Uyghur Tribunal Expert Report:
China's State Responsibility for Breaches of the Genocide Convention

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1. Introduction

This report is submitted in advance of oral testimony to be delivered on 11 September by the authors (Messrs Yonah Diamond and John Packer). Our testimony arises from and is in relation to the report published jointly by the Newlines Institute for Strategy and Policy (the Newlines Institute) and the Raoul Wallenberg Centre for Human Rights (RWCHR) dated 8 March 2021 and entitled *The Uyghur Genocide: An Examination of China's Breaches of the 1948 Genocide Convention.*[1] The authors contributed to that report as, respectively, the Principal Author and the Principal Advisor. The report was initiated by Dr. Azeem Ibrahim[2] in summer 2020 in his capacity as a Director of the Newlines Institute. The report was the result of collaboration among over 50 independent experts comprising individuals possessing a range of relevant expertise and from all principal regions of the world, of whom 32 experts are named in the report[3]. All contributions were *pro bono*.

The Newlines-RWCHR report analyzes whether the People's Republic of China (China or the PRC) bears State Responsibility for genocide against the Uyghurs in breach of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention), notably Article II thereof. The report examines key developments relating to the destructive campaigns against the Uyghurs as a group, dating from May 2013 and the start of the "Strike Hard Campaign," and only makes findings of fact on systematic trends when supported by direct evidence and corroborated by multiple data points. The direct evidence examined includes firsthand/eyewitness testimony, authenticated government documents, directives and statistics, and reliable satellite imagery analyses.

The report concludes that China bears State Responsibility for genocide, including breaches of every provision of Article II, on a clear and convincing standard, i.e. a standard of proof that is higher than we believe is required by international law (see *infra*). The report has been cited by governments and parliaments around the world in debating and declaring that the identified atrocities constitute genocide (or at least its serious risk),[4] and a number of leading genocide scholars endorsed the report following publication, including, notably, Ambassador Samantha Power and General Roméo Dallaire among others.[5] The findings of the report have been confirmed by other reports subsequent to its release. We refer the members of the Tribunal to the

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[1] https://newlinesinstitute.org/uyghurs/the-uyghur-genocide-an-examination-of-chinas-breaches-of-the-1948-genocide-convention/

[2] Dr Ibrahim is a Director at the Newlines Institute for Strategy and Policy, author of *"The Rohingyas: Inside Myanmar's Genocide"* (Hurst, 2017), and recipient of the 2019 International Association of Genocide Scholars Engaged Scholar Award.

[3] A number of contributors declined to be named for a variety of reasons, including related to their official positions and for fear of retribution.

[4] A number of parliamentary and governmental bodies have debated both the possibility of commission of genocide or the serious risk of it – each of which gives rise to State responsibility and entails consequences in International Law.

[5] See https://twitter.com/SamanthaJPower/status/1370067488436670476?s=20, https://www.youtube.com/watch?v=v488j5GpQ0E.

8 March 2021 report for background and submit the present report to clarify some aspects of law as applied to the situation under examination. In terms of the application of the elements of genocide enshrined in the Genocide Convention, we will focus on the question of intent to destroy the group as such, as the acts of genocide have already been amply demonstrated in our previous report and we note that other independent experts will present before this Tribunal testimony regarding the acts in question.

2. The Law on State Responsibility

It is at present virtually impossible to bring China, or one of its officials, before an international adjudicative body for the crime of genocide. Specifically, China is not a party to the Rome Statute and therefore does not recognize the jurisdiction of the International Criminal Court (ICC).[6] China is also a permanent Security Council member and can – and surely would – block any attempt at an ICC referral in effect foreclosing its jurisdiction. Moreover, the prospects of a national court exercising universal jurisdiction over a high-ranking Chinese official is almost inconceivable given China's increasing global influence. China similarly does not recognize the jurisdiction of the International Court of Justice (ICJ) over genocide cases, having lodged a reservation to the Genocide Convention that stipulates it "does not consider itself bound by article IX of the said Convention,"[7] thus foreclosing ICJ jurisdiction over the interpretation and application of the Convention in respect of China in a contentious case.[8] Further, we do not believe there exists any reasonable prospect of establishment of an ad hoc international tribunal in respect of the matters here concerned. As a result of these limitations, and in light of the urgency of the situation, we assembled a coalition of independent experts to determine whether China bears *State responsibility* for breaches of the Genocide Convention, *not individual criminal responsibility*— a distinct legal regime (see *infra*).

We chose to apply the law of State Responsibility, as opposed to international criminal jurisprudence, for the following additional reasons.

First, the State Responsibility framework allows other States to reach sovereign conclusions as to the application of International Law in general and of the Genocide Convention in particular to the facts at hand including especially determinations as to China's breaches of the Genocide

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[6] "The States Party to the Rome Statute," *International Criminal Court,* https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx; There is currently a team of lawyers pursuing an innovative argument for jurisdiction based on a nexus to Cambodia and Tajikistan (State Parties), though this will be an uphill battle given that the genocidal acts are almost entirely carried out within China's territory, and the unlikelihood of the Court apprehending a suspect; https://apnews.com/article/europe-business-crime-government-and-politics-a3f92d7348b0878bed274ec40645e136

[7] For China's reservation and objection to ICJ jurisdiction over and interpretation of the Genocide Convention, *see* UN Treaty Collection citing China's reservation to the Genocide Convention and objection to the only ICJ Advisory Opinion on the Genocide Convention, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, I.C.J. Reports 1951, https://www.icj-cij.org/public/files/case-related/12/012-19510528-ADV-01-00-EN.pdf.

[8] Article IX reads in full: "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

Convention and to take effective countermeasures to respond, seek justice, and prevent violations that are ongoing or at serious risk. This is the natural requirement for effectiveness in the conduct of international relations and law. The absence of adjudication does not render the treaty non-applicable and it would be absurd to suggest that in the absence of an available judicial recourse the Law would not apply. Specifically with regard to the Genocide Convention, the possibility of a reservation to Article IX of the Genocide Convention (i.e. the jurisdiction of the ICJ) applies solely with regard to disputes between States party and has no effect with regard to the substantive obligations per se. Moreover, to argue otherwise (i.e. absence of recourse to a court) would render almost all International Law meaningless, including the over 158,000 treaties registered with the United Nations absent compulsory judicial jurisdiction.[9] Further, the idea of adjudication before a court is but one of many options for the pacific settlement of disputes prescribed in Article 33 of the UN Charter.

Second, State responsibility better addresses accountability for genocide under a system that is designed to diffuse individual responsibility to the point of nonrecognition. The genocidal system under the PRC is systematic, bureaucratic, technical, and extremely sophisticated, and sustained by a complex hierarchy of government bodies, commissions, officials, and centralized machine learning, making it difficult to attribute large-scale State-sanctioned atrocities to any single individual. Indeed, some actions of the State, such as adoption of Laws or Court decisions, are by their nature not acts of individuals. In our view, the Chinese system is unprecedented and requires a context-specific approach to assess a crime of the severity, magnitude, and complexity of genocide.

Third, the intent requirement for genocide is more ascertainable under the law of State Responsibility, as a form of "collective fault,"[10] rather than the near-impossible inquiry into the *mens rea* of an individual, a feature that does not apply to States.[11] State intent, as it were, gives rise to an objective standard—rather than a subjective inquiry—that allows for an inference of the "intent to destroy… [the] group as such" from the State's destructive policies and practices which can more reasonably be demonstrated by the mass of evidence.

State Responsibility vs Individual Criminal Responsibility

The distinction between the law of State Responsibility and individual criminal responsibility is delineated by both regimes. The International Criminal Court's founding treaty, the Rome Statute, accounts for this strict division. Notably, Article 25(4) makes the distinction unequivocal: "No provision in this Statute relating to individual criminal responsibility shall

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[9] Pursuant to Article 102 of the UN Charter, Member States are to register and publish all treaties; the UN treaty Series so far runs some 2,500 volumes and includes since 1946 over 158,000 treaties; see: https://www.oecd-ilibrary.org/content/publication/edca3afd-en-fr

[10] Beatrice I. Bonafè, *The Relationship Between State and Individual Responsibility for International Crimes*, at 123-24.

[11] See the deliberations and eventual decision of the International Law Commission, notably *Yearbook of the International Law Commission*, 1976, Vol. II(2), in particular at para. 59.

affect the responsibility of States under international law."[12] Article 10 further limits the application, and influence, of the law and rules of the ICC to the ICC itself, which are therefore not to be applied to State Responsibility.[13]

The International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles on Responsibility of States), the so far authoritative statement of the law on State responsibility[14], similarly recognizes the separate regimes, holding that the authority is "without prejudice to any question of the individual responsibility under international law."[15] Of course, as the ILC has explained,

> [w]here crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them. In certain cases, in particular aggression, the State will by definition be involved. Even so, the question of individual responsibility is in principle distinct from the question of State responsibility.[16]

For its part, the ICJ affirms this strict distinction in its 2015 judgment regarding a dispute over breaches of the Genocide Convention:

> State responsibility and individual criminal responsibility are governed by different legal régimes and pursue different aims. The former concerns the consequences of the breach by a State of the obligations imposed upon it by international law, whereas the latter is concerned with the responsibility of an individual as established under the rules of international and domestic criminal law, and the resultant sanctions to be imposed upon that person.[17]

Under these closed regimes, an individual can be acquitted, while a State is or is not responsible for genocide.[18] As pointed out by Professor Beatrice Bonafè, citing the example of Darfur and the 2005 report of the UN's International Commission of Inquiry,

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[12] Under Art. 1, the Court is empowered "to exercise jurisdiction over *persons* for the most serious crimes of international concern."

[13] Art. 10 reads: "Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."

[14] The International Law Commission was established by the UN General Assembly in 1947 pursuant to Article 13(1)(a) of the UN Charter to "initiate studies and make recommendations for the purpose of ... encouraging the progressive development of international law and its codification". The ILC comprises 34 members elected from the UNGA and its reports are considered and adopted by the UN Member States.

[15] For further distinction between the modes of liability, *see* ICTY, *Prosecutor v. Furundzija*, IT-95-17/1-T, Trial Judgment, 10 December 1998, para. 142.

[16] ILC Commentary on Article 58 of the Draft Articles on the Responsibility of States, 2001, p. 142 at para. 3.

[17] *Croatia v. Serbia*, ICJ Judgment of 3 February 2015, para. 129.

[18] *Ibid.* para. 182 ("State responsibility can arise under the Convention for genocide and complicity, without an individual being convicted of the crime.") For a discussion on the distinction between individual and State responsibility, see Bonafè, Reassessing Dual Responsibility for International Crimes, *Sequência (Florianópolis)*, August 2016.

> With respect to the same facts, a state might be responsible while the individual perpetrator can be acquitted – and the other way around – according to the requirements of each responsibility regime and the actual possibility to prove them.[19]

The application of international criminal jurisprudence as binding on States for their responsibility under international law is therefore a conflation.[20] Moreover, it is clear that, with regard to the ICJ, the Genocide Convention covers State responsibility for genocide as expressly stated in Article IX regarding disputes "relating to the responsibility of a State for genocide."[21]

3. Source of Law

In this context, the primary source of law is the Genocide Convention, a legally binding treaty to which 152 States are party, including China (signed and ratified in 1949 and 1983, respectively).[22] The ILC Articles on Responsibility of States are widely recognized as codification of customary international law on State responsibility and have been relied upon by States and international courts alike in practice.[23] In fact, as recently as the UN's 2019 Sixth Committee meeting just before the pandemic, China affirmed that the ILC's Articles on Responsibility of States are viewed by States "for guidance in addressing the issue of State responsibility in their practice." The Vienna Convention on the Law of Treaties (VCLT), or the "treaty on treaties," to which China is also party, provides the primary rules for interpreting the Genocide Convention.[24] Under the law of State Responsibility, breaches of the Genocide

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[19] Beatrice I. Bonafè, "Reassessing Dual Responsibility for International Crimes", *Seqüência* (Florianópolis), n. 73, pp. 19-36, ago 2016, at 23.

[20] A violation of the Genocide Convention might better be characterized as international responsibility, as it concerns an *erga omnes* breach of an obligation owed to the international community as a whole.

[21] *See also Bosnia v Serbia,* para. 162.

[22] *The Convention on the Prevention and Punishment of the Crime of Genocide* (Genocide Convention) was adopted by unanimous vote, UN General Assembly resolution 260 (III) of 9 December 1948, https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf. There are currently 152 States parties, "Status of Treaties: Convention on the Prevention and Punishment of the Crime of Genocide," *United Nations Treaty Collection* https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&clang=_en#33.

[23] For the ILC, *see supra* note 14; *see Croatia v. Serbia*, *supra,* note 16, para. 128; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* Judgment of 26 February 2007, para. 401.

[24] Though the VCLT came into force (1980) after the Genocide Convention (1951), its rules on treaty interpretation apply to the Genocide Convention as they are deemed to have codified longstanding Customary International Law, Oil Platforms (Islamic Republic of Iran v. United States of America) (Judgment), 12 December 1996, [1996] ICJ Rep 803, para. 23; The international ad hoc tribunals also draw on the VCLT. *See* e.g. *Nyiramasuhuko et al. (Butare*) (ICTR-98-42), para 2137; *Aleksovski* Appeal Judgement, para. 98; Celibici Appeal Judgement, para. 67.

Convention are determined by recourse to these primary rules of international law and interpretation.[25]

According to its own Statute (which is appended to and forms part of the UN Charter), ICJ jurisprudence is a "subsidiary means for the determination of rules of law" (Article 38(1)(d)). The ICJ is fundamentally a dispute resolution body, whose decisions are, according to its own Statute, explicitly not legally binding on the ICJ itself, beyond the specific parties to any single dispute.[26] Thus, ICJ jurisprudence regarding the relevant legal standards is likewise not binding under international law.

4. Legal Standards

Neither in General International Law nor in the law of treaties exists an explicit rule on the standard of proof. Indeed, the subject is generally not addressed; the Vienna Convention on the Law of Treaties makes no mention of it. Nor, of course, does any domestic theory or practice of law on the matter prevail at International Law; there exist varying systems and rationales. This said, the principle of good faith (as a General Principle of Law) may offer some guidance, and in the *lex specialis* of International Human Rights Law and of International Criminal Law the standard of "beyond a reasonable doubt" (drawn from Anglo-Saxon law) or its equivalent has been adopted in order to respect the high standards of due process required to protect a vulnerable individual human being.

For States, the general standard of proof for breaches of international law is the preponderance of the evidence which applies to obligations, notably those specific obligations arising from a treaty. Given the especially serious nature of the breaches in question, our report applied a "clear and convincing" standard of proof, i.e. a higher standard than we believe is required by International Law.[27]

The challenges in securing direct evidence must therefore be considered when assessing the evidence, and specifically that pertaining to the State's intent to destroy.

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[25] There is no formal rule of *stare decisis* under international law. *Bosnia v. Serbia*, *supra,* note 18, para. 149.

[26] Art. 59 of the ICJ Statute reads: "The decision of the Court has no binding force except between the parties and in respect of that particular case." https://www.icj-cij.org/en/statute

[27] On the standard of proof in respect of the Genocide Convention, see, amongst others: Stephen Wilkinson, "Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions", the Geneva Academy of International Humanitarian Law and Human Rights, at 20, https://www.geneva-academy.ch/joomlatools-files/docman-files/Standards%20of%20Proof%20in%20Fact-Finding.pdf.

International fact-finding inquiries apply the "reasonable grounds to believe/conclude" standard for evaluating genocide allegations.[28] The ICJ has applied a similar "credible evidence sufficient to conclude" standard in *Congo v. Uganda,* a case dealing with serious breaches of peremptory norms.[29] Nonetheless, the ICJ's Rules and Statute contain no guidance on the standard of proof, other than the authority to settle the handling of evidence on an ad hoc basis after hearing from the parties (Rules, Article 58), in line with the Court's dispute resolution function confined to the narrow disputes before the Court. Moreover, the ICJ has not established a uniform standard of proof in its decisions. In fact, the ICJ has expressed its evidentiary standards in at least fifteen different ways.[30]

A fair and just standard of proof must also take into account the restrictions on securing direct evidence. The ICJ, in its first case, *Corfu Channel,* affirmed that a State's exclusive territorial control makes it difficult for a victim State to "furnish direct proof of facts giving rise to responsibility [i.e. the knowledge requirement in *Corfu*]," and therefore warrants "a more liberal recourse to inferences of fact and circumstantial evidence." [31] In this context, the Court noted that "indirect evidence […] must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion."[32]

It is salient that China not only refuses to cooperate or participate in any investigation in the matters here of concern, but, rather, it is actively hiding and destroying evidence within its exclusive territory and control. China has thus far blocked any independent, unfettered access to the region, and yet was elected last year to a three-year term on the Human Rights Council, one of the key bodies empowered with initiating a fact-finding mission.[33] Moreover, since last year Chinese authorities have scrubbed or omitted critical data for the region from public record—including birth rate, population breakdown, birth control, and prison information[34]—expelled at least 20 foreign journalists, and continues to harass and monitor the few journalists who are granted limited access to the region. These restrictive conditions were only exacerbated by the

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[28] According to the IFFMM, the standard is "met when a sufficient and reliable body of primary information, consistent with other information, would allow an ordinarily prudent person to reasonably conclude that an incident or pattern of conduct occurred" (A/HRC/39/64, para. 6). See Independent International Fact-Finding Mission on Myanmar full account and Independent International Commission of Inquiry on the Syrian Arab Republic report *"They came to destroy": ISIS Crimes Against the Yazidis,* https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A_HRC_32_CRP.2_en.pdf; https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23575&LangID=E; https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/236/74/PDF/G1923674.pdf?OpenElement

[29] *Democratic Republic of Congo v. Uganda*, ICJ, Judgment of 19 December 2005, para. 211.

[30] https://www.geneva-academy.ch/joomlatools-files/docman-files/Standards%20of%20Proof%20in%20Fact-Finding.pdf, at 20.

[31] *Corfu* Judgment 1949, at 18.

[32] *Ibid*.

[33] https://www.un.org/en/ga/75/meetings/elections/hrc.shtml

[34] China Statistics Press. 2020a. Xinjiang Statistical Yearbook; *see also* Ruser/ASPI UT Report, https://www.aspi.org.au/report/family-deplanning-birthrates-xinjiang, at 23; https://www.cnn.com/2021/06/24/china/xinjiang-prisons-china-intl-hnk-dst/index.html

COVID-19 pandemic.[35] The evidentiary burden for making a *prima facie* case of breaches of the Genocide Convention must account for these serious limitations. For instance, satellite imagery analyses should be accorded special weight in proving the extent of the mass atrocities.

5. Intent Jurisprudence

The ICJ has only issued judgments for disputes over the Genocide Convention in two cases, both stemming from the mass atrocities committed in the context of the conflict(s) in the former Yugoslavia, notably in Bosnia and Herzgovina and in Croatia between 1991 and 1995. These cases were unique in the sense that the Court could rely on the troves of factual findings tested by and emerging from rigorous trials and appeals before the International Criminal Tribunal for the former Yugoslavia. The Court admitted as much in the case of *Bosnia v. Serbia*:

> This case does however have an *unusual feature*. Many of the allegations before this Court have already been the subject of the processes and decisions of the ICTY… The Court has been referred to extensive documentation arising from the Tribunal's processes, including indictments by the Prosecutor, various interlocutory decisions by judges and Trial Chambers, oral and written evidence, decisions of the Trial Chambers on guilt or innocence, sentencing judgments following a plea agreement and decisions of the Appeals Chamber.[36] [emphasis added]

The Court not only largely drew on the facts established by the ICTY, but also on its conclusions on questions of law or application of the law to the facts.[37] The Court's reliance on the ICTY's assessments of intent is particularly problematic.[38] The Court in *Bosnia v. Serbia* stated that the specific intent (*dolus specialis*) to "destroy, in whole or in part… [the] group as such" can be inferred from a pattern of conduct when such conduct could only point towards such intent.[39] Eight years later, and absent justification, the Court essentially repeated this phrasing that "intent to destroy the group, in whole or in part, must be the only reasonable inference which can be drawn from the pattern of conduct."[40] However, the *Bosnia* articulation is an exact replica of the ICTY's *criminal standard* applied to questions of intent: "when the Prosecution relies upon proof of a state of mind of an accused by inference, that inference must be the only reasonable

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[35] https://www.washingtonpost.com/world/asia_pacific/china-genocide-olympics-uyghurs-xinjiang/2021/03/17/d892816c-75b7-11eb-9489-8f7dacd51e75_story.html

[36] *Bosnia v. Serbia*, paras. 212-14.

[37] For example, to support the lack of special intent, the Court cited its careful examination of "the criminal proceedings of the ICTY and the findings of its Chambers, cited above, and observes that none of those convicted were found to have acted with specific intent *(dolus specialis)*." *Bosnia v Serbia*, para. 277, 281, 292.

[38] In discussing the intent discovered by the ICTY, the Court noted "any evaluation by the Tribunal based on the facts as so found for instance about the existence of the required intent, is also entitled to due weight." *Bosnia v. Serbia*, para. 223, an approach followed by *Croatia v. Serbia*, para. 182.

[39] *Bosnia v. Serbia* paras. 373, 376.

[40] *Croatia v. Serbia*, paras. 148, 417, 510.

inference available on the evidence."[41] Indeed, the Court in *Croatia v. Serbia* confirmed that the *Bosnia* decision blurred the individual-State distinction: "the criterion applied by the ICTY Trial Chamber in the Judgment in the *Tolimir* case is in *substance identical* with that laid down by the Court [ICJ] in its 2007 Judgment" [emphasis added].[42] These heightened standards applied by the ICJ, including proof beyond a reasonable doubt[43], are of course designed to protect the liberty interests of the individual accused against *criminal prosecution*, and cannot reasonably apply to sovereign States. The Court was correct to rely on the ICTY's rigorous *factual* findings, but erred when replicating its *criminal trial standard of proof* for determining State responsibility.

Notwithstanding the above, even on a higher standard of proof, it is implausible to look at the situation in Xinjiang and conclude that China's destructive campaigns will result in anything but the destruction of the Uyghurs as a group as such, at least in substantial part.

6. Intent to Destroy

Genocide is distinguished as an international crime by the destruction of a *group* entity.

Article II of the Genocide Convention defines genocide as follows:

> *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:*
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> *(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.*

As referenced, the VCLT provides the applicable interpretive approach in Article 31:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Accordingly, on a plain reading of the text of the Genocide Convention, *any one* of the five acts constitutes genocide if committed with the requisite intent to destroy, in whole or in part, the identified protected group, as such. The acts are discrete, not conditioned on one another, nor listed in hierarchy. Furthermore, there is no language in the text indicating that the intent to destroy only entails biological or physical destruction. These terms are purely a legal construction read into the Convention, largely influenced by the international criminal tribunals presiding over individual criminal responsibility. To illustrate this point, according to the

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[41] *Prosecutor v. Krstic*, Case No. ICTY-IT-98-33, Appeals Chamber Judgment, para. 41.

[42] *Croatia v. Serbia*, para. 148.

[43] The *Bosnia v Serbia* judgment even intimates a stricter standard at one point of proof "beyond any doubt," para. 422.

ordinary meaning of the terms within the four corners of the treaty, genocide can be committed through acts (b) and (e) alone, neither of which necessarily entail physical or biological destruction of the group members. Moreover, acts (c) and (d) both require specific intent for physical ("calculated to bring about its physical destruction") and biological ("intended to prevent births") destruction respectively, implying by deduction that the other acts need not have an accompanying physio-biological destruction intent attached to them[44] in so far as the terms would discretely retain their ordinary meanings (or else they would be redundant).

This interpretation of group destruction is also rooted in precedent by regional and international courts with jurisdiction over State responsibility. Notably, the European Court of Human Rights (ECtHR) upheld the German courts' interpretation of intent to destroy as meaning "destruction of the group as a social unit in its distinctiveness and particularity and its feeling of belonging together; a biological-physical destruction was not necessary."[45] The case was the first genocide conviction by German courts since the crime of genocide was incorporated into its domestic law in 1955. The ECtHR concluded that "the domestic courts' interpretation of 'intent to destroy a group' as not necessitating a physical destruction of the group, which has also been adopted by a number of scholars is therefore covered by the wording, read in its context, of the crime of genocide in the Criminal Code."[46] Guatemala's Commission for Historical Clarification (led by renowned German jurist Professor Christian Tomuschat), which specifically dealt with State responsibility, noted in its conclusions on acts under Article II(b) that "the resulting destruction of *social cohesion* of the group, typical of these acts, corresponds to the intent to annihilate the group, physically and *spiritually*."[emphasis added][47] Moreover, the ICTY Trial Chamber even suggested that:

> 'Destruction', as a component of the mens rea of genocide, is not limited to physical or biological destruction of the group's members, since the group (or a part of it) can be destroyed in other ways, such as by transferring children out of the group (or the part) or by *severing the bonds among its members*.[1701] Thus it has been said that one may rely, for example, on evidence of deliberate forcible transfer as evidence of the mens rea of genocide.[48]

The footnote (within the quoted text) goes on to read:

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[44] See *Prosecutor v. Krstic*, Case No. ICTY-IT-98-33, Appeals Chamber Judgment, Partial Dissenting Opinion of Judge Shahabuddeen, para. 48, (when discussing the built-in intent in Article II (c) and (d): "*a contrario*, it would seem that, in other cases, the Statute itself does not require an intent to cause physical or biological destruction of the group in whole or in part.")

[45] ECtHR, citing German Court, *Jorgic v. Germany* (Application no. 74613/01), Judgment, Strasbourg, 12 July 2007, para. 18.

[46] Application no. 74613/01, para. 105, "The Court notes that the domestic courts construed the "intent to destroy a group as such" systematically in the context of Article 220a § 1 of the Criminal Code as a whole, having regard notably to alternatives no. 4 (imposition of measures which are intended to prevent births within the group) and no. 5 (forcible transfer of children of the group into another group) of that provision, which did not necessitate a physical destruction of living members of the group in question."

[47] "Guatemala: Memory of Silence," *Commission for Historical Clarification*, February 1999, Conclusions, para. 115.

[48] *Krajišnik* (IT-00-39), Judgment, para. 854.

> It is not accurate to speak of 'the group' as being amenable to physical or biological destruction. Its members are, of course, physical or biological beings, but the bonds among its members, as well as such aspects of the group as its members' culture and beliefs, are neither physical nor biological. Hence the Genocide Convention's 'intent to destroy' the group cannot sensibly be regarded as reducible to an intent to destroy the group physically or biologically, as has occasionally been said.[49]

The Trial Chamber ultimately found insufficient evidence of intent, so the question was never decided on Appeal.[50] Nonetheless, these authoritative decisions demonstrate that the interpretation of intent to destroy as encompassing the social unit in all its complexities is a well-accepted interpretation.

The terms of the Genocide Convention must also be read in the light of its object and purpose, as expressly stated in its title and in Article I: to bind the Contracting Parties to prevent and punish genocide. As the ICJ put it, the object of the Convention "is to safeguard the very existence of certain human groups,"[51] an ideal that provides "the foundation and measure of all its provisions."[52] The terms of Article II must therefore be read in light of this primary purpose to safeguard the existence of what constitutes a group.

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[49] *Ibid*. FN: 1701.

[50] *Ibid.* 1092-94

[51] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, I.C.J. Reports 1951, at 12.

[52] *Ibid.*

7. Evidence of Specific Intent

As demonstrated, the concept of *mens rea* does not apply *stricto sensu* to States. As the prominent international criminal law scholar Professor Paola Gaeta has put it, under the law of State Responsibility there is "no need to demonstrate that the state as such—or one or more of its officials—harboured a genocidal intent in the criminal sense… a requirement that *only* pertains to the criminal liability of individuals."[53][emphasis added] The State's "intent to destroy" is measured by objective standards: comprehensive destructive campaigns or State policies "manifested in actions which had a logical and coherent sequence."[54] A more objective approach to the question of intent has likewise been adopted by the international criminal tribunals, relying primarily on the "general criminal context" as evidence of intent, and acknowledging "that intent is a mental factor which is difficult, even impossible, to determine."[55]

In the words of the Prosecution in the case of *Krstic* in discussing the destruction of mosques which, on its own, does not necessarily constitute genocide, but like all the destructive campaigns it is:

> a factor in the matrix of all the other factors that you could consider when assessing whether or not there was genocidal intent. We know that immediately on the heels of the deportations and immediately during or after the mass executions, the traces of the Muslim community were being erased.[56]

Such objective acts, attributable to the State, could be read as intentional—not accidental or coincidental—especially when juxtaposed with scale, given timing and over time, as well as other pertinent factors.

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[53] P. Gaeta, "On What Conditions Can a State Be Held Responsible for Genocide?", *European Journal of International Law*, 2007, at 643.

[54] "Guatemala: Memory of Silence," *Commission for Historical Clarification*, February 1999, para. 120, describing the acts of genocide as "obeying a higher, strategically planned policy." *See also* para. 111, "Considering the series of criminal acts and human rights violations which occurred in the regions and periods indicated and which were analysed for the purpose of determining whether they constituted the crime of genocide, the CEH concludes that the reiteration of destructive acts, directed systematically against groups of the Mayan population, within which can be mentioned the elimination of leaders and criminal acts against minors who could not possibly have been military targets, demonstrates that the only common denominator for all the victims was the fact that they belonged to a specific ethnic group and makes it evident that these acts were committed 'with intent to destroy, in whole or in part' these groups." The pleadings of Bosnia and Herzgovina phrased the inference of State intent in a conceptually helpful way: "an operational plan for the destruction of the group… can readily be ascertained by induction through a global analysis of the criminal actions taken by the state against the targeted group." ICJ, *Bosnia v. Serbia*, Oral pleadings, 20 April 2006, CR/2006/34, para. 33.

[55] Bonafè *supra* note 10, at 134-35; *see e.g.* ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 523; ICTY, *Prosecutor v. Jelisić*, IT-95-10-A, Judgment, 5 July 2001, para. 47 ("On the issue of determining the offender's specific intent, the Chamber considers that intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act.")

[56] *Krstic´*, 'Transcript' (27 June 2001), p. 10029, at 1-5.

The ILC Articles on the Responsibility of States are additionally helpful in considering the composite nature of State responsibility for genocide. First, it must be recalled, as indicated above, that the ILC considered and rejected the idea of *criminal* responsibility of the State. Rather, a violation or breach "through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act"; the breach starts "with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation."[57] Article 26 of the ILC Articles on the Responsibility of States further provides that there are no defenses or nothing that will preclude "the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm." China's purported goals behind its destructive campaigns against Uyghurs do not determine the State's intent; its objective and comprehensive system of destruction does.

The inference of specific intent is thus derived from the State-orchestrated and interconnected destructive campaigns, which target every aspect of the Uyghurs as a group and, when viewed as a whole, can only amount to an intent to destroy the group as such.

Mass Surveillance, State Terror, and Severance of Uyghur Communal Bonds

Since 2014, Xinjiang has become one of the most extensively surveilled regions in the world, where Uyghurs are most closely monitored by a combination of human and digital mechanisms. The government has mandated a program that has sent over a million cadres, or public servants, to live in Uyghur homes at regular intervals for week-long "homestays," monitoring their every move with the ever-present threat of detention, and intruding on the most intimate of spaces, including sharing beds.[58] When Chen Quanguo was appointed Party Secretary for the region in late 2016, he launched an unprecedented recruitment of approximately 100,000 new officers, and a policing grid of thousands of "convenience police stations" throughout Xinjiang.[59] The government uses facial recognition technology that exclusively tracks Uyghurs and systematically gathers their biometric data, information which is fed into a machine learning policing system known as the Integrated Joint Operations Platform (IJOP).[60] There is even evidence suggesting that the government has benefitted from a "Uyghur alarm" developed by Huawei and tested an emotion detection software on Uyghurs during interrogations/torture.[61]

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[57] Article 15, Breach consisting of composite act.

[58] "China's Uighurs Told to Share Beds, Meals with Party Members", *Associated Press*, 30 November 2018, https://apnews.com/article/9ca1c29fc9554c1697a8729bba4dd93b.

[59] James Leibold and Adrian Zenz, "Xinjiang's Rapidly Evolving Security State." *Jamestown*, *China Brief Volume: 17 Issue: 4,* https://jamestown.org/program/xinjiangs-rapidly-evolving-security-state/.

[60] James Leibold (2020), "Surveillance in China's Xinjiang Region: Ethnic Sorting, Coercion, and Inducement", *Journal of Contemporary China*, 29:121, at 51; https://www.nytimes.com/2019/04/14/technology/china-surveillance-artificial-intelligence-racial-profiling.html.

[61] https://www.washingtonpost.com/technology/2020/12/08/huawei-tested-ai-software-that-could-recognize-uighur-minorities-alert-police-report-says/; https://www.bbc.com/news/technology-57101248.

IJOP monitors the personal information of Uyghurs from video cameras, wifi networks, security checkpoints, smartphone checks, and other personal records, and uses algorithms to generate lists of "suspects" for detention.[62] A leaked confidential government document revealed that IJOP flagged nearly 2 million Uyghur users of a software app of concern to the government and ordered localities to "carry out investigation and verification one by one, and for those suspected of terrorism, it is necessary to fix evidence and crack down according to the law."[63]

The system of terror has taken on a life of its own through community policing and artificial intelligence. This mass surveillance system permeates Uyghur life both inside and outside the detention compounds, terrorizing all Uyghurs and resulting in the severance of communal bonds and trust. The authorities in Xinjiang have quite literally and effectively followed Xi Jinping's 2014 order to deploy "walls made of copper and steel" and "nets spread from the earth to the sky."[64]

Mass Internment

Satellite imagery analyses have identified and mapped out upwards of 380 newly built or expanded detention centres across Xinjiang, with enough space to detain more than a million prisoners at once (19.2 million sq. meters), before accounting for the severe overcrowding to which former detainees have testified, and excluding the 100 detention centers built before 2016.[65] Two leaked lists from Karakax and Aksu, prefectures where Uyghurs constitute 80% and 90% of the population respectively, cover a wide variety of benign and vague grounds for detention, including being "born after 1980s," "generally untrustworthy," "generally acting suspiciously," "having complex social ties," "birth policy violations," and the like.[66] According to internal police documents, there are citywide quotas for collecting intelligence on Muslims, which includes scanning phones and computers for *53,000* markers of suspicious activity or grounds for detention.[67] According to the Neighborhood Watch Units' Trustworthiness

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[62] Wang, Maya. "China: Big Data Fuels Crackdown in Minority Region", *Human Rights Watch*, 28 October 2020, www.hrw.org/news/2018/02/26/china-big-data-fuels-crackdown-minority-region; *see also* Wang, Maya. "China's Algorithms of Repression: Reverse Engineering a Xinjiang Police Mass Surveillance App." *Human Rights Watch*, 1 May 2019, www.hrw.org/report/2019/05/02/chinas-algorithms-repression/reverse-engineering-xinjiang-police-mass.

[63] "Integrated Joint Operation Platform' Daily Essentials Bulletin, No. 20," (IJOP Bulletin No. 20) as published by the *ICIJ*, *China Cables*, http://www.documentcloud.org/documents/6558508-China-Cables-IJOP-Daily-Bulletin-20-English.html.

[64] James Leibold and Adrian Zenz, "Xinjiang's Rapidly Evolving Security State." *Jamestown*, *China Brief Volume: 17 Issue: 4,* https://jamestown.org/program/xinjiangs-rapidly-evolving-security-state/.

[65] See https://xjdp.aspi.org.au/explainers/exploring-xinjiangs-detention-facilities/; https://www.buzzfeednews.com/article/meghara/china-camps-prisons-xinjiang-muslims-size

[66] In Aksu and Karakax, Uyghurs constitute 80% and more than 90% of the population, respectively; "China: Big Data Program Targets Xinjiang's Muslims", *Human Rights Watch*, 9 December 2020, www.hrw.org/news/2020/12/09/china-big-data-program-targets-xinjiangs-muslims; "'Ideological Transformation:' Records of Mass Detention From Qaraqash [also spelled Karakax], Hotan", *Uyghur Human Rights Project*, February 2020, https://docs.uhrp.org/pdf/UHRP_QaraqashDocument.pdf; Shepherd, Christian and Laura Pitel, "The Karakax List: How China Targets Uighurs in Xinjiang," *Financial Times*, 17 February 2020, https://www.ft.com/content/e0224416-4e77-11ea-95a0-43d18ec715f5.

[67] Byler UT Report at 11, 17-18.

Assessment Forms, "being ethnic Uyghur" is a factor in point deductions, which could result in detention.[68] Even in Urumqi, where Han make up over 70% of the population, the greatest number of individuals flagged for detention are Uyghurs, who comprise 12.9% of the population.[69]

The vast majority of detainees are Uyghur men between the ages of 18 and 55.[70] As expert witness Darren Byler has demonstrated, the mass internment drive has also contributed to irreparably destroying familial ties, resulting in a significant number of partners of detainees divorcing their detained husbands, sometimes to escape the sexual abuse of their live-in cadre "relatives."[71]

In a rare and telling testimony before this Tribunal, a former Han Chinese police officer, under the pseudonym Wang Leizhan, explained how the violence of mass internment is condoned and even encouraged by deeply ingrained State policy and formal training. After testifying to the brutal methods of physical and mental torture inflicted on Uyghurs, including sexual violence, he testified to the following:

> I think such torture against Uyghurs took place because it was encouraged by central Chinese Government. This is because, according to Chinese government policy, Uyghurs are systematically and collectively defined as 'terrorists'… As part of the national policy of seeing Uyghurs as automatically enemies/terrorists, as part of my police training, I was taught to see Uyghurs as 'the enemy.' If a Chinese police officer decided to arrest Uyghurs, we were told to invent reasons/pretext and to make the arrest appear as legal/plausible as possible.[72]

In addition to the notorious internment camps operating outside the criminal justice system, the breadth and scope of formal prison sentences have skyrocketed in Xinjiang since 2017.[73] Recent reports suggest that Uyghurs are increasingly being transferred to serve long-term formal sentences, confirming the concerted plan to render the internment campaign more permanent

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[68] Byler UT Report at 12.

[69] Byler UT Report at 12.

[70] https://shahit.biz/eng/#stats

[71] Byler UT Report, at 5-6.

[72] UT Witness Statement, Wang Leizhan, 7 June 2021, paras. 9-10.

[73] In 2014, 21,000 prison sentences were issued. Between 2016 and 2018, more than 250,000 people were imprisoned formally. In 2016, 27% of sentences were over five-year terms, a percentage that grew to 87% a year later. https://www.cnn.com/2021/06/24/china/xinjiang-prisons-china-intl-hnk-dst/index.html

with a veneer of legitimacy.[74] This proposition is further supported by the fact that the majority of newly built or expanded prisons since 2019 are high security facilities.[75]

The government has also established a parallel unprecedented system of institutionalized long-term Uyghur forced labour programs within and outside the internment camps.[76] The expansion of these programs shows no sign of abating.

Coercive Birth Prevention Campaign

The Chinese Government is simultaneously engaged in a well-documented systematic coercive birth prevention campaign targeting Uyghurs in tandem with the mass internment drive, describing it in the same terms—a "strike-hard campaign" against "illegal births."[77] At a high-level meeting in 2017, Chen Quanguo demanded "effective containment of illegal births in the four southern prefectures of Xinjiang through a clear transformation of the masses' concept on childbirth."[78] According to the Karakax List, the two most cited reasons, by far, for detention or internment are (1) "birth policy violations" and (2) "unsafe post 80s, 90s, or 00s person" (referencing years of birth).[79] These two principal reasons for detention suggest that a key driver of the mass internment campaign is the coercive birth prevention program, and vice versa, either by enforcing strict "birth policy" rules or detaining young or middle aged persons. [80]

By 2019, the government planned to subject over 80% of women of child-bearing age in the Southern four prefectures—Hotan, Kashgar, Aksu, and Kizilsu—to "birth control measures with long-term effectiveness," essentially referring to sterilizations or IUDs.[81] Since the crackdown escalation, Xinjiang authorities began issuing directives and maintaining spreadsheets to

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[74] https://www.hrw.org/news/2021/02/24/china-baseless-imprisonments-surge-xinjiang; https://www.cnn.com/2021/06/24/china/xinjiang-prisons-china-intl-hnk-dst/index.html

[75] Ruser, Nathan. "Exploring Xinjiang's Detention System", *The Xinjiang Data Project*, September 2020, https://xjdp.aspi.org.au/explainers/exploring-xinjiangs-detention-facilities/.

[76] *See* Laura T. Murphy & Nyrola Elima, *In Broad Daylight: Uyghur Forced Labour and Global Solar Supply Chains,* Sheffield Hallam University Helena Kennedy Centre for International Justice, May 2021, at 9-13.

[77] Ruser at 7. The coercive birth prevention campaign in Xinjiang is evidenced by government documents and statistics and corroborating testimony, including Zumret Dawut before the Tribunal (paras. 30-33).

[78] Ruser at 7.

[79] "'Ideological Transformation:' Records of Mass Detention From Qaraqash [also spelled Karakax], Hotan", *Uyghur Human Rights Project*, February 2020, https://docs.uhrp.org/pdf/UHRP_QaraqashDocument.pdf, at 9.

[80] Zenz, Adrian, "The Karakax List: Dissecting the Anatomy of Beijing's Internment Drive in Xinjiang," *Journal of Political Risk*. https://www.jpolrisk.com/karakax/; These reasons are corroborated by local officials, who have interned all or nearly all Uyghurs born between 1980 and 2000, branding them an "untrustworthy generation"; *see* "Xinjiang Authorities Targeting Uyghurs Under 40 For Re-Education Camps", *Radio Free Asia*, 22 March 2018, https://www.rfa.org/english/news/uyghur/1980-03222018155500.html; Thum, Rian, "China's Mass Internment Camps Have No Clear End in Sight," *Foreign Policy*, 22 August 2018, https://foreignpolicy.com/2018/08/22/chinas-mass-internment-camps-have-no-clear-end-in-sight/.

[81] Zenz, Adrian. "Sterilizations, IUDs, and Mandatory Birth Control: The CCP's Campaign to Suppress Uyghur Birthrates in Xinjiang" *Jamestown*, June 2020, https://jamestown.org/product/sterilizations-iuds-and-mandatory-birth-control-the-ccps-campaign-to-suppress-uyghur-birthrates-in-xinjiang/ at 12.

implement "sterilization," particularly in the Southern four prefectures.[82] These Southern target areas are significant since Uyghurs comprise approximately 90% of the population in the South.[83]

Officials enforce these policies by classifying those who undergo sterilization or IUDs as "trustworthy," and therefore perhaps protected from detention.[84] A government directive requires State workers to subject women of childbearing age to quarterly pregnancy checks and visit them on a monthly basis; refusal can result in detention.[85] All women are subjected to at least quarterly gynecological examinations.[86] Xinjiang county directives, corroborated by firsthand testimony, show that women face penalties, including detention or threat of detention, for illegal pregnancies or failure to comply with sterilizations or IUDs.[87] According to a 52 GB leak of police files, in the majority of cases of illegal births, the victims were sentenced to 3-5 years in prison.[88] Government documents further state that illegal pregnancies must be "disposed of early."[89] Camp survivors have similarly testified that women are forced to undergo abortions if pregnant upon arrival.[90] The authorities also enforce birth prevention measures by incentivizing reporting on "illegal births," or officials who fail to report illegal births accurately, with cash rewards.[91]

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[82] *Ibid*. at 16, 18.

[83] The following numbers on the Southern four prefectures of Kashgar, Hotan, Aksu, and Kizilsu are from the Xinjiang Statistical Bureau's Xinjiang Statistical Yearbook 2019, *available at* http://tjj.xinjiang.gov.cn/tjj/rkjyu/202006/3b1eef1049114b0c9cf9e81bf18433ef.shtml.
Uyghurs/Total Population
Kashgar: 4,289,151 / 4,633,781 (92.5%)
Hotan: 2,453,618 / 2,530,562 (97%)
Aksu: 2,051,412 / 2,561,674 (80%)
Kizilsu: 413,655 / 624,496 (66%)
Total: 9207836 / 10350513.

[84] Ruser UT Report at 18; Byler UT Report, at 3.

[85] Byler UT Report, at 2-3.

[86] Byler UT Report, at 3.

[87] Zenz, *supra*, note 79, at 11-12, 15; Ruser/ASPI UT Report, at 17.

[88] Byler UT Report, at 4.

[89] Byler UT Report, at 2.

[90] Gulbahar Jelilova, UT Testimony, para. 11. *See also* https://shahit.biz/eng/ Victim # 1723 ("As for the pill they received, I think it was a birth control pill. They didn't want any births. If you were pregnant when you came to the camp, they performed an abortion. If you refused, they took you to a stricter place, one without visits with relatives.")

[91] Ruser UT Report, at 17.

In 2018, Xinjiang had the highest net IUD placements of *any region in China* (calculated as placements minus removals), despite comprising 1.8% of China's total population.[92] An August 2020 Kizilsu report (66% Uyghur) noted that 88% of all childbearing age women had "long-term effective birth prevention" measures.[93]

As a result of these aggressive "family planning" policies, the indigenous birthrate in Xinjiang plummeted. Between 2017 and 2019, the birth-rate across Xinjiang dropped by nearly half—the most extreme drop out of any region in the world since 1950.[94] In counties with indigenous populations of 90% or higher, the birth-rate fell by 56.5% on average, including a 66.3 % decrease in 2019-2020.[95] The 29 counties with available 2019-2020 data show a 58.5% drop from the 2011-2015 baseline average.[96] Hotan County (99% Uyghur) suffered a 70.8% drop between 2012 and 2018.[97] In Urumqi (70% Han), every Han-majority district saw an increase in birth-rates compared to the pre-2017 baseline (as did the Han-majority county of Qitai, which is 72% Han),[98] whereas the birth-rates in the two indigenous-majority Urumqi districts declined.[99] Southern Xinjiang's growth rates are near or below zero and appear to be continuing on this downward trend,[100] at a time when China is encouraging childbirth across the country to fend off a national crisis—all demonstrating a clear discriminatory program suppressing Uyghur births in the region. The government does not even dispute these declines in birthrates, but instead attributes them to "the comprehensive implementation of the family planning policy."[101] Moreover, China's US Embassy outwardly admitted that the anti-extremism policies in Xinjiang made "Uygur women… no longer baby-making machines."[102]

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[92] China Statistical Yearbook of Health and Hygiene (2019), *available at* https://web.archive.org/web/20210527122258/http://heqishi.com/material/2019%E5%B9%B4%E4%B8%AD%E5%9B%BD%E5%8D%AB%E7%94%9F%E5%81%A5%E5%BA%B7%E7%BB%9F%E8%AE%A1%E5%B9%B4%E9%89%B4.pdf.

[93] Zenz, "'End the dominance of the Uyghur ethnic group': an analysis of Beijing's population optimization strategy in southern Xinjiang," *Central Asian Survey*, 24 August 2021, at 295.

[94] Ruser UT Report, at 4.

[95] Numbers corroborated by *Zenz*, *supra* note 79, at 4.

[96] Ruser UT Report, at 11.

[97] Ruser UT Report, at 11.

[98] Thum UT Report, at 8.

[99] Ruser UT Report, at 15.

[100] Zenz, *supra*, note 79, at 295. Though data is missing from 2020, government targets suggest efforts to suppress birth-rates further, Thum UT Report, at 9.

[101] Watson Ivan, et al. "China's Xinjiang Government Confirms Huge Birth Rate Drop but Denies Forced Sterilization of Women," *CNN*, 21 September 2020, https://www.cnn.com/2020/09/21/asia/xinjiang-china-response-sterilization-intl-hnk/index.html; Ruser UT Report, at 22.

[102] Davidson, Helen, "Twitter removes China US embassy post saying Uighur women no longer 'baby-making machines,'" *Guardian,* 10 January 2021, https://www.theguardian.com/world/2021/jan/10/twitter-removes-china-us-embassy-post-saying-uighur-women-no-longer-baby-making-machines

The combined mass internment and coercive birth prevention campaigns clearly point towards an intent to biologically destroy the group as such.

Forcible Separation of Uyghur Children and Families

Since 2017, pursuant to a new policy, the government has pursued an unprecedented expansion of massive,[103] State-run, highly securitized, boarding schools and orphanages to confine Uyghur children full-time, including infants.[104] According to a Ministry of Education planning document, the residential-school expansion was at the top of its list of priorities and, between 2017 and 2019, the number of children separated from their families and placed into state-run boarding schools in the region increased by 76.9%, from 497,800 to 880,500.[105] The explicit goals of these boarding schools are "to promote the teaching of the national standard language [Mandarin Chinese]… block the influence of the family's atmosphere on the children to the greatest extent and reduce the occurrence of …listening to the scriptures at home."[106] The government set a 2020 goal of running one to two such boarding schools in each of Xinjiang's over 800 townships.[107] Under State custody, Uyghur children are being raised in Chinese-language environments with standard Han child-rearing methods adopted by the State.[108] The State is thus forcibly transferring Uyghur children to State-run Han group settings. Expert witness Rian Thum has demonstrated that it is reasonable to conclude that the majority of Uyghur middle school students are now in residential schools and that the transfer of Uyghur children into Han-dominated facilities is not only a by-product of losing parents to mass internment but is an independent goal in and of itself.[109] The systematic forcible separation of Uyghur children from their families, combined with the widespread forcible prevention of Uyghur births and mass

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[103] For example, in 2018, a rural county (Yumin) with a population of 50,000 built a 3,000 square-meter centre, *see* Feng, Emily. "Uighur Children Fall Victim to China Anti-Terror Drive." *Financial Times,* 10 July 2018, https://www.ft.com/content/f0d3223a-7f4d-11e8-bc55-50daf11b720d.

[104] "China: Xinjiang Children Separated from Families", *Human Rights Watch*, 15 September 2019, https://www.hrw.org/news/2019/09/15/china-xinjiang-children-separated-families; Zenz, Adrian, "Break Their Roots: Evidence for China's Parent-Child Separation Campaign in Xinjiang*," Journal of Political Risk*. https://www.jpolrisk.com/break-their-roots-evidence-for-chinas-parent-child-separation-campaign-in-xinjiang/.

[105] The planning document is available at: http://web.archive.org/web/20191216040455/http:/www.moe.gov.cn/jyb_xwfb/xw_zt/moe_357/jyzt_2016nztzl/ztzl_xyncs/ztzl_xy_dxjy/201801/W020180109353888301306.pdf, at 232, and http://archive.is/QZ2eM; *see also* Adrian Zenz*,* "Parent-Child Separation in Yarkand County, Kashgar", *Medium,* 13 October 2020, https://adrianzenz.medium.com/story-45d07b25bcad#_ftn7 and Qin, Amy. "In China's Crackdown on Muslims, Children Have Not Been Spared." *New York Times*, 28 Dec. 2019, https://www.nytimes.com/2019/12/28/world/asia/china-xinjiang-children-boarding-schools.html.

[106] Thum UT Report, at 3.

[107] *Ibid.*

[108] Sean Roberts, *The War on the Uyghurs: China's Internal Campaign against a Muslim Minority* (Princeton, NJ: Princeton University Press, 2020), at 232.

[109] Thum UT Report, at 3-4.

internment, threatens "the group's capacity to renew itself, and hence to ensure its long-term survival" or existence (to use the language of the ICJ interpreting the Genocide Convention).[110]

Destruction of Language

A rigorous analysis of Uyghur-medium primary level textbooks further demonstrates the erasure of Uyghur culture, religion, history, literature, and poetry from primary education.[111] The government has completely replaced "bilingual education" with "national language education" or Chinese-medium education, depriving the next generation of the Uyghur language,[112] while subjecting adult detainees in the camps to torture and/or degrading or inhumane treatment for speaking Uyghur or failing to speak Chinese.[113]

Destruction of Uyghur Sacred Sites, Mosques, and Way of Life

The Australian Strategic Policy Institute estimates that approximately 16,000 Xinjiang mosques, or 65% of the total, have been destroyed or damaged due to government policies, largely since 2017, with 8,500 mosques completely demolished.[114] A number of the mosques that remain intact and undamaged have been converted into commercial or civic spaces.[115] Private religious schools have also been destroyed. In addition, an estimated 58% of important religious-cultural sites in the region, such as shrines, cemeteries, and pilgrimage sites, have been damaged or completely demolished,[116] sites at the heart of Uyghur spiritual identity, including what is widely considered the holiest Uyghur site, Ordam Padshah.[117] Many of the undamaged sites are fully enclosed by walls or security checkpoints.[118]

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[110] *Croatia v. Serbia*, para. 136.

[111] Joanne Smith Finley and Ondřej Klimeš, "China's Neo-Totalitarian Turn and Genocide in Xinjiang," *Society and Space,* https://www.societyandspace.org/articles/chinas-neo-totalitarian-turn-and-genocide-in-xinjiang.

[112] *Ibid.*

[113] https://shahit.biz/eng/; Victims # 1414, 1540, 2209, and 3623.

[114] As confirmed by satellite imagery and eyewitness testimony: "Cultural Erasure", *Australian Strategic Policy Institute,* 24 September 2020, https://www.aspi.org.au/report/cultural-erasure. According to another intensive investigation by *The Guardian* and *Bellingcat*, 42% of the mosques and shrines analyzed between 2016 and 2018 were partly or completely demolished, including the sites of mass pilgrimages, a central practice for Uyghurs. Eyewitness accounts indicate that the number is far higher; *see* Kuo, Lily, "Revealed: New Evidence of China's Mission to Raze the Mosques of Xinjiang*", The Guardian*, 7 May 2019, https://www.theguardian.com/world/2019/may/07/revealed-new-evidence-of-chinas-mission-to-raze-the-mosques-of-xinjiang.

[115] Joanne Smith Finley, "'Now We Don't Talk Anymore' Inside the 'Cleansing' of Xinjiang," *China File,* https://www.chinafile.com/reporting-opinion/viewpoint/now-we-dont-talk-anymore; *Cultural Erasure, supra* note 114.

[116] *Ibid.*

[117] Thum, Rian. "The Spatial Cleansing of Xinjiang: Mazar Desecration in Context." 24 Aug. 2020, *Made in China Journal*. https://madeinchinajournal.com/2020/08/24/the-spatial-cleansing-of-xinjiang-mazar-desecration-in-context/.

[118] *Cultural Erasure, supra* note 114.

In early 2018, Xinjiang officials extended these destructive practices further into public, private, domestic, and communal Uyghur spaces. Officials implemented a "Beautifying Spaces" programme, intended to transform "backward" Uyghur lifestyles and erase ethnically distinct Uyghur architecture.[119] Authorities have specifically ordered the destruction of two household features that stand at the center of Uyghur domestic and sacred life—the *supa,* an interior raised platform, and *mehrab,* an arch or niche facing the direction of Mecca for prayer.[120]

The practices connected to these destroyed or converted sacred sites and household features not only carry religious significance for the Uyghurs but also capture essential elements of Uyghur identity, culture, communal bonds, and connection with the land.[121]

Selective Targeting of Uyghur Leaders

There is a growing list of approximately 400 disappeared or imprisoned Uyghur intellectuals from 2016 to the present, including Government officials, prominent academics, celebrated writers, poets, linguists, tech developers and the like.[122] Some of these figures were even praised for fostering understanding and building bridges between minorities and the Government,[123] or the Han majority.[124] Many of these community leaders and guardians of Uyghur identity are

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[119] Smith Finley and Klimeš, *supra* note 111.

[120] Timothy A. Grose, *"*If you don't know how, just learn: Chinese housing and the transformation of Uyghur domestic space," *Ethnic and Racial Studies,* 6 July 2020.

[121] The prominent Uyghur scholar, Rahile Dawut, who studied these sites and disappeared in 2017, likely due to her work preserving Uyghur native traditions, once commented: "If one were to remove these … shrines, the Uighur people would lose contact with earth. They would no longer have a personal, cultural, and spiritual history. After a few years we would not have a memory of why we live here or where we belong." Kuo *supra,* note 114; *see also* Roberts, *supra* note 108, at 228.

[122] "List of Uyghur intellectuals imprisoned in China from 2016 to the present", *Xinjiang Victims Database,* last updated: 13 March 2021, https://shahit.biz/supp/list_003.pdf.

[123] *See* case of Uyghur media app owner, Ekpar Asat, who disappeared in 2016 and was reportedly sentenced to 15 years; Wong, Edward, "Sister Fights to Free Uighur Businessman Held in China After U.S. Trip", *The New York Times*, 9 May 2020, https://www.nytimes.com/2020/05/09/us/politics/china-uighurs-arrest.html

[124] "The Persecution of the Intellectuals in the Uyghur Region: Disappeared Forever?", *Uyghur Human Rights Project,* October 2020, https://docs.uhrp.org/pdf/UHRP_Disappeared_Forever_.pdf, e.g. Abdukerim Rahman, a 77 year-old literature professor at Xinjiang University was charged as "two-faced," despite being praised by the Chinese State for over 50 years; Ramzy, Austin. "China Targets Prominent Uighur Intellectuals to Erase an Ethnic Identity", *The New York Times*, 5 January 2019, https://www.nytimes.com/2019/01/05/world/asia/china-xinjiang-uighur-intellectuals.html.

subjected to formal, often harsher prisons sentences, and even death sentences,[125] evidencing a deliberate Government policy of selectively targeting prominent Uyghur leaders.[126]

8. Conclusion: In Whole or In Part

The Tribunal has requested an explanation as to how the "part" is being targeted substantially. We would first submit that the group as a whole is being targeted. When taking an aerial view of the realities on the ground, one cannot reasonably conclude otherwise. The government has launched discrete and interconnected attacks at every possible aspect of what defines the Uyghurs' survival as a group: the coerced reduction and prevention of Uyghur births; mass internment of Uyghurs; disappearance of Uyghur community leaders, household heads, and intellectuals; severance of all communal or familial Uyghur bonds; eradication of communal, spiritual, and religious Uyghur sites and rituals; erasure of Uyghur language; and the forcible transfer of the next generation of Uyghur children from their homes to be raised in Han settings by the State. The sheer comprehensiveness of these destructive campaigns can only lead to one conclusion—destruction of the Uyghur group as such.

According to the ICJ, the "in part," or "substantial part," requirement has been interpreted to mean that "the part targeted must be significant enough to have an impact on the group as a whole."[127] It is therefore important to consider the significance or prominence of the part of the Uyghur population that has been targeted,[128] when assessing "in part," including the selective targeting, disappearances, harsh sentencing and even deaths,[129] of prominent Uyghur leaders and religious figures. The deliberate campaign targeting these leading figures carries significant probative value for the question of genocidal intent.

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[125] Shepherd, Christian, "Fear and Oppression in Xinjiang: China's War on Uighur Culture," *Financial Times*, 12 September 2019, www.ft.com/content/48508182-d426-11e9-8367-807ebd53ab77. The editor-in-chief of a State-run literature magazine committed suicide out of fear of being sent to an internment camp. "Uyghur Editor of State-Run Magazine Commits Suicide 'Out of Fear' of Detention." *Radio Free Asia*, 28 September 2018 https://www.rfa.org/english/news/uyghur/suicide-09282018171559.html; *See* Harris, Rachel, "Cultural Genocide in Xinjiang: China Targets Uyghur Cultural Leaders", *The Globe Post*, 17 January 2019, https://theglobepost.com/2019/01/17/cultural-genocide-xinjiang/.

[126] *See* Harris, Rachel, "Cultural Genocide in Xinjiang: China Targets Uyghur Cultural Leaders", *The Globe Post*, 17 January 2019, https://theglobepost.com/2019/01/17/cultural-genocide-xinjiang/.

[127] *Bosnia v. Serbia,* at para. 198.

[128] *Prosecutor v. Krstic*, Case No. ICTY-IT-98-33, Judgment, at paras. 12 and 587 ("In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article [II]."), and citing the Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) "that an intent to destroy a specific part of a group, such as its political, administrative, intellectual or business leaders, 'may be a strong indication of genocide regardless of the actual numbers killed.'"

[129] For a list of documented deaths in detention, see *Xinjiang Victims Database*, https://shahit.biz/eng/#lists. *See also* "Prominent Uyghur Poet and Author Confirmed to Have Died While Imprisoned", *Radio Free Asia,* 25 January 2021, *https://www.rfa.org/english/news/uyghur/poet-01252021133515.html*. Moreover, according to a first-hand account, elderly detainees as old as 80 years of age were the main targets of torture and inhumane treatment at the internment camp. Imams could be sentenced to more than 20 years, and hand-cuffed and shackled at all times (Victim # 67 https://shahit.biz/eng/).

Even on a narrower interpretation of intent, there is sufficient evidence to infer the State's genocidal intent to destroy a substantial part of the Uyghur group biologically, based on China's own statistics and directives. These official documents conclusively show that Uyghur birth rates are plummeting and growth rates are near or below zero. These numbers will not abate so long as Uyghur women continue to be subjected to draconian, coercive birth prevention measures, and men to mass internment or forced labor. Moreover, it is reasonable to conclude that Uyghur prison rates are increasing and that Uyghur birth rates continue to precipitously drop, since China has concealed all recent Xinjiang prison data (since 2018) and birth rate data (since 2019-2020) from public record.[130] This departure from longstanding tradition of public documentation by the State can only lead to a negative inference.

9. Epilogue: 'Bystanders' and the Duty to Prevent[131]

China is not the only State with obligations vis-à-vis the situation in Xinjiang and the genocide (or serious risk of genocide) against the Uyghurs. The first and foremost obligation of the Genocide Convention, binding on each and every State party, is to prevent and punish genocide. That obligation is multilateral, i.e. *inter pares*. As discussed above, State responsibility occurs when there is a breach that is attributable to a State. The attributable conduct for the obligation to prevent which gives rise to State responsibility is framed as an omission: the failure of the State to prevent and/or punish genocide.

According to the ICJ, the duty to prevent starts at the time the State knows or ought to know that there is a serious risk of genocide occurring, and "[f]rom that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit."[132] In the case of *Bosnia v Serbia,* the ICJ took note of an abundance of documentary evidence demonstrating that the respondent State had "foreknowledge" of an imminent massacre (which we now know to have been the Srebrenica genocide) and the fact that the respondent State was "fully aware of the climate of deep-seated hatred which reigned" between the individual perpetrators of the genocide and the victims, the Bosnian Muslims.[133] The ICJ also found that the respondent State was in a position of influence over, and closer to, the perpetrators of genocide than any other State party to the Genocide Convention.[134] Even if this position of influence did not exist, the ICJ found that "for a State to

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[130] According to ASPI/Ruser UT Report, "roughly 95 percent of Xinjiang's missing births in 2019 appear to be in indigenous-majority counties," at 15.

[131] The authors acknowledge with appreciation the research assistance of Aneta Bajic in respect of this section of the report.

[132] *See Bosnia v Serbia*, para. 432.

[133] *Ibid.* at paras. 436-438.

[134] *Ibid.* at para. 434.

be held responsible for breaching its obligation of prevention, it does not need to be proven that the State concerned definitely had the power to prevent the genocide; it is sufficient that it had the means to do so and that it manifestly refrained from using them."[135] The ICJ concluded that in light of the evidence that the respondent State had prior knowledge that the genocide was at serious risk of occurring and was in a position of power with the means to prevent, the respondent State "violated its obligation to prevent the Srebrenica genocide in such a manner as to engage its international responsibility."[136]

When applying the same logic and principles to the Uyghur genocide, whether or not there is consensus that a genocide is occurring at this moment, States parties would be hard-pressed to argue that they were not aware of the environment in China, the enormous means apparently being deployed (including to hide the situation or prevent free access and independent scrutiny), and the manifest risk of genocide faced by Uyghurs as a group, as such. In short, the 151 States parties to the Genocide Convention, in addition to and separate from China, are under an obligation at least to employ the means at their disposal to try to prevent genocide against the Uyghurs. Therefore, as passive bystanders, each State party violates the Genocide Convention and engages State responsibility for its omissions.

In this regard, it bears observing that Article VIII of the Genocide Convention expressly stipulates the option for States parties to call upon the UN to take action to suppress acts of genocide, as follows:

> Any Contracting Party 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 acts of genocide or any of the other acts enumerated in article III.[137]

Furthermore, a State party to the Genocide Convention incurs State responsibility for breaching the duty to prevent at the time a serious risk of genocide arises and extends through the entire period during which the genocide continues.[138] Article 14(3) of the ILC Articles on the Responsibility of States provides:

> The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.[139]

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[135] *Ibid.* at para. 438.

[136] *Ibid.*

[137] The Genocide Convention, *supra* note 20 at Article VIII.

[138] *See* Eyal Mayroz, "The legal duty to 'prevent': after the onset of 'genocide'", (2012) 14 *Journal of Genocide Research* 1 at 84; see at 86 for research into how the international community has used "prevent" and "stop" interchangeably when referring to genocide, including how an early draft of the Genocide Convention referred to stopping genocide in its title.

[139] ILC Draft Articles (here Article 14, para. 3) are available with official commentary online at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

One practical method of preventing genocide is already contained in the Genocide Convention itself. Article V of the Genocide Convention imposes upon States parties a duty to legislate in domestic law the prohibition of genocide. Failure to do so is not only a breach of Article V, but it can be said to be also a breach of Article I, i.e. the duty to prevent, because such prevention cannot occur, at least domestically, if the internationally proscribed acts are not domestically criminalized since no crime can be committed and no punishment can be imposed if there is no law which proscribes and establishes punishment for that crime. Accordingly, the first step in preventing genocide is to criminalize it domestically across all States parties.

Another method of preventing genocide, at a minimum, is to call it out when it is identifiable whether in fact occurring or at serious risk of occurring. Naming and shaming, for example by passing a motion in Parliament or publicly issuing an official statement, undoubtedly draws attention and can in effect place on notice violators in terms of prospective consequences including permissible sanctions.[140] Often naming and shaming is the first step to preventing genocide or suppressing acts of genocide, prior to engaging in diplomatic negotiations or participating in military interventions.[141] Arguably, naming and shaming is also the most minimal action to take to prevent or supress genocide while avoiding a breach of international obligations under the Convention,[142] and every State (as part of the "international community as a whole") has the capacity to name and shame, and so should act, no matter its proximity to the situation or acts of concern.[143] Indeed, the example of The Gambia in the ICJ case against Myanmar in respect of the Rohingya[144] underlines the much more meaningful possibility for action available even to small, distant and weak States having no immediate connection with a situation nor incurring or likely to incur specific injury. As such, one can only imagine all that could and should be done by the 151 other States parties to the Genocide Convention vis-à-vis the situation in Xinjiang and the Uyghur genocide. To the extent such possibilities for action exist, those States failing, by omission, to act incur State responsibility for breach of their duty to prevent.

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[140] *See* Schiffbauer, Björn, "The duty to prevent genocide under international law: naming and shaming as a measure of prevention", (2018) 12.3 *Genocide Studies and Prevention: An International Journal* 86.

[141] *Ibid.* at 87.

[142] *Ibid.* at 86.

[143] *Ibid.* at 87.

[144] *See* the case of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, ICJ, documents and "Latest Developments", available online at: https://www.icj-cij.org/en/case/178