Indians. Around the core of fact, however, US officials have built an edifice of innuendo and exaggeration.” “Nor has the Government [of Nicaragua] practiced elimination of cultural or ethnic groups, as the [US] Administration frequently claims; indeed in this respect, as in most others, Nicaragua’s record is by no means so bad as that of Guatemala, whose government the Administration consistently defends”).

147 See Virginia Garrard-Burnett, *Terror in the Land of the Holy Spirit: Guatemala under General Efraín Ríos Montt* (London: Oxford University Press, 2010), 14; and Ronald Reagan, “Remarks in San Pedro Sula, Honduras, following a Meeting with President Jose Efraín Ríos Montt of Guatemala,” press release, December 4, 1982, <https://www.reaganlibrary.gov/research/speeches/120482f>.

148 We are also unaware of a US review of such genocide allegations in light of judicial proceedings undertaken in Guatemala in later years, including on charges of genocide, against former Guatemalan officials who held office at this time, although US officials have attended and expressed support for such proceedings. See US Department of State, “Ambassador at Large Stephen J. Rapp Travels to Guatemala,” Washington, D.C., April 23, 2013, <https://2009-2017.state.gov/r/pa/prs/ps/2013/04/207914.htm>.

149 “Analysis of Human Rights Report on Guatemala by Amnesty International, WOLA/NISGUA, and Guatemalan Human Rights Commission,” telegram Guatemala 7963 to US Department of State, October 22, 1982, <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB11/docs/doc16.pdf>. See also US Embassy Guatemala, “Massacres and Refugee Concentrations Reported in the Press,” June 1982 telegram.

150 Charles Fairbanks, “Credibility of Embassy Guatemala Human Rights Reporting,” memo to US Department of State Bureau of Humanitarian Affairs officials, November 23, 1982.

151 Power, *A Problem from Hell*, 174-76, 187-195, 200-04.

152 For example, State Department bureaus sent a memorandum to the secretary of state titled “US Policy Toward Iraqi CW Use” (September 13, 1988) that laid out in some detail a variety of options for discouraging Iraq from using chemical weapons again and strengthening the norm against their use generally.

153 Staff Report, “Chemical Weapons Use in Kurdistan: Iraq’s Final Offensive,” S. Prt. 100-148 (100th Cong., 2d Sess.) (1988), <https://babel.hathitrust.org/cgi/pt?id=purl.32754079182451>.

154 Power, *A Problem from Hell*, 198, 218-19. See also William Safire, “Stop the Iraqi Murder of the Kurds,” *The New York Times*, September 5, 1988, <https://www.nytimes.com/1988/09/05/opinion/essay-stop-the-iraqi-murder-of-the-kurds.html>; Jim Hoagland, “Make No Mistake: This is Genocide,” *The Washington Post*, September 8, 1988.

155 Power, *A Problem from Hell*, 209-10.

156 Prevention of Genocide Act of 1988 (100th Cong., 2d Sess.), introduced September 8, 1988.

157 In explaining this conclusion, the letter stated that “large segments of Iraqi Kurdistan are untouched by the current campaign,” but did not address whether the abuses could nonetheless have been consistent with an intent to destroy the Kurds “in substantial part.” J. Edward Fox, US Department of State, letter to Dante B. Fascell, House of Representatives, September 13, 1988.

158 Power, *A Problem from Hell*, 226-28.

159 Power, *A Problem from Hell*, 235-36. See Public Law 101-513, section 586H, November 5, 1990, <https://www.gpo.gov/fdsys/pkg/STATUTE-104/pdf/STATUTE-104-Pg1979.pdf>.

160 George H.W. Bush, “Address Before the 45th Session of the United Nations General Assembly,” October 1, 1990, <http://www.presidency.ucsb.edu/ws/?pid=18883>.

161 See “Revised and updated report on the question of the prevention and punishment of the crime of genocide prepared by Mr. B. Whitaker,” U.N. Doc. No. E/CN.4/Sub.2/1985/6 (July 2, 1985), 10, n. 17 (“Even under the most restricted definition, [the Khmer Rouge atrocities] constituted genocide, since the victims included target groups such as the Chams (an Islamic minority) and the Buddhist monks”); Hannum, “International Law and Cambodian Genocide: The Sounds of Silence.”

162 Memorandum from Stephen M. Schwebel to other State Department officials, “Should the U.K.—Or the United States—Charge Cambodia or Uganda before the World Court?,” September 27, 1978 (“The acts complained of approach being genocidal in character, though, since they apparently have been aimed not at destroying, in whole or in part, ‘a national, ethnical, racial, or religious group’ but rather at those whom Cambodian authorities deem to be politically unsympathetic, probably these acts do not transgress the terms of the Genocide Convention”), on file with the authors.

163 Author interview with Stephen Schwebel; Schwebel memorandum. Because the United States was not then a party to the Genocide Convention, it could not itself bring a case.

164 Letter from U.K. Foreign and Commonwealth Office to Stephen M. Schwebel, December 28, 1978 (“I undertook to let you have the considered views of the FCO on your memorandum of 27 September about the possibility of instituting proceedings against Cambodia before the International Court of Justice (ICJ).... We...have come to the conclusion that the arguments against instituting proceedings are too strong for the UK to wish to consider such a course of action”), on file with the authors.

165 See Jimmy Carter, “Human Rights Violations in Cambodia—Statement by the President,” April 21, 1978 (“Thousands of refugees from Cambodia have accused their Government of inflicting death on hundreds of thou-

sands of the Cambodian people through the genocidal policies it has implemented over the past 3 years....On April 17 the Canadian House of Commons, in a unanimous motion, expressed the horror of all its members in the acts of genocide carried out in Cambodia and called on all governments which maintain relations with Canada to protest against the slaughter”), <https://www.presidency.ucsb.edu/documents/human-rights-violations-cambodia-statement-the-president>; and Letter from Secretary of State Cyrus Vance to Representative Clement J. Zablocki, September 30, 1978 (“I seriously considered your suggestion, but concluded that focusing before the General Assembly on a single human rights violator—even one as gross as Kampuchea [i.e. Cambodia]—would not be appropriate and would raise questions about the omission of other countries. I decided instead to refer to the need to end conditions everywhere which are tantamount to genocide. This reference clearly encompasses what is happening in Kampuchea, as was made clear during the press backgrounding on my speech by senior Department officials”), <https://history.state.gov/historicaldocuments/frus1977-80v22/d28>.

166 See Don Oberdorfer, “US to Support Pol Pot Regime for U.N. Seat,” *The Washington Post*, September 16, 1980, https://www.washingtonpost.com/archive/politics/1980/09/16/us-to-support-pol-pot-regime-for-un-seat/58b8b124-7dd7-448f-b4f7-80231683ec57/?utm_term=.81562283308f.

167 See, for example, telegram from US Department of State 302759, “Kampuchean Relief,” November 22, 1979 (“[State Department official] Barry said that we could understand why the Bulgarian government wants to give its own aid to those presently in control of Kampuchea. We could not understand or accept, however, using food as a weapon of war which was the declared intention of the [Vietnam-backed] Heng Samrin regime. This was genocide”), <https://aad.archives.gov/aad/createpdf?rid=258712&dt=2776>; and Memorandum from Director of Central Intelligence Turner to the President’s Assistant for National Security Affairs (Brzezinski), “Vietnamese Starvation Policy in Kampuchea,” December 11, 1979 (“We are also awaiting the placement of a story in a prestigious...newspaper based on a fact sheet sent out some weeks ago which highlights the Vietnamese starvation policy and war of genocide in Kampuchea, as well as the magnitude of Soviet aid to Vietnam”), <https://history.state.gov/historicaldocuments/frus1977-80v22/d76>.

168 See, e.g., Walter J. Stoessel, Jr., “US Commitment to Human Rights,” testimony at a hearing of the House Subcommittee on Human Rights and International Organizations, July 14, 1981 (“In a few cases we must take a stand even if it will have no immediate effect. In a case like the Kampuchean genocide, we must speak out simply to maintain our conception of decency and to preserve the shreds of international consensus on human rights standards”); and George P. Shultz, remarks on “The Meaning of Vietnam,” April 25, 1985 (“Finally, in Cambodia, the worst horror of all: the genocide of at least 1 million Cambodians by the Khmer Rouge, who also took power 10 years ago this month”). In addition, during the 1980s, a number of members of Congress, as well as a growing and politically active Cambodian-American diaspora, focused on Cambodia and the issue of genocide. In 1988, Congress adopted legislation that called the atrocities “one of the clearest examples of genocide in recent history.” See section 1244, Foreign Relations Authorization Act, FY 1988 and 1989, Public Law 100-204.

169 Office of the Legal Adviser memorandum, September 18, 1989 (noting that, as of that date, the Office of the Legal Adviser “has never provided a formal legal opinion as to whether the atrocities committed by the Khmer Rouge from 1975-1978 constituted genocide as that term appears in the 1948 Genocide Convention”), on file with the authors.

170 Steven Ratner, “The Cambodian Settlement Agreements,” 87 *American Journal of International Law* 1, 6 n.24 (1993).

171 Author interview with Steven Ratner; *November 1989 HFAC Hearing* (testimony of Mr. Lambertson), 120.

172 See Kenton J. Clymer, *Troubled Relations: The United States and Cambodia since 1870* (DeKalb, IL: Northern Illinois University Press, 2007), 171.

173 September 1989 HFAC Hearing, page 50 (arguing that the reason that the Khmer Rouge were denying that genocide took place “to give themselves a position of legitimacy in a future government” and that “by denying

genocide ever took place, [the United States] then gave the Khmer Rouge international legitimacy as part of the government”).

174 Transcript of a hearing of the Subcommittee on Asian and Pacific Affairs, “The Paris Peace Conference on Cambodia: Implications for US Policy,” September 14, 1989, 57-58.

175 Author interviews with Steven Ratner, June 21, 2018, and Michael Young, August 9, 2018.

176 *November 1989 HFAC Hearing* (testimony of Mr. Young), 121. The deputy legal adviser testified: “[W]e do believe that they committed genocide. I think we have tried to avoid the use of that term in part because as we have examined the treaties, particularly the genocide convention, as I am sure you know, the term seemed somewhat under-inclusive for what they actually did. They define genocide somewhat more narrowly as requiring the intent to destroy a national race or religious group as such. We believe they certainly did that in some cases, but they went beyond that. They attacked groups that spoke foreign languages, groups that were bourgeois It is probably too narrow a term to describe what they did.”

177 Ibid.

178 Question for the Record, at Ibid. 139-140.

179 Minutes of the 16th Session of the Assembly of the Serbian People in Bosnia and Herzegovina held on 12 May 1992 in Banja Luka, quoted in Stéphanie Maupas, “ICTY to hear closing arguments in Mladic case,” December 4, 2016, *JusticeInfo.net*, <https://www.justiceinfo.net/en/tribunals/icty/30907-icty-to-hear-closing-arguments-in-mladic-case.html>.

180 John Shattuck, *Freedom on Fire: Human Rights Wars & America’s Response* (Cambridge: Harvard University Press, 2003), 55-56.

181 Author interview with former State Department analyst; Power, *A Problem from Hell*, 242.

182 Roy Gutman, “Serbs Have Slain Over 1,000 in 2 Bosnia Camps, Ex-Prisoners Say,” *Newsday*, August 2, 1992, http://articles.latimes.com/1992-08-02/news/mn-5646_1_concentration-camp.

183 Mark Danner, “America and the Bosnia Genocide,” *New York Review of Books*, December 4, 1997, <https://www.nybooks.com/articles/1997/12/04/america-and-the-bosnia-genocide>. Danner quotes a vivid description from Ed Vulliamy’s reporting in *The Guardian*: “[T]he bones of their elbows and wrists protrude like piece of jagged stone from the pencil-thin stalks to which their arms have been reduced. Their skin is putrefied, the complexion . . . have corroded. [They] are alive but decomposed, debased, degraded, and utterly subservient, and yet they fix their huge hollow eyes on us with [what] looks like blades of knives.”

184 President Bush said: “The pictures of the prisoners rounded up by the Serbian forces and being held in detention camps are stark evidence of the *need to deal with this problem effectively*. The world cannot shed its horror at the prospect of concentration camps. The shocking brutality of genocide in World War II in those concentration camps are burning memories for all of us. That cannot happen again, and we will not rest until the international community has gained access to any and all detention camps.” President Bush’s News Conference (August 7, 1992), <https://books.google.com/books?id=eEjVAwAAQBAJ&pg=PA1315>, p. 1315 (emphasis added).

185 Ibid.

186 Ivo Daalder, *Getting to Dayton: The Making of America’s Bosnia Policy* (Washington, D.C.: Brookings Institution Press, 1999), 6-7.

187 James A. Baker III, *The Politics of Diplomacy* (1995), 635-37.

188 Power, *A Problem from Hell*, 282-83.

189 Power, *A Problem from Hell*, 273.

190 State Department Daily Press Briefing, August 20, 1992, https://permanent.access.gpo.gov/partnerships/DOSFAN/dosfan.lib.uic.edu/ERC/briefing/daily_briefings/1992/9208/117.html, (emphasis added).

191 The desk officer also said that he was “resigning in order to help develop a stronger public consensus that the United States and the West must act immediately to stop genocide in Bosnia.” Don Oberdorfer, “US Aide Resigns Over Balkan Policy,” *The Washington Post*, August 26, 1992, <https://www.washingtonpost.com/archive/politics/1992/08/26/us-aide-resigns-over-balkan-policy/a046cd13-51d3-41e9-84dd-71ea7d9bfd11>.

192 Interview with William Hill, March 24, 1999. William Hill was the division chief of the Office of East European Analysis, Bureau of Intelligence and Research, US Department of State from 1992–1994, cited in Jon Western, US Institute for Peace, “US Policy and Human Rights in Bosnia: The Transformation of Strategic Interests,” http://www.mtholyoke.edu/~jwestern/ps62/bosnia.htm#_ftn26

193 “The Need to Respond to War Crimes in Yugoslavia, Secretary Eagleburger, Statement at the International Conference on the Former Yugoslavia,” Geneva, Switzerland, December 16, 1992, US *Department of State Dispatch*, Vol.3, 923 (1992), <http://web.archive.org/web/20170405094916/http://dosfan.lib.uic.edu/ERC/briefing/dispatch/1992/html/Dispatchv3no52.html>.

194 “Secretary Eagleburger’s opening statement from a news conference, Geneva, en route to Brussels,” December 16, 1992, US Department of State Dispatch Vol. 3, 923 (1992), <http://web.archive.org/web/20170405094916/http://dosfan.lib.uic.edu/ERC/briefing/dispatch/1992/html/Dispatchv3no52.html>.

195 Author interview with former State Department official.

196 Eagleburger Statement, “The Need to Respond to War Crimes.”

197 See UN General Assembly resolution A/RES/47/121 “The situation in Bosnia and Herzegovina,” December 18, 1992 (describing Serbia and Montenegro’s “abhorrent policy of ‘ethnic cleansing’” as “a form of genocide”), <http://www.un.org/documents/ga/res/47/a47r121.htm>; UN Commission on Human Rights Resolution 1992/S-2/1, “The Situation of Human Rights in the Territory of the Former Yugoslavia,” December 1, 1992 (calling upon all states “to consider the extent to which the acts committed in Bosnia and Herzegovina and in Croatia constitute genocide”), <http://web.archive.org/web/20171209144955/http://dosfan.lib.uic.edu/ERC/briefing/dispatch/1993/html/Dispatchv4no03.html>.

198 Power, *A Problem from Hell*, 292-93.

199 Power, *A Problem from Hell*, 289-90.

200 Christopher, “New Steps Toward Conflict Resolution in the Former Yugoslavia,” February 10, 1993, <https://permanent.access.gpo.gov/partnerships/DOSFAN/dosfan.lib.uic.edu/ERC/briefing/dossec/1993/9302/930210dossec.html>.

201 Power, *A Problem from Hell*, 297, 301.

202 “Nomination of Warren M. Christopher to be Secretary of State: Hearing before the Committee on Foreign Relations,” January 13 and 14, 1993 (“I do say about this, Senator, not wanting to be evasive, I want to get around and talk with some of my counterparts in Europe, do that either here or there, to try to understand better why it is that they have been so reluctant on this issue, whether they are not as much concerned about the near-genocidal conditions, or perhaps genocidal conditions, as it looks from a distance”), http://www.archive.org/stream/nominationofwarr00unit/nominationofwarr00unit_djvu.txt.

203 As an example, in response to questions from Senator Dennis DeConcini at a Senate Appropriations Committee in March about whether he had any doubt that genocide has occurred, Christopher said: “There’s no doubt in my mind that rape and ethnic cleansing and other almost indescribable acts have taken place and it certainly rises to the level that is tantamount to genocide. The technical definition is not perhaps what’s important here, but what is important is that it is atrocious conduct, it is atrocity after atrocity and must be stopped.” Power, *A Problem from Hell*, 298.

204 The exchange, with Representative McCloskey, was as follows:

Rep. McCloskey: Previously to the Congress in response to a question as to whether or not genocide has taken place in Bosnia, the reply from State was that acts tantamount to genocide have taken place. I think that's not a clear answer to a very important and policy-driving question. Would you order a clear, explicit determination, yes or no, if the outrageous Serb systematic barbarism amounts to genocide?

Secretary Christopher: With respect to the definition of the circumstances in Bosnia, we certainly will reply to that. That is a legal question that you've posed. I've said several times that the conduct there is an atrocity. The killing, the raping, the ethnic cleansing is definitely an atrocious set of acts. Whether it meets the technical legal definition of genocide is a matter that we'll look into and get back to you.

Power, *A Problem from Hell*, 300.

205 Richard Johnson, "The Pinstripe Approach to Genocide," in *The Conceit of Innocence: Losing the Conscience of the West in the War in Bosnia* (College Station: Texas A&M University Press, 1997), 69-70. A similar formulation was rejected in September. Ibid.

206 Christopher said:

We have been filing reports with the United Nations for some time, this is the seventh or eighth report of that kind. If you look at these, you will see indications of atrocities by all three of the parties against each other.

The level of hatred is just incredible. It is somewhat different than the holocaust. It is easy to analogize this with the Holocaust, but I never heard about genocide against the Germans by the Jews. But here you have problems on all sides which makes this difficult to deal with.

"Foreign Assistance Legislation for Fiscal Year 1994," Hearings before the House Committee on Foreign Affairs, 103rd Congress: Parts 1 and 8, March 3, April 21, May 12 and 18, and June 8, 1993, 118.

207 Richard Johnson, "Some Call it Genocide," *The New York Times*, February 13, 1994, <https://www.washingtonpost.com/archive/opinions/1994/02/13/some-call-it-genocide/89b1e141-eca0-4f49-a872-14b661afdb83>. The press spokesperson said: "The Secretary never suggested that the Bosnian Government is guilty of genocide. In his testimony before the House Foreign Affairs Committee on Tuesday, he stated that all sides in this conflict have been guilty of atrocities." State Department Daily Press Briefing, May 21, 1993, https://permanent.access.gpo.gov/partnerships/DOSFAN/dosfan.lib.uic.edu/ERC/briefing/daily_briefings/1993/9305/930521db.html.

208 See <http://fedora.dlib.indiana.edu/fedora/get/iudl:1742110/OVERVIEW>.

209 The memorandum itself has not been publicly released; the only confirmation we have for the date of the memorandum is the reference to it as an attachment to the June 25, 2004 memorandum on Darfur. The Darfur memorandum also refers to a second Bosnia memorandum, dated February 10, 1993, which has also not been publicly released. A former State Department official told the authors that the February 1993 memorandum was submitted to seek the secretary's authorization to support a resolution of the UN Human Rights Commission that quoted language from the December 1992 General Assembly resolution equating ethnic cleansing with genocide. This presumably refers to the resolution "Rape and abuse of women in the territory of the former Yugoslavia" adopted by consensus on February 23, 1993, http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-1993-8.doc.

It is not entirely clear how the phrase "acts of genocide" emerged as the phrase of choice. One former official recalls, in a meeting that he and a colleague had been granted with Christopher and other senior officials in the spring of 1993 to discuss a new dissent memorandum, asking the secretary if he thought the Bosnian Serb atrocities constituted genocide. Christopher turned to Samuel Lewis, then the department's head of policy planning, and asked what he thought. Lewis hesitated and replied that he thought the abuses probably were "acts of genocide," and Christopher seemed to embrace the distinction. Author interview with Jim Hooper.

210 Power, *A Problem from Hell*, 321; and Frank McCloskey, “Christopher, Resign,” *The New York Times*, October 24, 1993, <https://www.nytimes.com/1993/10/24/opinion/christopher-resign.html>.

211 Johnson, “The Pinstripe Approach to Genocide,” 68-69. In January, McCloskey went public with the story about Christopher having withdrawn his approval for using the phrase “acts of genocide”—calling it “an unconscionable act of pique”—leading to another round of inconclusive exchanges with the department press spokesperson. David Hawkings, “McCloskey pushes ‘genocide’ label,” *Kokomo Tribune*, January 7, 1994, <https://kokomo.newspaperarchive.com/kokomo-tribune/1994-01-07/page-2/>.

212 US Department of State, *Bosnia-Herzegovina Human Rights Practices*, 1993, January 31, 1994, (“Supported by the Serbian authorities in Belgrade, the BSA began a brutal campaign of terror—in which acts of genocide took place—to establish an ethnically pure state linking Serb-occupied territory in Croatia with Serbia/Montenegro to form ‘greater Serbia’”) (emphasis added), https://permanent.access.gpo.gov/partnerships/DOSFAN/dosfan.lib.uic.edu/ERC/democracy/1993_hrp_report/93hrp_report_eur/Bosnia-Herzegovina.html.

213 See, e.g., State Department Daily Press Briefing, January 6, 1994, https://permanent.access.gpo.gov/partnerships/DOSFAN/dosfan.lib.uic.edu/ERC/briefing/daily_briefings/1994/9401/940106db.html.

214 State Department Memorandum, “Rwanda: Is it ‘genocide’ within the meaning of the 1948 Genocide Convention?,” April 28, 1994, <https://www.foia.state.gov/searchapp/DOCUMENTS/Waterfall/162579.pdf>.

215 See, e.g., Colum Lynch, *Politico*, “Genocide Under Our Watch,” April 16, 2015, <https://foreignpolicy.com/2015/04/16/genocide-under-our-watch-rwanda-susan-rice-richard-clarke>.

Just the previous fall, the Clinton Administration had described its own lack of response to an earlier wave of mass killing in Africa’s Great Lakes region—this one in neighboring Burundi—not as a failure of policy, but as an indication of the administration’s commitment to managing the pressures to support a peacekeeping response. Thus, Ambassador David Scheffer recalled: “I briefed congressional staffers in November 1993 that our inaction to the massacres of tens of thousands of both Tutsi and Hutu in Burundi demonstrated the Clinton administration’s reason-headed approach to peacekeeping. We were not going to rush into each and every humanitarian catastrophe, I confidently reported.” See David Scheffer, *All The Missing Souls: A Personal History of the War Crimes Tribunals*, (Princeton: Princeton University Press, 2012), 48.

216 Elaine Sciolino, “For West, Rwanda Is Not Worth the Political Candle,” *The New York Times*, April 15, 1994, (“Even hawkish Republicans in Congress who support air strikes in Bosnia have no appetite for intervening in Rwanda, which Robert Dole, the Republican leader in the Senate, made clear on the CBS News program ‘Face the Nation’ last Sunday. ‘I don’t think we have any national interest here,’ he said. ‘I hope we don’t get involved there. I don’t think we will. The Americans are out. As far as I’m concerned in Rwanda, that ought to be the end of it.’”), <https://www.nytimes.com/1994/04/15/world/for-west-rwanda-is-not-worth-the-political-candle.html>.

217 Power, *A Problem from Hell*, 367-368.

218 In his memoir, Ambassador Scheffer recalls a meeting occurring as early as April 12 “where we talked about ‘acts of genocide’ appearing to unfold in Rwanda, and yet we were not prepared to conclude that ‘genocide’ actually was occurring. I advised that this really was a distinction without a meaningful difference for the public.” Scheffer, *All The Missing Souls*, 52. See also CIA National Intelligence Daily, April 23, 1994, 10, at <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB117/Rw34.pdf>; and State Department INR report “Rwanda: Genocide and Partition,” April 26, 1994, <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB117/Rw23.pdf>.

219 State Department Press Briefing, April 28, 1994, https://permanent.access.gpo.gov/partnerships/DOSFAN/dosfan.lib.uic.edu/ERC/briefing/daily_briefings/1994/9404/940428db.html.

220 Telegram from US Department of State, “Official-Informal,” State Department 119567, May 6, 1994, https://www.foia.state.gov/searchapp/DOCUMENTS/5-FY2014/F-2013-05723/DOC_0C05400104/C05400104.pdf.

221 US Committee for Refugees, “Responding to the Rwanda Crisis: Declare Genocide, and Other Policy Steps,” May 3, 1994, <https://www.foia.state.gov/searchapp/DOCUMENTS/Waterfall/162934.pdf>.

222 Human Rights Watch, *Leave None to Tell the Story: Genocide in Rwanda*, n.d., <https://www.hrw.org/reports/1999/rwanda/Geno15-8-02.htm>. See Presidential Statement S/PRST/1994/21, April 30, 1994. (“In this context, the Security Council recalls that the killing of members of an ethnic group with the intention of destroying such a group in whole or in part constitutes a crime punishable under international law”).

223 The US Mission to Geneva, which represented the United States to the Council, specifically requested “prompt guidance” on “whether the massacres in Rwanda can be labeled as genocide.” See Cable from USMISSION Geneva, May 13, 1994, https://www.foia.state.gov/searchapp/DOCUMENTS/5-FY2014/F-2013-05723/DOC_0C05400172/C05400172.pdf.

224 See John Shattuck, *Freedom on Fire: Human Rights Wars & America’s Response* (Cambridge: Harvard University Press, 2003), 55-56; and National Security Archive, “The US and the Genocide in Rwanda 1994: Evidence of Inaction,” August 20, 2001, <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB53/index.html> (“A previous memo dated May 16, sought approval to use the term ‘genocide has occurred,’ but this formulation didn’t hold.”).

225 Memorandum for the Secretary from George E. Moose, John Shattuck, Douglas J. Bennet, and Conrad Harper, “Has Genocide Occurred in Rwanda?,” Department of State, May 20, 1994, <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB53/rw052194.pdf>.

226 Shattuck, *Freedom on Fire*, 55-56.

227 “Legal Analysis,” Tab 2 to May 20, 1994 Rwanda memorandum, <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB53/rw051694.pdf>.

228 May 20, 1994 Rwanda memorandum.

229 See, e.g., *Prosecutor v. Akayesu*, Judgment, ICTR-96-4-T, September 2, 1998, paragraph 702.

230 For example, in a 1993 order of the International Court of Justice in what would become the *Bosnia v. Serbia* case, the court’s judges stated that the Yugoslav government should ensure that certain armed units “do not commit any acts of genocide” (<https://www.icj-cij.org/files/case-related/91/091-19930408-ORD-01-00-EN.pdf>); in 2004, the Security Council resolution creating a commission of inquiry for Darfur asked the commission “to determine also whether or not acts of genocide have occurred” (<https://www.un.org/press/en/2004/sc8191.doc.htm>); and the Council of Europe’s Parliamentary Assembly in 2016 adopted a resolution recommending a number of steps that states should take with respect to “persons who might have perpetrated acts of genocide or other serious crimes prohibited under international law...” (<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22482&lang=en>).

231 Transcript of hearing before Senate Foreign Relations Committee, June 30, 1994, relevant portion <https://www.foia.state.gov/searchapp/DOCUMENTS/Waterfall/164056.pdf>.

232 This point is similar to the one made by the department’s deputy legal adviser in 1989 regarding Cambodia, as described earlier, and is perhaps suggested by the portion of the May 20 memorandum that says there is a strong basis to conclude “that *some* of the killings and other listed acts” could qualify as genocide. “Has Genocide Occurred in Rwanda?” memorandum (emphasis added). Similarly, in the instruction cable for the US delegation to the special session of the Commission on Human Rights to deal with Rwanda in May 1994, the delegation was authorized to use “formulations that some, but not all of the killings in Rwanda are genocide,” but instructed not “to agree to the characterization of any specific incident as genocide or to agree to any formulation that indicates that all killings in Rwanda are genocide.” Instruction cable from US Department of State to US Mission in Geneva, May 24, 1994, <https://www.foia.state.gov/searchapp/DOCUMENTS/Waterfall/163346.pdf>.

233 See State Department June 16, 1994 press guidance, <https://www.foia.state.gov/searchapp/DOCUMENTS/Waterfall/163876.pdf> (“We have used the term ‘acts of genocide’ in both Bosnia and Rwanda to emphasize indi-

vidual responsibility for the horrendous acts in Rwanda. The focus on ‘acts of genocide’ stresses that individuals are accountable for specific acts in which they engage”).

234 See February 3, 1994 press guidance, <https://www.foia.state.gov/searchapp/DOCUMENTS/foiadocs/6305.PDF> (“IF PRESSED: The Department uses the formulation ‘acts of genocide’ in order to emphasize that ‘genocide,’ as defined in the Genocide Convention of 1948, consists of specific acts including killing and inflicting bodily harm, committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group.”).

235 See Memorandum from Douglas P. Mulholland to Mr. Kanter, January 11, 1993, <https://www.documentcloud.org/documents/2259106-19930111-bosnia-actions-contributing-to-genocide.html> (noting the lack of clear proof of genocidal intent “among Bosnian Serb and Serbian leaders”).

236 Johnson, “The Pinstripe Approach to Genocide,” 69-70.

237 June 16, 1994 press guidance.

238 See, e.g., Secretary Christopher’s handwritten note inquiring to a staffer, with respect to a passage in a June 11, 1994, *The Washington Post* article that states “Signatories [to the Genocide Convention] are obliged to ‘prevent and punish’ such acts,” “What are our obligations under this provision?,” June 11, 1994, <https://www.foia.state.gov/searchapp/DOCUMENTS/Waterfall/163903.pdf>.

239 Moreover, US officials hedged away even from statements that “acts of genocide” had occurred, equivocating on basic factual points in ways that Christopher’s authorization should have settled. The department instructed the US delegation in Geneva on May 24 to refer to “possible acts of genocide” and even to assert that the United States was awaiting the investigation of a newly appointed United Nations special rapporteur *before* making determinations as to whether “acts of genocide” had occurred. May 24, 1994 instruction cable. Later, a department spokesperson similarly deferred to the United Nations special rapporteur when he was asked which group was committing acts of genocide in Rwanda, and against which group. June 13, 1994 daily press briefing. None of these evasions or hedging language were required by limits in Christopher’s authorization, or uncertainties in the factual and legal analysis he approved.

240 Douglas Jehl, “Officials Told to Avoid Calling Rwanda Killings ‘Genocide,’” *The New York Times*, June 10, 1994, <http://www.nytimes.com/1994/06/10/world/officials-told-to-avoid-calling-rwanda-killings-genocide.html>.

241 State Department Daily Press Briefing, June 10, 1994, https://permanent.access.gpo.gov/partnerships/DOSFAN/dosfan.lib.uic.edu/ERC/briefing/daily_briefings/1994/9406/940610db.html.

242 Press Availability by US Secretary of State Warren Christopher and Russian Foreign Minister Andrei Kozyrev, Istanbul, June 10, 1994, partial copy at <https://www.foia.state.gov/searchapp/DOCUMENTS/Waterfall/163593.pdf>.

243 See State Department Daily Press Briefing, June 13, 1994, <https://www.foia.state.gov/searchapp/DOCUMENTS/Waterfall/163906.pdf>; Christopher, “Remarks at White House Conference on Africa,” June 27, 1994, <http://web.archive.org/web/20100707141421/http://dosfan.lib.uic.edu/ERC/briefing/dispatch/1994/html/Dispatchv5no27.html> (Christopher himself repeats the “acts of genocide” formulation).

244 Transcript of hearing before Senate Foreign Relations Committee, June 30, 1994, low-quality copy of relevant portion at <https://www.foia.state.gov/searchapp/DOCUMENTS/Waterfall/164056.pdf>.

245 David Halberstam, *War in a Time of Peace: Bush, Clinton, and the Generals* (New York: Scribner, 2002); Power, *A Problem from Hell*.

246 See sections on Kosovo, Darfur, and ISIS below.

247 State Department Daily Press Briefing, November 13, 2015 (“I think the reason you get so many questions about this is that there’s a history here over the State Department and one of your predecessors not playing straight with the question of whether or not a genocide had occurred and where the spokesperson at the time said that acts of

genocide had been committed, but would not say that genocide had been committed”), <https://2009-2017.state.gov/r/pa/prs/dpb/2015/11/249462.htm>.

248 Serge Brammertz, “Reflections on Genocide,” *Studies in Transnational Legal Policy*, Vol. 40:57 (August 2008), citing *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice, 33-38, June 16, 2006.

249 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, paragraph 178; *Bosnia v. Serbia*, paragraphs 148, 209-210. Decisions regarding genocide in the municipalities remain under appeal.

250 See Rome Statute of the International Criminal Court, Articles 61 (confirmation of charges) and 66 (conviction).

Much, of course, depends on precisely what is being said about genocide. For example, it seems fair to accord more leeway where the accusation being made is that there is a risk of genocide, or that genocide may have occurred, or that the views being expressed are of the type that as a legal matter would ultimately be for a court to decide.

251 See, e.g., Richard Johnson, “Some Call it Genocide,” *The Washington Post*, February 13, 1994, https://www.washingtonpost.com/archive/opinions/1994/02/13/some-call-it-genocide/89b1e141-eca0-4f49-a872-14b661afd-b83/?noredirect=on&utm_term=.4a2787adcc2e (stating that there were not “any internal taskings within the State Department or to the CIA to build up cases against these leaders”); Dan Oberdorfer, “US Aide Resigns Over Balkan Policy,” *The Washington Post*, August 26, 1992, https://www.washingtonpost.com/archive/politics/1992/08/26/us-aide-resigns-over-balkan-policy/a046cd13-51d3-41e9-84dd-71ea7d9bfd11/?utm_term=.cabb357071b1 (inability to persuade State Department officials to investigate charges vigorously among greatest frustrations of resigning Yugoslavia desk officer).

252 Johnson, “The Pinstripe Approach to Genocide,” 66-67.

253 US Resolutions 764, 771, and 780.

254 Jon W. Western, “US Policy and Human Rights in Bosnia: The Transformation of Strategic Interests,” US Institute for Peace, n.d., http://www.mtholyoke.edu/~jwestern/ps62/bosnia.htm#_ftn26.

255 US resolutions 808 (former Yugoslavia) and 935 (Rwanda). For an overview of these steps taken to bring into existence and support the Yugoslavia Tribunal, see James O’Brien, “The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia,” *American Journal of International Law*, Vol. 87: 639 (October 1993).

256 *Bosnia v. Serbia*, paragraphs 431-432 (emphasis added).

257 Memorandum to the Deputy Secretary from Legal Adviser William Taft IV, Assistant Secretary Lorne Craner, Ambassador Pierre Prosper, and Acting Assistant Secretary Donald Yamamoto, “Genocide and Darfur,” June 25, 2004, https://nsarchive2.gwu.edu/NSAEBB/NSAEBB356/20040625_darfur.PDF.

258 Burundi’s demographic composition is similar to Rwanda’s, but—unlike in Rwanda—its Tutsi minority retained power at independence in 1959.

259 Final Report of the International Commission of Inquiry for Burundi, attachment to Letter Dated July 25, 1996 from the Secretary-General to the President of the Security Council, S/1996.682, August 22, 1996, paragraphs 92-104, <https://undocs.org/S/1996/682>.

260 Scheffer, *All The Missing Souls*, 48 (“I briefed congressional staffers in November 1993 that our inaction to the massacres of tens of thousands of both Tutsi and Hutu in Burundi demonstrated the Clinton administration’s reason-headed approach to peacekeeping. We were not going to rush into each and every humanitarian catastrophe, I confidently reported.”).

261 The Agreement is reproduced as an Annex to the Letter dated March 8, 1995 from the Chargé d'affaires a.i. of the Permanent Mission of Burundi to the United Nations addressed to the Secretary-General, UN Doc. No. A/50/94, S/1995/190, March 8, 1995, <http://undocs.org/S/1995/190>. Article 36 provides: "It is requested that an international judicial fact-finding mission be formed within 30 days; it shall be composed of competent and impartial persons to investigate the coup d'état of 21 October 1993 and what the political partners have agreed to call genocide without prejudice to the outcome of the independent national and international investigations, as well as the various political crimes that have been committed since October 1993."

262 Robert Krueger and Kathleen Tobin Krueger, *From Bloodshed to Hope in Burundi: Our Embassy Years During Genocide* (Austin: University of Texas Press, 2007), 212.

263 Author interview with Richard Bogosian, July 12, 2018.

264 Krueger and Krueger, *From Bloodshed to Hope in Burundi*, 212-213.

265 Author interview with former State Department Africa bureau official.

266 See Anthony Lake, "Recent US Initiative on Burundi," Memorandum for the President, May 20, 1996, <https://www.archives.gov/files/declassification/iscap/pdf/2013-040-doc18.pdf>; and William J. Clinton, "Statement on the Appointment of the Special Envoy for Burundi Peace Negotiations," June 17, 1996, <https://www.gpo.gov/fdsys/pkg/WCPD-1996-06-24/pdf/WCPD-1996-06-24-Pg1067-2.pdf>.

267 John Shattuck, "More than Words are Needed to Stop Terror in Burundi," *Christian Science Monitor*, June 24, 1996, <https://www.csmonitor.com/1996/0624/062496.opin.opin.1.html>; see also "US Crusading To Avert Another African Bloodbath Acts of genocide in Burundi," *San Francisco Chronicle*, May 23, 1996 ("We consider what has been going on as clearly acts of genocide against ethnic groups"), <https://reliefweb.int/report/burundi/us-crusading-avert-another-african-bloodbath-acts-genocide-burundi>. David J. Scheffer, "International Judicial Intervention," *Foreign Policy*, No. 102 (Spring, 1996), 34.

268 International Commission of Inquiry for Burundi, final report, August 22, 1996, paragraph 483, <https://undocs.org/S/1996/682>.

269 *Ibid.*, paragraphs 214-216.

270 Author interview with State Department analyst.

271 US Department of State, "Burundi Country Report on Human Rights Practices for 1996," January 30, 1997, https://1997-2001.state.gov/global/human_rights/1996_hrp_report/burundi.html.

272 Transcript of press briefing, "1996 Country Reports on Human Rights Practices," January 30, 1997, <https://permanent.access.gpo.gov/partnerships/DOSFAN/1997-2001.state.gov/www/statements/970130-1.html>.

273 See Association for Diplomatic Studies and Training Foreign Affairs Oral History Project, Interview of Ambassador Peter W. Galbraith, March 19, 1999, 77-79, <https://adst.org/wp-content/uploads/2012/09/Galbraith-Peter-W.pdf>; author interview with Peter Galbraith.

274 See Human Rights Watch, *Genocide in Iraq—The Anfal Campaign Against the Kurds* (1993), <https://www.hrw.org/reports/1993/iraqanfal/>; Human Rights Watch, *Bureaucracy of Repression—The Iraqi Government in its own Words* (1994), <https://www.hrw.org/legacy/reports/1994/iraq/TEXT.htm>.

275 Judith Miller, "Iraq Accused: A Case of Genocide," *The New York Times*, January 3, 1993, <https://www.nytimes.com/1993/01/03/magazine/iraq-accused-a-case-of-genocide.html>. Aryeh Neier, "Putting Saddam Hussein on Trial," *New York Review of Books*, September 23, 1993, <https://www.nybooks.com/articles/1993/09/23/putting-saddam-hussein-on-trial/>.

276 Author interviews with Richard Dicker and Kenneth Roth. The US reservation opting out of the ICJ's jurisdiction under the Genocide Convention effectively precluded the United States from bringing a claim itself.

277 Author interviews with Richard Dicker, June 15, 2018, and Kenneth Roth, July 20, 2018.

278 Dicker interview. See also Memorandum from Professor Lori F. Damrosch, Columbia University School of Law, *Kurdish Genocide Case—Legal Memorandum for Governments*, June 4, 1993, and Letter from Professor Lori F. Damrosch to State Department Legal Adviser Conrad Harper, November 17, 1994, on file with the authors.

279 Joost Hiltermann, “Elusive Justice: Trying to Try Saddam,” *Middle East Report*, No. 215 (Summer 2000), <https://www.jstor.org/stable/1520153>.

280 Dicker interview.

281 See William J. Clinton, Letter to Congressional Leaders Reporting on Iraq’s Compliance With United Nations Security Council Resolutions, October 27, 1994, (quoting the finding of a UN special rapporteur that the Iraqi government “may have committed violations of the 1948 Genocide Convention” and that “the extent and gravity of reported violations place the survival of the Kurds in jeopardy”), <http://www.presidency.ucsb.edu/ws/index.php?pid=49379>.

282 The exchange was as follows:

Pell: “Is it your thought that the United States will bring or participate in a genocide case against Iraq in the ICJ, the International Court of Justice?”

Christopher: “Yes, Mr. Chairman, I would support such a case very strongly.”

Pell: “Thank you. Should a case against individual Iraqis for crimes against humanity and genocide be brought in a specially constituted court, or even in a US court? In other words, should it be a United States, a specially constituted court, or the ICJ?”

Christopher: “Mr. Chairman, I do not have a fixed view about the forum for such proceedings. I do think these war crimes, atrocities, genocide crimes ought to be pursued in the best possible forum, whether it be the ICJ or a new forum set up for that purpose. I do not have a fixed view on that. I do have a view that the matter ought to be pursued vigorously.”

Nomination of Warren Christopher to be Secretary of State: Hearing Before the Committee on Foreign Relations, United States Senate, 103^d Cong., 1st Sess., January 13-14, 1993, http://www.archive.org/stream/nominationofwar-r00unit/nominationofwarr00unit_djvu.txt.

283 A request for the memorandum under the Freedom of Information Act (FOIA) is still under review.

284 Dicker interview.

285 Author interview with Angela Dickey, September 5, 2018; Memorandum from Kenneth Roth, Executive Director, Human Rights Watch, Proposed ICJ action against Iraq on basis of Genocide Convention, February 9, 1995 (an ICJ ruling that Iraq was responsible for genocide “would reinforce the fragile legitimacy of the international protection being provided to the Kurds today” and “encourage the international community to continue protective measures”), on file with authors.

286 Hiltermann, *Elusive Justice*; author email exchange with Joost Hiltermann.

287 Author interview with David Bame, October 1, 2018; Hiltermann, *Elusive Justice*.

288 One participant recalled that the matter had been raised during the open-to-the-public December 1995 meeting of the State Department’s Advisory Committee on Public International Law, though the State Department lawyer discussing the issue caveated that he was hampered in what he could say because of the sensitive nature of the diplomatic efforts. Author email interview with Lori Damrosch.

289 Bame interview.

290 Hiltermann, *Elusive Justice*.

291 See, for example, remarks by David Scheffer on October 29, 1999 (referring to “crimes against humanity and possibly genocide in the ‘Anfal’ campaign against the Iraqi Kurds”), https://1997-2001.state.gov/policy_remarks/1999/991029_scheffer_un_iraq.html; and remarks by David Scheffer on September 18, 2000 (“Saddam Hussein recognizes that he is vulnerable to calls for accountability for his crimes against humanity, genocide, and war crimes”; and challenging anyone to read HRW’s reports and “come to any different conclusion” than that “the Anfal campaign was genocide”), https://1997-2001.state.gov/policy_remarks/2000/000918_scheffer_iraq.html.

292 See, e.g., Jennifer Trahan, “A Critical Guide to the Iraqi High Tribunal’s Anfal Judgment: Genocide Against Kurds,” *Mich. J. Int’l Law*, Vol. 30:305 (2009).

293 UN Security Council resolution 1199, September 23, 1999, <http://unscr.com/en/resolutions/doc/1199>.

294 Power, *A Problem from Hell*, 447-449.

295 Karen E. Smith, *Genocide and the Europeans* (Cambridge: Cambridge University Press, 2010), 192; White House Press Briefing by Press Secretary Joe Lockhart, March 29, 1999, <http://www.presidency.ucsb.edu/ws/index.php?pid=47719>.

296 Scheffer, *All The Missing Souls*, 267-269.

297 David J. Scheffer, “Remarks at the Conference on Atrocities Prevention and Response: Atrocities Prevention: Lessons from Rwanda,” US Holocaust Memorial Museum, Washington, D.C., October 29, 1999, https://1997-2001.state.gov/policy_remarks/1999/991029_scheffer_rwanda.html.

298 Power, *A Problem from Hell*, 467. (“As one State Department official who fought the application of the term [genocide] later recalled, ‘My view was, “Why do we need to put the genocide label on it?” People are being killed. Women are being sexually violated and stabbed to death.’ As he put it, ‘Let’s just look at the facts. The facts necessitate action. This was a systematic attack against a civilian population. That is enough. Everyone is caught up in the “Is it or isn’t it?” We don’t need that debate.’”)

299 David Scheffer, “On-the Record Briefing on Atrocities in Kosovo,” released by the Office of the Spokesman, US Department of State, Washington, D.C., April 9, 1999, https://phdn.org/archives/www.ess.uwe.ac.uk/Kosovo/Kosovo-Current_News29.htm. See also Daily Press Briefing by Spokesperson James P. Rubin, March 29, 1999, (“There are indicators that genocide is unfolding in Kosovo, but we are looking at a mixture of confirmed and unconfirmed reports at this time”), <https://1997-2001.state.gov/briefings/9903/990329db.html>; Daily Press Briefing by Spokesperson James P. Rubin, March 30, 1999, (“We have very clear indicators that genocide is unfolding in Kosovo. We are looking at a mixture of confirmed and unconfirmed reports at this time”), <https://1997-2001.state.gov/briefings/9903/990330db.html>; and Madeleine Albright, “Remarks at the Brookings Institution, National Issues Forum: A New NATO for a New Century,” Washington, D.C., April 6, 1999 (“We are resolute, because it is in our interests and because it is right to stop the ethnic cleansing, war crimes, crimes against humanity, and the other indicators of genocide that we see”), <https://1997-2001.state.gov/publications/dispatch/April1999.pdf>, 7.

300 Scheffer, *All The Missing Souls*, 269.

301 Fourteen daily or weekly reports and two summary reports from the period after the air campaign began are available online, as well as a number of reports produced earlier, https://1997-2001.state.gov/regions/eur/kosovo_more.html.

302 “Report on the Visit of Ambassador Scheffer to the Border Between The Former Republic of Macedonia and Kosovo, April 1-2, and Refugee Accounts of Atrocities,” statement by US Department of State, Washington, D.C., April 7, 1999, https://phdn.org/archives/www.ess.uwe.ac.uk/Kosovo/Kosovo-Current_News22.html; James P. Rubin, “Responsibility of Individual Yugoslav Army and Ministry of Internal Affairs Commanders for Crimes Committed by Forces under Their Command in Kosovo,” Press Statement, April 7, 1999, <https://1997-2001.state.gov/briefings/statements/1999/ps990407.html>.

303 March 29, 1999, Rubin press conference (“There is no reason, however, to await confirmation of genocide because we can clearly say crimes against humanity are being committed by Milosevic’s forces. ... Current criminal activity by Milosevic’s forces is so great it warrants the full response we are now embarked upon with our NATO allies”); March 30, 1999, Rubin press conference (“But we don’t see any need to await confirmation of genocide; clearly, there are crimes against humanity occurring in Kosovo. Our response to this criminal activity by Milosevic’s forces is taking place right now. The full response we are now embarked upon with our NATO allies is fully justified by the crimes against humanity we know are being committed. ... Let me say we have been and are taking significant action through NATO right now to confront the criminal conduct of the Yugoslav Army and police in Kosovo as a result of the campaign that’s going on. Declaring it genocide wouldn’t change our determination to continue to pursue action through NATO.”).

304 David J. Scheffer, “The United States: Measures to Prevent Genocide and Other Atrocities,” Address at the Conference on Genocide and Crimes Against Humanity: Early Warning and Prevention, US Holocaust Memorial Museum, Washington, D.C., December 10, 1998 (“I have focused on genocide. History, however, teaches us that we have to be prepared to respond to situations of widespread or systematic killing, rape, or other abuses—and that those deserve the same moral condemnation, criminal prosecution, and efforts to prevent and to punish that we give to the crime of genocide. Crimes against humanity can occur—and have occurred—in situations where the specific requirements of genocide have not been met. We must not underestimate their significance.”), https://1997-2001.state.gov/policy_remarks/1998/981210_scheffer_genocide.html.

305 Transcript of US Department of State Daily Press Briefing by Spokesperson James P. Rubin, March 30, 1999 (“Question: Do you know what the legal implications are of a finding of genocide? Mr. Rubin: My understanding is it would be no different than what we’re doing right now, which is conducting military operations against the Serbs in Kosovo. Question: No, no (inaudible) prosecution. The United States took a long time subscribing to the concept of genocide because isolationists felt it would involve the United States in all sorts of international disputes that maybe the US would have a different view of. So if it’s genocide, that means the US is obliged by treaty to support, as you said, war crimes, et cetera. It’s more than just bombing the Serbs.”), <https://1997-2001.state.gov/briefings/9903/990330db.html>.

306 See Press Release, The Prosecutor’s Statement regarding the Tribunal’s jurisdiction over Kosovo (March 10, 1998), <http://www.icty.org/en/press/prosecutors-statement-regarding-tribunals-jurisdiction-over-kosovo>.

307 Scheffer, *All The Missing Souls*, 271-274, 277-278.

308 See, e.g., William S. Cohen, Press Conference at NATO Headquarters, April 7 1999 (“We will reject any settlement that freezes the result of Milosevic’s genocide and rewards him for his brutality”), <https://web.archive.org/web/20100228231026/http://www.defense.gov/transcripts/transcript.aspx?transcriptid=582>; and Madeleine Albright, “Testimony before the House Appropriations Subcommittee on Foreign Operations,” Washington, D.C., April 15, 1999 (“President Milosevic has unleashed a rampage of ethnic cleansing and genocide directed at the expulsion or total submission of the Kosovo Albanian community”), <https://1997-2001.state.gov/publications/dispatch/April1999.pdf>, 1.

309 US Department of State, Daily Press Briefing, March 30, 1999, <https://1997-2001.state.gov/briefings/9903/990330db.html>.

310 Scheffer, *All The Missing Souls*, 267.

311 White House press release, “President Bush Meets with Special Envoy for Sudan Rich Williamson,” January 17, 2008, <https://2001-2009.state.gov/p/af/rls/2008/99449.htm>.

312 Rebecca Hamilton, *Fighting for Darfur: Public Action and the Struggle to Stop Genocide* (New York: Palgrave Macmillan, 2011), 18-19. As early as 1999, the US House of Representatives passed a resolution condemning the Sudanese government for “deliberately and systematically committing genocide” in southern Sudan and other

regions along the country's north-south divide. June 16, 1999, House Concurrent Resolution 75, <https://www.congress.gov/bill/106th-congress/house-concurrent-resolution/75/text>.

313 Hamilton, *Fighting for Darfur*, 31.

314 Hamilton, *Fighting for Darfur*, 30-31.

315 At a Security Council briefing on April 2, UN humanitarian chief Jan Egeland said that he would not use the term genocide to describe the situation in Darfur, but would call it a “systematic depopulation of areas,” <http://www.un.org/press/en/2004/egelandbrf.DOC.htm>. In response to a question from Parliament, the UK government agreed “that what is happening in Darfur cannot be described as genocide,” April 19, 2004, <https://hansard.parliament.uk/Lords/2004-04-19/debates/533ea630-0ae7-436c-877e-8073160050b4/WrittenAnswers>, as did Kofi Annan in June (“There are massive violations of international humanitarian law, but I am not ready to describe it as genocide or ethnic cleansing yet.”). Karen E. Smith, *Genocide and the Europeans*, 216. See also Eric Reeves, “Unnoticed Genocide,” *The Washington Post*, February 25, 2004, <https://www.washingtonpost.com/archive/opinions/2004/02/25/unnoticed-genocide/d9e40128-c203-4614-86fe-b23b1f98edd7> (arguing that the killings constitute genocide); “US Official Cites Possible ‘Ethnic Cleansing’ in Sudan,” Washington File, February 26, 2004, <http://sudantribune.com/spip.php?article1921> (quoting USAID Assistant Administrator Roger Winter saying “Is this an ethnic cleansing in motion that is taking place there [Darfur]? I don’t have the answer for that — I’m not a human rights lawyer, [but] it sure looks like that”); “Eight UN Human Rights Experts Gravely Concerned about Reported Widespread Abuses in Darfur, Sudan,” March 26, 2004, <http://www.mukeshkapila.org/download/Item%2038.pdf> (statement by UN human rights experts that quoted UN Resident Coordinator Mukesh Kapila saying that the ethnic cleansing is “comparable in character, if not scale, to the Rwanda genocide”).

316 A congressional hearing on the lessons of Rwanda focused heavily on their implications for Darfur. “Rwanda’s Genocide: Looking Back,” Subcommittee on Africa, Committee on International Relations, House of Representatives, April 22, 2004, http://commdocs.house.gov/committees/intlrel/hfa93231.000/hfa93231_of.htm.

317 Author interview with Michael Orona, July 31, 2018. The final State Department fact sheet on “Sudan: Ethnic Cleansing in Darfur,” April 27, 2004, is available at <https://2001-2009.state.gov/g/drl/rls/31822.htm>.

318 Orona interview.

319 UN HRC resolution 2004/128, April 23, 2004, http://www.un.org/en/ga/search/view_doc.asp?symbol=E/CN.4/2004/127.

320 Interestingly, the US ambassador to the Human Rights Commission, Richard Williamson, appears to have published an op-ed in the *Chicago Sun-Times* in the run-up to the session in which he stated that “African countries and the entire world must decide if we will act to try to stop the genocide in Darfur.” State Department officials involved at the time recall that this statement attracted little notice despite using genocide language and being presented in an official capacity. Orona interview and author interview with Ambassador Prosper, August 6, 2018. Summer 2004 issue of Williamson’s law firm’s “Pro Bono Update,” https://m.mayerbrown.com/Files/Publication/ff21b84e-b983-47a0-9a2e-9986e13182c7/Presentation/PublicationAttachment/338e60f9-aa40-4569-96c4-9b049540fd9f/news_l_probono_July04.pdf.

321 Samantha Power, “Dying in Darfur,” *New Yorker*, August 30, 2004 (“But genocide is a crime based on intent, and pin-pointing who has acted with the goal of destroying Darfur’s non-Arab groups will remain difficult unless investigators dig up the wells, examine the ravines, apprehend perpetrators, and ascertain the command-and-control relationships among Sudanese leaders, Air Force pilots, and Arab militiamen. This will not happen soon: the major powers have not established an intelligence-gathering operation in Darfur that is sophisticated enough to gauge either the death toll or the intentions of perpetrators”), <https://www.newyorker.com/magazine/2004/08/30/dying-in-darfur>.

322 Marc Lacey interview with Colin Powell, June 11, 2004, <https://20012009.state.gov/secretary/former/powell/remarks/33472.htm>.

323 Pierre-Richard Prosper testimony before House International Relations Committee hearing, “Confronting, Ending, and Preventing War Crimes in Africa,” June 24, 2004, https://2001-2009.state.gov/s/wci/us_releases/rm/33934.htm.

324 The State Department September 2004 report describes the team as “composed of independent experts recruited by the Coalition for International Justice (CIJ), and also included experts from the American Bar Association (ABA), DRL, and the State Department’s Bureau of Intelligence and Research (INR) as well as the US Agency for International Development (USAID).” See State Department, “Documenting Atrocities in Darfur,” September 2004, <https://2001-2009.state.gov/g/drl/rls/36028.htm>.

325 Prosper interview.

326 Orona interview.

327 2004 Darfur memorandum. Later in the process, Prosper recalls additionally reassuring Secretary Powell that the US government could further address its obligations by describing its follow-up action—calling for a UN investigation of violations of international humanitarian law and human rights law—as being taken under Article VIII of the Genocide Convention. Author interview with Ambassador Prosper.

328 Stephen Kostas, “Making the Determination of Genocide in Darfur,” in *Genocide in Darfur*, Samuel Totten and Eric Markusen, eds. (London: Routledge, 2006), 119-120: “Powell’s visible leadership on the issue appears to have cleared any internal opposition. Already heavily invested in a successful Sudan policy, Powell was increasingly dismayed by Sudan’s complete disregard for international calls to end the violence.”

329 Samantha Power, “Remember Rwanda, but Take Action in Sudan,” *The New York Times*, April 6, 2004, <http://www.nytimes.com/2004/04/06/opinion/remember-rwanda-but-take-action-in-sudan.html>; Power, “Dying in Darfur,” *New Yorker*, August 30, 2004.

330 For example, Powell said at a July 22, 2004 press conference:

“But I know that there is a great deal of interest in this issue, but it’s almost beside the point. The point is that we need to fix the security problem, the humanitarian problem now. Whatever you call it, it’s a catastrophe. People are dying at an increasing rate. And we can debate what it should be called or not be called, but that’s not the real issue. The real issue is how do we fix the security and how do we put the pressure on the Sudanese Government to do what needs to be done and how do we get the international community more fully mobilized.”

Powell, “Remarks with UN Secretary General Kofi Annan After Meeting,” July 22, 2004, <https://2001-2009.state.gov/secretary/former/powell/remarks/34627.htm>.

331 H.Con.Res. 467, “Concurrent Resolution Declaring Genocide in Darfur, Sudan,” July 22, 2004, <https://www.congress.gov/108/bills/hconres467/BILLS-108hconres467rfs.pdf>.

332 Courtney Radsch, “Holocaust Museum Calls Crisis in Sudan ‘Genocide Emergency,’” *The New York Times*, July 31, 2004, <https://www.nytimes.com/2004/08/01/international/africa/holocaust-museum-calls-crisis-in-sudan-genocide.html>.

333 Hamilton, *Fighting for Darfur*, p. 38.

334 Prosper interview.

335 Ibid. See also Kostas, “Making the Determination of Genocide in Darfur,” 2006 (“Prosper suggests proof of genocidal intent, the key legal dispute within the State Department at the time, ultimately came from information other than the ADT data”), 124.

336 Hamilton, *Fighting for Darfur*, 38.

337 Prosper interview.

338 Colin L. Powell, Testimony before the Senate Foreign Relations Committee, September 9, 2004, <https://2001-2009.state.gov/secretary/former/powell/remarks/36042.htm>; US Department of State, “Documenting Atrocities in Darfur,” September 9, 2004, <https://2001-2009.state.gov/g/drl/rls/36028.htm>.

339 “Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General,” January 25, 2005, 4, https://www.un.org/news/dh/sudan/com_inq_darfur.pdf.

340 Hamilton, *Fighting for Darfur*, 39; author interview with Michael Orona.

341 Hamilton, *Fighting for Darfur*, 68 (“Powell’s genocide determination effectively constrained the Americans from vetoing the referral; legally and politically the first state in history to invoke the Genocide Convention could hardly veto a resolution designed to punish the perpetrators.”). The ICC eventually issued an arrest warrant, which has yet to be fulfilled, against Sudanese President Bashir on genocide charges. In *The Case of The Prosecutor v. Omar Al-Bashir, Second Warrant of Arrest*, July 12, 2010, ICC-02/05-01/09, https://www.icc-cpi.int/CourtRecords/CR2010_04825.PDF.

342 Hamilton, *Fighting for Darfur*, xvii and 48.

343 Hamilton, *Fighting for Darfur*, 100, 102.

344 Hamilton, *Fighting for Darfur*, 200-204.

345 Author interview with Michael Orona.

346 Hamilton, *Fighting for Darfur*, 197.

347 Author interview with three current and former human rights activists.

348 See, e.g., the remarks made by Deputy Secretary Robert Zoellick in 2005 (transcript of State Department press briefing, April 14, 2005, <https://2001-2009.state.gov/s/d/former/zoellick/rem/44656.htm>) and Nicholas Kristof’s op-ed in response (“Day 113 of the President’s Silence,” *The New York Times*, May 3, 2005, <https://www.nytimes.com/2005/05/03/opinion/day-113-of-the-presidents-silence.html>); or the exchange between Special Envoy Andrew Natsios and Senator Robert Menendez at a 2007 Senate hearing (Senate Foreign Relations Committee, Transcript of “Darfur: A ‘Plan B’ to Stop Genocide?” Hearing, April 11, 2007, 32-34, <https://www.foreign.senate.gov/download/hearing-transcript-041107>).

349 See, for example, Hamilton, *Fighting for Darfur*, 104-106; and Eric Reeves, “State Department Dishonesty on Darfur,” *The New Republic*, February 9, 2006, <http://sudanreeves.org/2006/03/07/state-department-dishonesty-on-darfur-the-new-republic-february-9-2006>.

350 See, e.g., Hamilton, *Fighting for Darfur* (US Special Envoy for Sudan Natsios “believed that by pushing back against the use of the g-word during congressional questioning, he was building trust with Khartoum; advocates believed that when Congress pushed administration officials hard, it signaled to Khartoum that the American public would not let them get away with the softer line that they feared US officials visiting Khartoum might convey in private”), 107.

351 See, e.g., Jendayi Frazer’s comments on February 3, 2006 (“The United States has said that a genocide has occurred in Sudan and we continue to be concerned about the security environment in Darfur,” US State Department press briefing, <https://2001-2009.state.gov/p/af/rls/rm/2006/60376.htm>) and Condoleezza Rice’s comments two weeks later (“It is our view that genocide was committed and in fact it continues in Darfur,” Sue Pleming, Reuters, February 16, 2006, <http://www.sudantribune.com/spip.php?article14117>); or the back-and-forth between Obama Administration officials in 2009 (Mark Memmott, “Gration, Without Using Word, Agrees That ‘Genocide’ Continues In Darfur,” National Public Radio, October 19, 2009, https://www.npr.org/sections/thetwo-way/2009/10/envoy_to_sudan_without_using_w.html).

352 Simon-Skjodt Center for the Prevention of Genocide, United States Holocaust Memorial Museum, *Bearing Witness Trip Report, Our Generation is Gone: The Islamic State’s Targeting of Iraqi Minorities in Ninewa* (November 2015), <https://www.ushmm.org/m/pdfs/Iraq-Bearing-Witness-Report-111215.pdf>, 12.

353 State Department Daily Press Briefing, August 14, 2014, <https://obamawhitehouse.archives.gov/the-press-office/2014/08/07/statement-president>.

354 State Department Daily Press Briefing, September 10, 2014, <https://2009-2017.state.gov/secretary/remarks/2014/08/230401.htm>.

355 President Obama said:

In recent days, Yezidi women, men, and children from the area of Sinjar have fled for their lives. And thousands—perhaps tens of thousands—are now hiding high up on the mountain, with little but the clothes on their backs. They’re without food, they’re without water. People are starving. And children are dying of thirst. Meanwhile, ISIL forces below have called for the systematic destruction of the entire Yezidi people, which would constitute genocide. So these innocent families are faced with a horrible choice: descend the mountain and be slaughtered, or stay and slowly die of thirst and hunger.

I’ve said before, the United States cannot and should not intervene every time there’s a crisis in the world. So let me be clear about why we must act, and act now. When we face a situation like we do on that mountain—with innocent people facing the prospect of violence on a horrific scale, when we have a mandate to help—in this case, a request from the Iraqi government—and when we have the unique capabilities to help avert a massacre, then I believe the United States of America cannot turn a blind eye. We can act, carefully and responsibly, to prevent a potential act of genocide. That’s what we’re doing on that mountain.

Statement by the President, August 7, 2014, <https://obamawhitehouse.archives.gov/the-press-office/2014/08/07/statement-president>.

356 State Department Daily Press Briefing, August 14, 2014, <https://2009-2017.state.gov/r/pa/prs/dpb/2014/08/230614.htm>.

357 September 10, 2014, State Department Press Briefing.

358 The “nine lines of effort” were part of President Obama’s comprehensive strategy for defeating ISIS. The sixth—exposing ISIS’s true nature—was described as follows: “Clerics around the world have spoken up in recent weeks to highlight ISIL’s hypocrisy, condemning the group’s savagery and criticizing its self-proclaimed ‘caliphate.’ We are working with our partners throughout the Muslim world to highlight ISIL’s hypocrisy and counter its false claims of acting in the name of religion.” “Disrupting the flow of foreign fighters” was the seventh line of effort. White House Office of the Press Secretary, *Fact Sheet: The Administration’s Strategy to Counter the Islamic State of Iraq and the Levant (ISIL) and the Updated FY 2015 Overseas Contingency Operations Request*, November 7, 2014, <https://obamawhitehouse.archives.gov/the-press-office/2014/11/07/fact-sheet-administration-s-strategy-counter-is-lamic-state-iraq-and-leva>.

359 See, e.g., Michael Isikoff, “US weighs ‘genocide’ label for IS in Iraq — and more than a word may be at stake,” *Yahoo News*, November 12, 2015, <https://www.yahoo.com/news/u-s-weighs-genocide-label-1298023405674550.html>.

360 Author interviews with former State Department officials.

361 State Department Daily Press Briefing, November 13, 2015, <https://2009-2017.state.gov/r/pa/prs/dpb/2015/11/249462.htm>.

362 Consolidated Appropriations Act, 2016, Public Law 114-113, December 18, 2015, section 7033(d), <https://www.gpo.gov/fdsys/pkg/PLAW-114publ113/pdf/PLAW-114publ113.pdf>.

363 There was considerable doubt whether the administration would make a determination on genocide by the March 17 reporting deadline—see e.g., statement the day before the deadline by the State Department press spokesperson that “We are informing Congress today that we’re not going to make that deadline,” <https://2009-2017.state>.

[gov/r/pa/prs/dpb/2016/03/254764.htm](https://www.state.gov/r/pa/prs/dpb/2016/03/254764.htm), but, in the end, the secretary's determination was timed to the release of the report.

364 US Holocaust Memorial Museum, "Museum Releases Groundbreaking Report on Threats to Minorities in Iraq," November 12, 2015, <https://www.ushmm.org/information/press/press-releases/museum-releases-groundbreaking-report-on-threats-to-minorities-in-iraq>.

365 See, e.g., White House, Press Briefing by Josh Earnest, February 4, 2016, <https://obamawhitehouse.archives.gov/the-press-office/2016/02/04/press-briefing-press-secretary-josh-earnest-242016> ("So this Administration has worked hard to try to protect religious minorities. And there is no doubt that Christians are among those who have been and are being targeted. But as it relates to the specific use of the word—I guess the point that I'm trying to make is this: The decision to apply this term to this situation is an important one. It has significant consequences, and it matters for a whole variety of reasons, both legal and moral. But it doesn't change our response. And the fact is that this administration has been aggressive, even though the term has not been applied, in trying to protect religious minorities who are victims or potential victims of violence."); State Department Daily Press Briefing, March 16, 2016, <https://2009-2017.state.gov/r/pa/prs/dpb/2016/03/254764.htm>, ("acknowledging that genocide or crimes against humanity have taken place in another country would not necessarily result in any particular legal obligation of the United States" and that the United States was already "hell-bent" on destroying Daesh because "we already recognize what a murderous, barbaric terrorist group" it is).

366 *Genocide against Christians in the Middle East, A report submitted to Secretary of State John Kerry by the Knights of Columbus and In Defense of Christians*, March 9, 2016, <http://www.stopthechristiangenocide.org/scg/en/resources/Genocide-report.pdf>.

367 H. Con. Res. 75, March 15, 2016, <https://www.congress.gov/114/bills/hconres75/BILLS-114hconres75rfs.pdf>.

368 See *Genocide against Christians*, Addenda 7.

369 USHMM, *Bearing Witness Trip Report*, 20-21.

370 *Genocide against Christians* report, 12-14, 43-44.

371 Kerry, *Remarks on Daesh and Genocide*, March 17, 2016, <https://2009-2017.state.gov/secretary/remarks/2016/03/254782.htm>

372 See, e.g., statements by Knights of Columbus, <http://www.kofc.org/en/news/releases/correct-truly-historic.html> ("thank[ing] Secretary Kerry for seriously considering the evidence, and commend[ing] the State Department staff of working closely with us"); In Defense of Christians, <https://www.prweb.com/releases/2016/03/prweb13274264.htm> ("extending" our deepest gratitude to Secretary Kerry and the Obama Administration").

373 See State Department Press Spokesperson, Daily Press Briefing, March 21, 2016, <https://2009-2017.state.gov/r/pa/prs/dpb/2016/03/254892.htm>:

Question:...the Secretary Kerry statement from last week didn't include the Kurds among other minorities in his explicit reference to genocide. Am I right to understand it this way, that Secretary Kerry or the State Department believes that the crimes against Shia Muslims, the Yezidis, and Christians are genocide, but not the one against the Kurds?"

Mr. Kirby: The Secretary said that we have found that even though the record isn't complete, it's complete enough to be able to determine that genocide has occurred against Christians, Yezidis, Shia groups, and others. And I think I'm going to leave it the way the Secretary talked about it.

Questions about whether particular Christian groups in Iraq were victims of genocide were addressed in a similar way. See State Department press spokesperson, Daily Press Briefing, March 17, 2016, <https://2009-2017.state.gov/r/pa/prs/dpb/2016/03/254776.htm>:

Question:...As Secretary [Kerry] said, there's a genocide against Yezidis, Christians, and Shia Muslims. He did not specify which Christian ethnic groups particularly. Could you please be more specific on that?

Mr. Kirby:...We have seen various Christian communities suffer violent atrocities at the hands of Daesh... We have made the determination that Christian groups, Shia groups, certainly Yezidis have been victims of genocidal acts—genocide—by Daesh. And that's as specific as we need to be in this case.

At the same time, the press spokesperson deflected questions about why the secretary had decided not to make statements characterizing the atrocities of the Assad regime—if not as genocide, then at least as crimes against humanity:

Clarissa Ward, CNN:...the question that I kept hearing over and over on the ground from the Syrian people is, why does the US care so much more about the crimes that ISIS is perpetuating against minorities in Iraq and Syria than they do about what they would call the genocide that the Assad regime is perpetuating inside Syria.

Kirby: Yeah, it's a very fair point, Clarissa. Let me say that I certainly understand how that sentiment could be had...But I can tell you that nobody in the United States government, certainly not here at the State Department, is turning a blind eye to the atrocities that Bashar al Assad has visited upon his own people. But we have always maintained what needs to happen is a political solution to this conflict, and that's what we're putting our energies on, finding a political solution, so they have a government that's responsible to them, responsive to them, and they can come home to a whole unified Syria.

Transcript, Interview with State Department Press Spokesperson Kirby, March 17, 2017, <http://transcripts.cnn.com/TRANSCRIPTS/1603/17/wolf.02.html>.

374 Nomination of Rex Tillerson to be Secretary of State: Hearing before the Committee on Foreign Relations, 115th Cong., 1st Sess., January 11, 2017, 173.

375 See, e.g., “US State Department No Longer Referring to ISIS’ Slaughter of Christians as ‘Genocide’,” July 28, 2017, <https://www.christianheadlines.com/blog/u-s-state-department-is-no-longer-referring-to-isis-slaughter-of-christians-as-genocide.html>; “ISIS’ ‘Genocide’ of Christians References Removed From State Dept. Documents,” July 26, 2017, <https://www.christianpost.com/news/isis-genocide-christians-removed-state-department-documents-193327/>; “GOP Senators Ask If State Department Lawyers Are Removing References to ISIS ‘Genocide’,” July 27, 2017, <https://freebeacon.com/national-security/rubio-lankford-ask-state-department-lawyers-removing-references-isis-genocide/>.

376 The exchange with the press spokesperson was as follows:

Question: Thanks. There's been media reports that State Department officials are removing the word “genocide” from documents. There's been—human rights activists have spoken out about it. Can you address that?

Ms. Nauert: Yeah. I can tell you I have seen an article that indicates that the United States has allegedly taken that word—the State Department, in fact, an article said, has taken that word “genocide” out of some documents, and I can tell you that that is categorically false. We have looked through documents ourselves. The word “genocide” is in fact in there. That has not been removed. When we look at Iraq and we look at what has happened to some of the Yezidis, some of the Christians, we—the Secretary believes and he firmly believes that that was genocide, okay, and I'm—that's all I'm going to have to say about that, okay? I hope I've been clear.

State Department Press Briefing, July 27, 2017, <https://www.state.gov/r/pa/prs/dpb/2017/07/272879.htm>

377 Secretary Tillerson stated:

To remove any ambiguity from previous statements or reports by the State Department, the crime of genocide requires three elements: specific acts with specific intent to destroy in whole or in part specific people, members of national, ethnic, racial, or religious groups. Specific act, specific intent, specific people.

Application of the law to the facts at hand leads to the conclusion ISIS is clearly responsible for genocide against Yazidis, Christians, and Shia Muslims in areas it controls or has controlled.

ISIS is also responsible for crimes against humanity and ethnic cleansing directed at these same groups, and in some cases against Sunni Muslims, Kurds, and other minorities.

Remarks by Secretary Tillerson on the 2016 International Religious Freedom Annual Report, August 15, 2017, <https://www.state.gov/secretary/20172018tillerson/remarks/2017/08/273449.htm>. Note also that Vice President Michael Pence had earlier stated that “ISIS is guilty of nothing short of genocide against people of Christian faith, and it is time the world called it by name.” Remarks by Vice President Pence at the World Summit in Defense of Persecuted Christians, May 11, 2017, <https://www.whitehouse.gov/briefings-statements/remarks-vice-president-pence-world-summit-defense-persecuted-christians/>.

378 See, for example, Stephen Pomper, “Atrocity Prevention Under the Obama Administration: What We Learned and the Path Ahead,” US Holocaust Memorial Museum, February 2018, 12-13, https://www.ushmm.org/m/pdfs/Stephen_Pomper_Report_02-2018.pdf.

379 The provision—the Consolidated Appropriations Act, 2016, Public Law 114-113 (18 December 2015)—provided as follows:

“ATROCITIES PREVENTION.—Not later than 90 days after enactment of this Act, the Secretary of State, after consultation with the heads of other United States Government agencies represented on the Atrocities Prevention Board (APB) and representatives of human rights organizations, as appropriate, shall submit to the appropriate congressional committees an evaluation of the persecution of, including attacks against, Christians and people of other religions in the Middle East by violent Islamic extremists and the Muslim Rohingya people in Burma by violent Buddhist extremists, including whether either situation constitutes mass atrocities or genocide (as defined in section 1091 of title 18, United States Code), and a detailed description of any proposed atrocities prevention response recommended by the APB: Provided, that such evaluation and response may include a classified annex, if necessary.”

380 Author interviews with congressional staffers, August 29, 2018.

381 See, for example, Penny Green, Thomas MacManus, and Alicia de la Cour Venning, “Countdown to Annihilation: Genocide in Myanmar,” International State Crime Initiative, October 2015 (e.g., “ISCI’s findings suggest strongly that we are witnessing Feierstein’s fourth stage of genocide—the stage prior to mass extermination”), <http://statecrime.org/data/2015/10/ISCI-Rohingya-Report-PUBLISHED-VERSION.pdf>; Yale Law School’s Allard K. Lowenstein International Human Rights Clinic, “Persecution of the Rohingya Muslims: Is Genocide Occurring in Myanmar’s Rakhine State? A Legal Analysis,” October 2015 (“This analysis does not conclude definitively whether genocide is occurring...the paper finds strong evidence that genocide is being committed against Rohingya”), <https://law.yale.edu/system/files/documents/pdf/Clinics/fortifyrights.pdf>; US Holocaust Memorial Museum, “‘They Want Us All to Go Away’: Early Warning Signs of Genocide in Burma: Update,” September 1, 2015 (“concerns about the early warning signs of genocide are all the more pressing,” “Dedicated action is required — and is so far lacking — on the part of the Burmese authorities to take steps to mitigate the early warning signs of genocide against the Rohingya”), <https://www.ushmm.org/m/pdfs/20150901-Burma-Report-Update.pdf>.

382 “Atrocities Prevention Report: Targeting of and Attacks on Members of Religious Groups in the Middle East and Burma,” March 17, 2016, <https://2009-2017.state.gov/j/drl/rls/254807.htm>. The department’s report characterized the atrocities for which ISIS was responsible as constituting mass atrocities and reported what the Secretary had announced about genocide, but with respect to Burma said only that “[w]e remain concerned about current acts that constitute persecution of and discrimination against members of the Rohingya population in Burma. The Department of State will continue to investigate and assess information as it becomes available.”

- 383 *The Washington Post*, “Obama administration eases economic sanctions on Burma,” May 17, 2016, https://www.washingtonpost.com/politics/obama-administration-eases-economic-sanctions-on-burma/2016/05/17/c028dfd0-1c71-11e6-8c7b-6931e66333e7_story.html?utm_term=.b2147b4348d8.
- 384 US Holocaust Memorial Museum, “‘They Tried to Kill Us All’: Atrocity Crimes against Rohingya Muslims in Rakhine State, Myanmar,” 1, <https://www.ushmm.org/m/pdfs/201711-atrocity-crimes-rohingya-muslims.pdf>.
- 385 Human Rights Council resolution A/HRC/34/L.8/Rev.1, “Situation of human rights in Myanmar,” March 22, 2017, http://www.un.org/ga/search/view_doc.asp?symbol=A/HRC/34/L.8/Rev.1.
- 386 Zeid Ra’ad Al Hussein, opening statement at the Human Rights Council’s 36th session, September 11, 2017 (“Because Myanmar has refused access to human rights investigators the current situation cannot yet be fully assessed, but the situation seems a textbook example of ethnic cleansing”), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22041&LangID=E>.
- 387 Transcript of “The Rohingya Crisis: US Response to the Tragedy in Burma,” hearing before the House Foreign Affairs Committee, October 5, 2017, 25 and 34-37, <https://docs.house.gov/meetings/FA/FA00/20171005/106471/HHRG-115-FA00-Transcript-20171005.pdf>.
- 388 Rex W. Tillerson, “Efforts to Address Burma’s Rakhine State Crisis,” press statement, Washington, D.C., November 22, 2017, <https://www.state.gov/secretary/20172018tillerson/remarks/2017/11/275848.htm>.
- 389 Public International Law & Policy Group, “Documenting Atrocity Crimes Committed against the Rohingya in Myanmar’s Rakhine State: Factual Findings Report,” September 2018, iii-iv, <https://www.publicinternationallawandpolicygroup.org/s/PILPG-Documenting-Atrocity-Crimes-Against-Rohingya-Factual-Findings-Report-September-2018.pdf>.
- 390 Report of the independent international fact-finding mission on Myanmar, August 27, 2018, 1 and 16, https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_64.pdf.
- 391 See “Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar,” September 17, 2018, https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_CRP.2.pdf.
- 392 Ambassador Nikki Haley, “Remarks at a UN Security Council Briefing on the Situation in Burma,” August 28, 2018 (“The results are consistent with the recently released UN independent international fact-finding mission on Burma”), <https://usun.state.gov/remarks/8560>.
- 393 US Department of State, “Documentation of Atrocities in Northern Rakhine State,” September 24, 2018, <https://www.state.gov/j/drl/rls/286063.htm>.
- 394 Public International Law and Policy Group, “Factual Findings and Legal Analysis Report,” December 2018, <https://www.publicinternationallawandpolicygroup.org/s/PILPG-ROHINGYA-REPORT-Factual-Findings-and-Legal-Analysis-3-Dec-2018-1.pdf>; and US Holocaust Memorial Museum, “Museum Finds Compelling Evidence Genocide was Committed Against Rohingya, Warns of Continued Threat,” December 3, 2018, <https://www.ushmm.org/information/press/press-releases/museum-finds-compelling-evidence-genocide-was-committed-against-rohingya-warns-of-continued-threat>.
- 395 H.Res. 1091, agreed to December 13, 2018, <https://www.congress.gov/bill/115th-congress/house-resolution/1091>.
- 396 State Department Daily Press Briefing, December 11, 2018 (“That conclusion of ethnic cleansing, to your question, in no way prejudices any potential further analysis on whether mass atrocities have taken place, including genocide or crimes against humanity”), <https://www.state.gov/r/pa/prs/dpb/2018/12/288024.htm>.
- 397 Author interviews with current and former State Department officials.

398 See, for example, UN Commission on Human Rights in South Sudan, Report, March 6, 2017 (“An abundance of reports prepared by the United Nations, the African Union and non-governmental organizations about the situation of human rights in South Sudan since December 2013 have documented credible allegations of widespread human rights violations and abuses, which if established before a court of law, may (depending on the circumstances) amount to war crimes”), https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session37/Documents/A_HRC_37_71_EN.docx.

399 African Union Commission of Inquiry report, paragraphs 805 and 1132. Released October 27, 2015, completed October 15, 2014, <http://www.peaceau.org/uploads/auciss.final.report.pdf>.

400 See, for example, Adama Dieng, “Statement on the human rights and humanitarian dimensions of the crisis in the Central African Republic,” January 22, 2014 (“In my assessment, the widespread, unchecked nature of attacks by ex-Séléka and anti-Balaka militia, as well as by armed civilians associated with them, against civilians on the basis of religion or ethnicity constitute crimes against humanity. If not halted, there is a risk of genocide in this country”), http://www.un.org/en/genocideprevention/documents/our-work/Doc.5_SAPG%20Statement%20at%20US%20on%20the%20situation%20in%20CAR%20-%2022%20Jan%202014.%20Final.pdf.

401 Final report of the International Commission of Inquiry on the Central African Republic, December 19, 2014, paragraphs 46-49, <http://undocs.org/S/2014/928>.

402 Author interviews with former and current State Department officials.

403 Hearing of the Subcommittee on Africa, Global Health, Global Human Rights, and International Organizations, May 1, 2014, <https://www.gpo.gov/fdsys/pkg/CHRG-113hhrg87715/pdf/CHRG-113hhrg87715.pdf>.

404 The chairman replied, “I appreciate that. I do think it matters but I respect the difference,” and deferred to a colleague for further questions. The hearing did not return to the issue. *Ibid.*

405 See Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka, March 31, 2011, http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf.

406 Congressional staffers interviews.

407 See Joint Explanatory Statement accompanying the Supplemental Appropriations Act, 2009 (P.L. 111-32), <https://www.congress.gov/congressional-report/111th-congress/house-report/151>.

408 US Department of State, “Report to Congress on Incidents During the Recent Conflict in Sri Lanka” (2009), <https://www.state.gov/documents/organization/131025.pdf>; Author interview with State Department official.

409 For example, the report stated: “[A] determination about whether particular conduct would amount to a crime against humanity requires an assessment of the purpose and intent of government-sponsored or -sanctioned actions. In the context of civilian casualties, an analysis of whether particular military operations were conducted consistent with the laws of war would require an understanding of who committed the harms and the knowledge and intent of those actors when the operations were conducted, as well as information regarding whether apparently civilian persons were actually taking direct part in hostilities or civilian objects were being used to contribute effectively to military actions.” US Department of State Sri Lanka report, para. 10.

410 Author interview with former State Department official.

411 For a congressional expression of such concerns, See S. Rpt. 111-36, Sri Lanka: Recharting US Strategy After the War, Committee on Foreign Relations, United States Senate (111th Cong., 1st Sess.), December 7, 2009, <https://www.gpo.gov/fdsys/pkg/CPRT-111SPRT53866/pdf/CPRT-111SPRT538.66.pdf> (arguing that the United States cannot afford to “lose” Sri Lanka”; quoting Sri Lankan representatives as saying “We have the United States to thank for pushing us closer to China”; and stating that US policy should not be “dominated by a single agenda” of humanitarian concerns).

412 This episode generally does not appear to be described in publicly available records, and this account is based on interviews with five former or current State Department officials.

413 See, e.g., Human Rights Watch, “Sudan: Crisis Conditions in Southern Kordofan: Nuba Civilians Suffer Indiscriminate Bombing, Severe Hunger,” May 4, 2012, <https://www.hrw.org/news/2012/05/04/sudan-crisis-conditions-southern-kordofan>.

414 See e.g., White House Office of the Press Secretary, “Statement by the Press Secretary on the Bombings in South Sudan,” November 10, 2011, <https://obamawhitehouse.archives.gov/the-press-office/2011/11/10/statement-press-secretary-bombings-south-sudan>; Princeton Lyman, Special Envoy for Sudan, testimony before the US House of Representatives Subcommittee on Africa, Global Health, and Human Rights Hearing, October 4, 2011, <https://2009-2017.state.gov/s/sudan/rem/2011/175228.htm>.

415 Lyman testimony.

416 Author interviews with two former State Department officials involved in the presentations.

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The Simon-Skjodt Center for the Prevention of Genocide of the United States Holocaust Memorial Museum works to prevent genocide and related crimes against humanity. The Simon-Skjodt Center is dedicated to stimulating timely global action to prevent genocide and to catalyze an international response when it occurs. Our goal is to make the prevention of genocide a core foreign policy priority for leaders around the world through a multi-pronged program of research, education, and public outreach. We work to equip decision makers, starting with officials in the United States but also extending to other governments, with the knowledge, tools, and institutional support required to prevent—or, if necessary, halt—genocide and related crimes against humanity.

The assertions, opinions, and conclusions in this report are those of the author. They do not necessarily reflect those of the United States Holocaust Memorial Museum.

Cover: President Ronald Reagan signs the US ratification of the Genocide Convention in Chicago on October 4, 1988. Courtesy of US Holocaust Memorial Museum Collection, Gift of Sandy Elster.



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