

ASIA PACIFIC CENTRE - RESPONSIBILITY TO PROTECT

GENOCIDE AND CRIMES AGAINST HUMANITY IN XINJIANG? APPLYING THE LEGAL TESTS



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A U S T R A L I A

Genocide and crimes against humanity in Xinjiang?

Applying the legal tests

Introduction

Since early 2017, numerous reports have emerged of large-scale arbitrary detention and mass surveillance, forced political indoctrination, severe restrictions on movement and religious practice, torture and inhumane treatment, forced sterilisation, forced separation of children from parents, forced labour and killings of persons in detention in the Xinjiang Uighur Autonomous Region ('XUAR' or 'Xinjiang') of China. The alleged victims are predominantly Uighur and other Turkic Muslim minorities. This Report provides a summary of the tests applicable to establishing genocide and crimes against humanity under international law and preliminary analysis of the extent to which the situation in Xinjiang, as evidenced in publicly available information, may currently be said to satisfy those tests.¹

The legal tests of genocide and crimes against humanity under international law are complex, and the evidential standards applicable to establishing these crimes robust. The legal difficulties associated with establishing these crimes reinforces the importance of the key conclusion of this Report—namely, that international crimes *have* occurred and are likely *continuing* to occur in Xinjiang. More specifically, the Report concludes that:

1. The evidence analysed in this Report likely meets the requirements of the following **crimes against humanity**: persecution, imprisonment, enforced disappearance, torture, forced sterilisation, and enslavement. The evidence may also substantiate further crimes against humanity of murder, rape, and other inhumane acts.
2. It is arguable that **genocidal acts** have occurred in Xinjiang, in particular acts of imposing measures to prevent births and forcible transfers. There is also evidence that raises concerns that acts including killing, serious bodily and mental harm, and inflicting conditions that are calculated to bring about physical destruction have occurred in Xinjiang.

Sources and reliability of evidence

The conclusions made in this Report are based on publicly available information relating to the situation in Xinjiang. Principally, this information consists of:

- (1) Official Chinese government documents made publicly available through journalistic investigation or alleged government leaks including the 'Xinjiang papers' published by the *New York Times* and the 'China cables' released by the International Consortium of Investigative Journalists (ICIJ) in November 2019; and
- (2) Eye-witness or personal testimony of individuals with direct experience of the situation in Xinjiang as available through UN, United States Congress, NGO, and media reports.

These sources of information are, at the time of writing, the most reliable and credible information available to inform high-level legal analysis of the situation in Xinjiang such as that presented in this Report. The Chinese government has, to date, been largely uncooperative in granting independent access to Xinjiang such that credible and reliable information about the situation is limited.²

As a matter of law, the weight that may be attached to the various sources of evidence available varies according to the authenticity, credibility, and reliability of each source.³ Due to practical difficulties and exigen-

1 The Report does not consider the identity of perpetrators or responsible entities, nor the most appropriate avenues for pursuing their accountability. An important consequence is that elements of *mens rea* specific to the individual perpetrator's culpability are not robustly considered. The Report also does not consider responsibility for international wrongs other than genocide or crimes against humanity to which the situation may amount.

2 The EU has recently pressed China to let its independent observers into Xinjiang. At the time of writing, China has agreed to a visit from EU officials but has not confirmed that EU observers would be allowed to travel freely in the region: see "[Xinjiang: US to block Chinese 'forced labour' products as EU warns on trade](#)", *The Guardian*, 15 September 2020, (last accessed 24 September 2020).

3 *Prosecutor v Jean-Pierre Bemba Gombo (Decision on the admission into evidence of items deferred in the Chamber's 'Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute')* (ICC, Trial Chamber III, Case No ICC-01/05-01/08, 27 June 2013) [9].

cies, much of the currently available information pertaining to the situation in Xinjiang derives from NGO and media reports. Such sources are generally not considered “best evidence” for the purpose of determining international crimes. However, until an independent fact-finding mission or investigation is launched into the situation in Xinjiang and more reliable evidence is made available, such sources remain critical to preliminary assessments of the situation. For the purposes of this Report, necessary assumptions are accordingly made about the extent to which more reliable open source evidence could be corroborated by (or rather, corroborate) direct evidence.

Possible crimes against humanity in Xinjiang

Although there have been various definitions of crimes against humanity since 1945, the most commonly accepted definition is that contained in Article 7 of the ICC Statute.⁴ According to that definition, a crime against humanity consists of specific and contextual elements as follows:

ICC Statute, Article 7(1) ⁵	
...“crime against humanity” means <u>any of the following acts</u> when committed as part of a <u>widespread or systematic attack directed against any civilian population, with knowledge</u> of the attack:	
(a)	Murder;
(b)	Extermination;
(c)	Enslavement;
(d)	Deportation or forcible transfer of population;
(e)	Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
(f)	Torture;
(g)	Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
(h)	Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
(i)	Enforced disappearance of persons;
(j)	The crime of apartheid;
(k)	Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

A crime against humanity under international law therefore requires satisfaction of both *specific* and *contextual* elements—that is, the commission of certain inhumane acts and critically, that those acts occurred in the particular context of “a widespread or systematic attack directed against a civilian population”. This section of the Report first considers the likelihood that the existing evidence establishes the requisite contextual elements and then, whether that evidence suffices to establish acts prohibited under Article 7(1) of the ICC Statute.

Contextual elements: “attack directed against any civilian population” that is “widespread or systematic”

a. Existence of an “attack directed against any civilian population”

An “attack directed against any civilian population” requires: (a) “a course of conduct involving the multiple commission of [prohibited] acts”; (b) directed “against any civilian population”; and (c) “pursuant to or in furtherance of a State or organizational policy to commit such an attack”.⁶ Together, these sub-elements

⁴ The definition contained in Article 7 has now received broad recognition and for the most part, is accepted as customary international law. As of mid-2019, the definition had been accepted by 122 State parties to the Statute, was used by many States when adopting or amending national laws, and has been adopted in case law of international and national courts and tribunals. Nonetheless, the definition and contours of terms used within it remain contested by some. See further: M. Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (Cambridge, 2011) 361-364. The definition contained in Article 7 of the ICC Statute is generally that taken to be law in this Report, except where the customary status of particular aspects of the definition are particularly contested (in which case, the particular content of the law is further scrutinised).

⁵ Emphasis added. See also Article 7(2) of the ICC Statute, which provides relevant definitions of specific terms.

⁶ ICC Statute, Art 7(2)(a).

establish the existence of an “attack directed against any civilian population”. Importantly, the “attack” need not be military in character; it can encompass mistreatment of the civilian population.⁷

i) **Relevant “course of conduct”**

NGO and press reports have described mass detention of Uighurs and other Turkic Muslims in Xinjiang “re-education” camps as beginning in late March or early April of 2017.⁸ Reports indicate that, at that time, Xinjiang authorities began detaining 5-15% of the Muslim population across Xinjiang.⁹ Statements by former internees and “re-education” teachers describe conditions within the camps as including political indoctrination, some language training, forced renunciation of religion and culture, crowded cells, beatings, physical and psychological torture, rape, and forced sterilisation.¹⁰ Various NGO and press releases document deployment of internees to work placements after completion of their “re-education”.¹¹ Reports also document significant destruction of Islamic and Uighur religious and cultural heritage across Xinjiang during this period.¹² As considered later in this Report, if proven these events amount to prohibited acts under Article 7(1) of the ICC Statute.¹³ The coincidence, continuity, and similar *modus operandi* across these acts from early 2017 to present indicates that they form “a campaign” or “series” of events as opposed to “a mere aggregate of random acts”,¹⁴ constituting a relevant “attack” under international law.

ii) **Directed “against any civilian population”**

International jurisprudence has interpreted the phrase “directed against” as requiring that civilians be the *primary* object of the attack.¹⁵ This is the case in Xinjiang, where the attack has been predominantly directed against Uighur and other Turkic Muslims of civilian status, ostensibly for the risk those individuals pose of “extremism”.¹⁶

iii) **Pursuant to or in furtherance of a State or organisational policy**

A “policy” need not be formally adopted, nor even expressly declared or stated to meet the requirements of a crime against humanity.¹⁷ In the case of Xinjiang, the existence of a policy sanctioning the treatment of Uighurs and other Turkic Muslims can be inferred merely from the manner in which the acts have occurred—as identified above, the similar *modus operandi* and scale of relevant acts show that it is very improbable that the acts have occurred randomly. In accordance with international jurisprudence, such an inference is sufficient to satisfy the policy element of a relevant “attack”.¹⁸ The inference is also substantiated in the circumstances by robust research documenting the state’s role in planning the “re-education” and sinicisation campaigns in Xinjiang and also official documents linking the campaigns to a broader state-sanctioned policy of “de-extremification”.¹⁹ For example, the Xinjiang Uyghur Autonomous Region Regulation on De-extremi-

7 *Prosecutor v Jean-Pierre Bemba Gombo (Judgment)* (ICC, Trial Chamber III, Case No ICC-01/05-01/08, 21 March 2016) (*‘Bemba (Judgment)’*) [149]; *Prosecutor v Germain Katanga (Judgment)* (ICC, Trial Chamber II, Case No ICC-01/04-01/07, 7 March 2014) (*‘Katanga (Judgment)’*) [1101]; *Prosecutor v Kunarac et al (Judgment)* (ICTY, Appeals Chamber, Case No IT-96-23 & IT-96-23/1-A, 12 June 2002) (*‘Kunarac (Appeals Judgment)’*) [86]; *Prosecutor v Jean-Paul Akayesu (Judgment)* (ICTR, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) (*‘Akayesu (Judgment)’*) [581]; *Prosecutor v Charles Ghankay Taylor (Judgment)* (SCSL, Trial Chamber II, Case No SCSL-03-01-T, 18 May 2012) (*‘Taylor (Judgment)’*) [506].

8 See, eg, Shohret Hoshur, “[Around 120,000 Uyghurs Detained For Political Re-Education in Xinjiang’s Kashgar Prefecture](#)”, *Radio Free Asia*, 22 January 2018 (last accessed 29 September 2020).

9 See James Millward and Dahlia Peterson, *China’s System of Oppression in Xinjiang: How it Developed and How to Curb It* (Brookings, September 2020, available [online](#)) 6. See also Shohret Hoshur, “[Xinjiang Authorities Up Detentions in Uyghur Majority Areas of Ghulja City](#)”, *Radio Free Asia*, 19 March 2018 (last accessed 29 September 2020).

10 See especially the sections of the Report relating to persecution, imprisonment, torture, rape, and forced sterilisation.

11 See especially the section of the Report on forced labour.

12 See especially the section of the Report on persecution.

13 A relevant “attack” requires the occurrence of “multiple” crimes: *Prosecutor v Kunarac et al (Judgment)* (ICTY, Trial Chamber, Case No IT-96-23-T & IT-96-23/1-T, 22 February 2001) (*‘Kunarac (Judgment)’*) [415]; *Prosecutor v Milorad Krnojelac (Judgment)* (ICTY, Trial Chamber II, Case No IT-97-25-T, 15 March 2002) (*‘Krnojelac (Judgment)’*) [54].

14 *Bemba (Judgment)* [149].

15 See, eg, *Kunarac (Judgment)* [421]; *Situation in the Republic of Kenya (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya)* (ICC, Pre-Trial Chamber II, Case No ICC-01/09, 31 March 2010) [82]; *Prosecutor v Jean-Pierre Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo)* (ICC, Pre-Trial Chamber II, Case No ICC-01/05-01/08-424, 15 June 2009) (*‘Bemba (Decision on Charges)’*) [76].

16 See below n 19.

17 *Prosecutor v Tihomir Blaškić (Judgment)* (ICTY, Trial Chamber, Case No IT-95-14-T, 3 March 2000) (*‘Blaškić (Judgment)’*) [204]-[205]; *Bemba (Decision on Charges)* [81].

18 *Ibid.*

19 See, eg, Adrian Zenz, “The Karakax List: Dissecting the Anatomy of Beijing’s Internment Drive in Xinjiang” (2020) 8(2) *Journal of Political Risk* ([online](#)) (*‘The Karakax List’*); Adrian Zenz, “New Evidence for China’s Political Re-Education Campaign in Xinjiang” (2018)

fication ('XUAR 2017 Regulation') published just prior to the ramping up of mass detentions in early 2017, arguably provides an official blueprint for Xinjiang's "re-education" centres,²⁰ and internee labour scheme,²¹ and also implicitly sanctions destruction of cultural and religious sites.²² Other official documents further evidence the role of the state in organising the precise application of the policy to Muslim minorities in Xinjiang.²³ The available evidence therefore clearly satisfies the policy requirement of crimes against humanity.

b. Attack of a "widespread or systematic" character

According to international jurisprudence, the term "widespread" "connotes the large-scale nature of the attack and the number of targeted persons",²⁴ whereas the "systematic" character of an "attack" may be established by showing their "organised nature" and "the improbability of their random occurrence".²⁵ The available evidence relating to the situation in Xinjiang arguably satisfies both thresholds. Reliable evidence suggesting that more than one million Uighurs and other Turkic Muslims have been interned in "re-education" camps,²⁶ that at least 80,000 were transferred out of Xinjiang to work in factories between 2017 and 2019,²⁷ and that up to 16,000 mosques have been destroyed in Xinjiang,²⁸ indicates that the "widespread" requirement is met.²⁹ Similarly, the high level of organisation underpinning the situation in Xinjiang, as evinced in official documents sanctioning cultural destruction, "re-education" centres, and labour placements,³⁰ indicates that the attack against Uighurs and other Turkic Muslims is "systematic".

1. Specific elements: commission of certain inhumane acts

As the existing evidence relating to the situation in Xinjiang likely meets the threshold of "a widespread or systematic attack directed against a civilian population", whether the situation amounts to crimes against humanity turns on whether, and if so, which, certain inhumane acts (enumerated in Article 7(1) of the ICC Statute) can be said to have occurred in Xinjiang as part of the attack. This section considers those arguably present on the existing evidence.

18(10) *China Brief* ([online](#)) (last accessed 29 September 2020); Adrian Zenz, "Xinjiang's Re-Education and Securitization Campaign: Evidence from Domestic Security Budgets" (2018) 18(17) *China Brief* ([online](#)); Adrian Zenz, "'Thoroughly reforming them towards a healthy heart attitude': China's political re-education campaign in Xinjiang" (2019) 38(1) *Central Asian Survey* 102; International Consortium of Investigative Journalists, "[China Cables](#)" (24 November 2019) ('China Cables'); Austin Ramzy and Chris Buckley, "[The Xinjiang Papers](#)", *The New York Times* (16 November 2019) (last accessed 27 September 2020) ('the Xinjiang Papers'); Network of Chinese Human Rights Defenders and Equal Rights Initiative, *Joint Civil Society Report Submitted to the Committee on the Elimination of Racial Discrimination for its Review at the 96th Session of the combined fourteenth to seventeenth periodic report of the People's Republic of China (CERD/C/CHN/14-17)*, 16 July 2018 ([online](#)) [4]-[7].

20 See Xinjiang Uyghur Autonomous Region Regulation on De-extremification (adopted at the 28th meeting of the Standing Committee of the Twelfth People's Congress for the Xinjiang Uyghur Autonomous Region on 29 March 2017) ([online translation](#)) ('XUAR 2017 Regulation') arts 13-14. See also Counter-Terrorism Law of the People's Republic of China (adopted by the 18th session of the Standing Committee of the Twelfth National People's Congress on 27 December 2015) ([online translation](#)).

21 *Ibid* art 15.

22 *Ibid* arts 17, 21.

23 See Karakax List; China Cables; Xinjiang Papers. See also Cao Siqi, "[Xinjiang counties identify 75 forms of religious extremism](#)", *Global Times* (25 December 2014).

24 *Prosecutor v Laurent Gbagbo (Decision on the confirmation of charges against Laurent Gbagbo)* (ICC, Pre-Trial Chamber I, Case No ICC-02/11-01/11-656-Red, 12 June 2014) [222].

25 Nahimana et al v The Prosecutor (Judgment) (ICTR, Appeals Chamber, Case No ICTR-99-52-A, 28 Nov 2007) [920]; Prosecutor v Omar Hassan Ahmad Al Bashir (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) (ICC, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 4 March 2009) [81]; Taylor (Judgment) [511]; Prosecutor v Mrkšić et al (Judgment) (ICTY, Trial Chamber II, Case No IT-95-13/1-T, 27 Sep 2007) [437]; Kunarac (Judgment) [429]. An attack of a "systematic" character "goes beyond the existence of any policy seeking to eliminate, persecute or undermine a community": Katanga (Judgment) [111]-[112].

26 See, eg, Adrian Zenz, "'Thoroughly reforming them towards a healthy hard attitude': China's political re-education campaign in Xinjiang" (2018) 38(1) *Central Asian Survey* 102; Naoko Mizutani, "[The number of internees in Uyghur despair camps exceeds 890,000](#)", *Newsweek Japan*, 13 March 2018 (last accessed 29 September 2020); Shawn Zhang, "[List of Re-education Camps in Xinjiang](#)", *Medium*, 20 May 2018 (last accessed 29 September 2020); Megha Rajagopalan, Alison Killing and Christo Buschek, "[China Secretly Built A Vast New Infrastructure To Imprison Muslims](#)", *BuzzFeed News*, 27 August 2020 (last accessed 29 September 2020).

27 See Vicky Xiuzhong Xu, Danielle Cave, James Leibold, Kelsey Munro and Nathan Ruser, *Uyghurs for Sale: 'Re-education', forced labour and surveillance beyond Xinjiang* (ASPI, Policy Brief, Report No. 26/2020).

28 Nathan Ruser, [Cultural erasure: Tracing the destruction of Uyghur and Islamic spaces in Xinjiang](#) (Policy Brief, Report No. 38/2020, Australian Strategic Policy Institute).

29 Bemba (Judgment) [83].

30 See Karakax List; China Cables; Xinjiang Papers. See also Shore Hoshur, "[Under the guise of public safety, China demolishes thousands of mosques](#)", *Radio Free Asia* (19 December 2016) (last accessed 26 September 2020); Adrian Zenz, "'Thoroughly reforming them towards a healthy heart attitude': China's political re-education campaign in Xinjiang" (2019) 38(1) *Central Asian Survey* 102; Adrian Zenz, "Beyond the Camps: Beijing's Long-Term Scheme of Coercive Labor, Poverty Alleviation and Social Control in Xinjiang" (2019) 7(12) *Journal of Political Risk* ([online](#)).

a. Persecution

Persecution involves “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”.³¹ As a matter of principle, the particular acts that may constitute persecution for the purposes of a crime against humanity remains contested.³² The best view seems to be that relevant acts are “persecutory acts of a similar character and severity to those acts listed in the other subparagraphs of paragraph 1 [of Article 7 of the ICC Statute]”.³³ International jurisprudence also clarifies that the crime of persecution under customary international law “can consist of the deprivation of a wide variety of rights”, including political, social, and economic rights, and that the persecutory act “need not be prohibited explicitly” in the Statute.³⁴ In such instances, to qualify as persecution, the “acts of persecution must be of an equal gravity or severity to the other acts enumerated” in the Statute—they must be “gross or blatant denials of fundamental human rights”.³⁵ Importantly, in determining whether particular acts amount to persecution, the discriminatory acts should be “examined in their context and weighed for their cumulative effect” because acts that in isolation may not be so serious as to constitute a crime against humanity may, together with other acts, meet the threshold.³⁶

On currently available evidence, numerous acts of persecution have occurred against Turkic Muslim minorities, particularly Uighurs, in Xinjiang. Indeed, the alleged facts amenable to characterisation as “persecution” are too vast to cover comprehensively in this Report. Those focused on are: widespread destruction of Uighur cultural and religious heritage (including property, language, and customs); and the organised mass detention and “re-education” of Uighurs and other Turkic Muslims (including associated crimes of imprisonment, forcible transfer, torture, forced sterilisation, and enslavement considered later in the Report).³⁷ The cumulative effect of these acts, as well as their effects independently, are likely to rise to the level of persecution.

i) **Destruction of Uighur cultural and religious heritage**

There have been numerous and credible reports of Uighur historical and holy places being destroyed and desecrated in Xinjiang. Using satellite imagery, the Australian Strategic Policy Institute (‘ASPI’) recently found that of a sample of 533 mosques across Xinjiang, 31.9% had been destroyed, 32.8% were damaged, and 35.3% were undamaged.³⁸ Extrapolating this data to mosques across Xinjiang, approximately 16,000 mosques may have been damaged or destroyed and 8,450 completely demolished since 2017.³⁹ Besides mosques, ASPI’s data and analysis suggested that 30% of other sacred sites (included shrines (*mazar*), cemeteries, and pilgrimage sites) have been demolished, mostly since 2017, and an additional 27.8% have been damaged in some way.⁴⁰ This evidence is consistent with individual reports published by NGOs and media of deliberate destruction of mosques and other culturally significant sites.⁴¹ Reports also document destruction of historic

31 ICC Statute, Art 7.

32 Article 7(1)(h) of the ICC Statute requires that the persecution be undertaken in connection with “any act referred to in this paragraph or any crime within the jurisdiction of the Court”. However, the ICTY has found that “although the Statute of the ICC may be indicative of the *opinio juris* of many States, Article 7(1)(h) is not consonant with customary international law” and rejected any notion that “persecution must be linked to crimes found elsewhere in the Statute of the International Tribunal”: *Prosecutor v Kupreškić et al (Judgement)* (ICTY, Trial Chamber, Case No IT-95-16-T, 14 January 2000) (‘*Kupreškić (Judgement)*’) [580]-[581]. Recently, the International Law Commission “considered this clause to be designed to establish a specific jurisdiction of the International Criminal Court and not to indicate the scope of what should constitute persecution as a crime against humanity more generally”: International Law Commission, Draft articles on Prevention and Punishment of Crimes Against Humanity, with commentaries, UN Doc A/74/10 (adopted by the ILC at its 71st sess., 2019) (‘*ILC Draft Articles on Crimes Against Humanity*’) 44 (39).

33 ILC Draft Articles on Crimes Against Humanity, 44 (38).

34 *Kupreškić (Judgement)* [614]-[615].

35 *Ibid* [619], [620].

36 *Ibid* [615].

37 The evidence considered later in the Report as to whether the genocidal acts of imposing measures to prevent births and forcible transfers are established may also meet the threshold of “persecution” as a crime against humanity: see *Kupreškić (Judgement)* [636] (noting that the key difference between persecution and genocide is the threshold of intent—“While in the case of persecution the discriminatory intent can take multifarious inhumane forms and manifest itself in a plurality of actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong”).

38 Nathan Ruser, [Cultural erasure: Tracing the destruction of Uyghur and Islamic spaces in Xinjiang](#) (Policy Brief, Report No. 38/2020, Australian Strategic Policy Institute) 7 (‘ASPI, Report on Cultural Erasure’). The New York Times reports having independently verified “many of the details in ASPI’s report”: Chris Buckley and Austin Ramzy, [“China Is Erasing Mosques and Precious Shrines in Xinjiang”](#), New York Times (25 September 2020) (last accessed 28 September 2020).

39 ASPI, Report on Cultural Erasure, 3-4, 8.

40 *Ibid* 5.

41 See Lily Kuo, [“Revealed: New evidence of China’s mission to raze the mosques of Xinjiang”](#), The Guardian (7 May 2019) (last accessed 26 September 2020) (identifying 31 mosques and two shrines that had suffered significant structural damage between 2016 and 2018, including 15 that had been completely destroyed); Matt Rivers, [“More than 100 Uyghur graveyards demolished by Chinese authorities, satellite images show”](#),

Uighur neighbourhoods and old cities,⁴² and re-ordering of Uighur households.⁴³ Reports further indicate that Muslims are prevented, including by official regulation, from: performing traditional rituals and ceremonies, using Arabic, giving their children traditional names, growing beards, wearing Islamic clothing and face coverings, and selling and buying halal food.⁴⁴ Each amounts to restriction of Uighur and Muslim customs.

Whether these acts amount to “persecution” turns on whether they can be said to involve “gross” violations of “fundamental” human rights,⁴⁵ and were committed for a discriminatory purpose.⁴⁶ The rights violated by such conduct are primarily religious, cultural, and social self-determination rights protected as fundamental freedoms under international law.⁴⁷ The ICTY confirmed in *Kupreškić* that such rights can fall within those protected by the law against persecution, and that attacks on property can be persecutory.⁴⁸ Albeit in the context of war crimes rather than crimes against humanity, the ICC recognised the psychological damage inflicted by destruction of religious and cultural sites in its judgment against Ahmad Al Faqi Al Mahdi, relating to the destruction of religious and cultural sites in Timbuktu.⁴⁹ Here, the effect of destroying religious and cultural heritage can be said to be of comparable gravity as that in the *Al Mahdi* case, as evidenced by available statements of Uighurs and evidence of the connection of such sites to Uighur identity. For example, Rahile Dawut stated in 2012 that the effect of removing or destroying such sites would be that “the Uighur people would lose contact with earth. They would no longer have a personal, cultural, and spiritual history”.⁵⁰ The violations of Uighur fundamental rights is therefore very likely to meet the severity of conduct threshold to amount to the crime against humanity of persecution.⁵¹

It can also be inferred from the circumstances that the destruction of Uighur heritage is motivated by discriminatory intent. Although Chinese authorities defend interference with Uighur cultural and religious sites as part of a “mosque rectification” campaign necessary for protecting public services and safety,⁵² ASPI’s data shows that the vast majority of mosques that have remained undamaged in Xinjiang “had no existing visible Islamic architectural features”.⁵³ Some holy sites destroyed have also been in extremely remote areas such that their removal cannot ostensibly have been to provide necessary public services.⁵⁴ Media reports also suggest that a number of mosques that have remained physically intact have been secularised,⁵⁵ and those that have not are mostly shut to worshippers.⁵⁶ A Xinjiang official is reported as having defended mosque

CNN (3 January 2020) (last accessed 26 September 2020) (documenting the destruction of over 100 Uighur cemeteries); Agence France-Presse (AFP), “[‘No space to mourn’: The destruction of Uyghur graveyards in Xinjiang](#)”, South China Morning Post (12 October 2019) (last accessed 26 September 2020) (identifying, with assistance from satellite imagery analysts Earthrise Alliance, the destruction of at least 45 Uyghur cemeteries since 2014 including 30 of them since 2017).

42 See, eg, William Drexel, *Kashgar Coerced: Forced Reconstruction, Exploitation, and Surveillance in the Cradle of Uyghur Culture* (Uyghur Human Rights Project, Report, June 2020) https://uhrp.org/sites/default/files/UHRP-Kashgar-Coerced-Report-06_03_20%20Final.pdf (last accessed 26 September 2020).

43 See Timothy A. Grose, “If you don’t know how, just learn: Chinese housing and the transformation of Uyghur domestic space” (2020) *Ethnic and Racial Studies* 1; Shohret Hoshur, “Uyghurs in Xinjiang Ordered to Replace Traditional Décor With Sinicized Furniture”, Radio Free Asia (9 January 2020) <https://www.rfa.org/english/news/uyghur/furniture-01092020165529.html> (last accessed 26 September 2020).

44 See Network of Chinese Human Rights Defenders and Equal Rights Initiative, *Joint Civil Society Report Submitted to the Committee on the Elimination of Racial Discrimination for its Review at the 96th Session of the combined fourteenth to seventeenth periodic report of the People’s Republic of China (CERD/C/CHN/14-17)*, 16 July 2018 ([online](#)).

45 See *Kupreškić* (Judgement) [619], [620].

46 ICC Statute, Art 7.

47 See Universal Declaration of Human Rights Arts 18-20; ICCPR art 18; ICESCR arts 1, 2, 15; ICERD arts 2, 5; CRC art 30. Religious freedoms are also protected, to a degree, under Article 36 of China’s Constitution.

48 *Kupreškić* (Judgement) [631].

49 *Prosecutor v Ahmad Al Faqi Al Mahdi* (Judgment and Sentence) (ICC, Trial Chamber VIII, Case No ICC-01/12-01/15, 27 September 2016) [34], [46], [78]-[80].

50 Reported in Lily Kuo, “[Revealed: New evidence of China’s mission to raze mosques of Xinjiang](#)” *The Guardian* (7 May 2019) (last accessed 26 September 2020). Ms Dawut is reported to have disappeared in 2017. The *Guardian* reported that “[h]er former colleagues and relatives believe she has been detained because of her work preserving Uighur traditions”: *ibid.* See also Chris Buckley and Austin Ramzy, “[China Is Erasing Mosques and Precious Shrines in Xinjiang](#)”, *New York Times* (25 September 2020) (last accessed 28 September 2020).

51 See further ICC, *Elements of Crimes*, 12.

52 See Chen Quanguo, “[Focusing on the general goal of social stability and long-term peace and security, and promoting religious harmony and harmony](#)”, *Xinjiang Daily* (30 September 2016); Li Zhongxiang, “[Safety hazards of 317 mosques in the fire inspection area of Qorgas County, Yilihuo city](#)”, *Muslim Online*, 25 February 2017, cited in ASPI, *Report on Cultural Erasure*, footnote 17.

53 ASPI, *Report on Cultural Erasure*, 10.

54 Chris Buckley and Austin Ramzy, “[China Is Erasing Mosques and Precious Shrines in Xinjiang](#)”, *New York Times* (25 September 2020) (last accessed 28 September 2020).

55 See, eg, Joanne Smith Finley, “[‘Now We Don’t Talk Anymore’: Inside the ‘Cleansing’ of Xinjiang](#)”, *China File*, 28 December 2018 (last accessed 28 September 2020); Briti Roy Barman, “[Mosque converted into public toilet in China](#)”, *OneIndia*, 19 August 2020.

56 Chris Buckley and Austin Ramzy, “[China Is Erasing Mosques and Precious Shrines in Xinjiang](#)”, *New York Times* (25 September 2020) (last

demolishment on the basis that mosques were “unnecessary” buildings.⁵⁷ ASPI’s analysis of several Christian and Buddhist religious sites in Xinjiang revealed that destruction of Uighur and Islamic heritage has been more widespread.⁵⁸ Cumulatively, this evidence strongly suggests that documented destruction has occurred primarily because the relevant sites were sites of Uighur or Islamic importance. Such reasons amount to discrimination on racial, ethnic, cultural, and/or religious grounds, expressly prohibited under Article 7(1)(h) of the ICC Statute.

ii) Mass detention and “re-education” of Uighurs

Going back as far as 2009 and accelerating from early 2017, Chinese authorities have been reported as detaining a large number of Uighurs and other ethnic Muslim minorities in Xinjiang in so-called “de-radicalisation” and “re-education” camps. The campaign has arguably involved enforced disappearances, arbitrary detention, forcible transfers, torture, forced sterilisation, and enslavement of Uighurs and other Muslim ethnic minorities. These acts amount to crimes specifically identified in Article 7(1) of the ICC Statute and are therefore capable of constituting underlying acts of persecution.⁵⁹ The extent to which the legal elements of each crime are likely made out on existing evidence is examined for each crime later in this Report.

There is considerable evidence that these acts are discriminatory against Uighur and other Muslim ethnic minorities. For example, the “Karakax List”, a leaked government document from Xinjiang providing the personal details of and reasons for internment for those held in re-education camps in the county of Karakax, reveals that those interned are almost entirely Uighurs, and that reasons for their internment (and treatment therein) are usually expressed in vague and arbitrary terms that suggest individuals are interned due to the perceived risk associated with their *identity* as Uighurs or Muslims.⁶⁰ Grounds for internment explicitly specified by authorities include distinctively Muslim traits such as having previously worn a veil or long beard, or donating money to a mosque.⁶¹ The singling out of Uighurs and other Turkic Muslim minorities on these grounds suggests that these crimes have been perpetrated with the aim of removing these identity traits from Chinese society altogether. In *Kupreškić*, the ICTY identified such aims as being at the core of the *mens rea* requirement of persecution.⁶²

b. Enforced disappearance

Reports of the situation in Xinjiang have documented instances in which Uighur or other Turkic Muslims have been taken away by authorities to “re-education” camps without identifying to friends and family where they have been taken to or for how long. Such instances suggest the crime of “enforced disappearance” which is defined in the ICC Statute as the “arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of, a State or political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of law for a prolonged period of time”.⁶³ The “essence” of the crime has been articulated as “that the friends and families of the direct victims do not know whether the persons concerned are alive or dead”.⁶⁴ In its latest Report, the United Nations Working Group on Enforced or Involuntary Disappearances expressed concern that the “conditions under which reportedly several thousand Uighurs are detained... may amount to enforced disappearances”.⁶⁵

Relevant evidence to the determination of this crime includes reports of particular instances of Uighurs

accessed 28 September 2020).

57 Shoret Hoshur, “[Under the guise of public safety, China demolishes thousands of mosques](#)”, Radio Free Asia (19 December 2016) (last accessed 26 September 2020). See further Bahram K. Sintash, [Demolishing Faith: The Destruction and Desecration of Uyghur Mosques and Shrines](#) (Uyghur Human Rights Project, Report, October 2019) (last accessed 26 September 2020).

58 See ASPI, Report on Cultural Erasure, 10.

59 ICC Statute, Art 7(1)(h).

60 See Adrian Zenz, “The Karakax List: Dissecting the Anatomy of Beijing’s Internment Drive in Xinjiang” (2020) 8(2) *Journal of Political Risk* ([online](#)).

61 Ibid. See also XUAR 2017 Regulation.

62 *Kupreškić* (Judgement) [634].

63 ICC Statute, Art 7(2)(i).

64 Robert Cryer, Håkan Friman, Darryl Robinson, Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (3rd ed, Cambridge University Press: 2014) 260.

65 Working Group on Enforced or Involuntary Disappearances, Report of the Working Group on Enforced or Involuntary Disappearances, UN HRC, 42nd sess, Agenda Item 3, UN Doc A/HRC/42/40 (9-27 September 2019) [69].

disappearing without explanation,⁶⁶ especially of Uighur intellectuals and prominent cultural figures.⁶⁷ Relevant evidence is also contained in the “Xinjiang Papers” leaked to the *New York Times*.⁶⁸ One Xinjiang Paper is purportedly a directive advising local officials of how to engage with students returning to the Xinjiang “and whose family members are being punished during the ‘Strike Hard’ campaign”.⁶⁹ The document advises officials as to how to handle questions about the location and fate of their relatives without any specificity. Officials are to give only a vague reference to where relatives are—“in a training school set up by the government” because “they have come under a degree of harmful influence in religious extremism and violent terrorist thoughts”—and for an indeterminate period of time—“an extended period”.⁷⁰ Arguably, this evidence could also arguably show that authorities have not “refused” to acknowledge the deprivation of internees’ freedoms. It is likely that the existing evidence meets the threshold of “enforced disappearance” under international law, although further evidence is needed to determine the extent of the crime.

c. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law

There is a significant amount of evidence to suggest that the “re-education camps” in Xinjiang satisfy the threshold of the crime against humanity of imprisonment. Imprisonment as a crime against humanity is “the arbitrary or otherwise unlawful detention or deprivation of liberty” of an individual without due process of law.⁷¹ Deprivation of liberty is “arbitrary” and “unlawful” where “no legal basis can be called upon to justify the initial deprivation of liberty”.⁷² Both the ICTY and ICTR have confirmed that where national law is relied upon as a basis for the deprivation of liberty, “the relevant provisions must not violate international law”.⁷³

Most NGO reports and press releases documenting the circumstances of internment of Uighurs in Xinjiang identify the internment as a complete deprivation of physical liberty—while detained, internees are subjected to compulsory daily routines, political indoctrination, language training, forced renunciations of their religion and culture, and denunciation of fellow internees.⁷⁴ This information is also consistent with witness testimony given to the United States Congressional-Executive Commission on China.⁷⁵ Whether the internment regime is *arbitrary* is contested by Chinese authorities, which claim that the camps are voluntary “vocational training centres”.⁷⁶ However, the weight of witness evidence publicly reported, as well as leaked official documents contained in the China Cables,⁷⁷ strongly indicates internment is involuntary and any “vocational”

66 Ibid. See generally Nathan VanderKlippe, “[Frontier injustice: Inside China’s campaign to ‘re-educate’ Uyghurs](#)”, *Globe and Mail* (9 September 2017). See also Network of Chinese Human Rights Defenders and Equal Rights Initiative, Joint Civil Society Report Submitted to the Committee on the Elimination of Racial Discrimination for its Review at the 96th Session of the combined fourteenth to seventeenth periodic report of the People’s Republic of China (CERD/C/CHN/14-17), 16 July 2018 ([online](#)) [27], [34].

67 See, eg, “[Detained and Disappeared: Intellectuals Under Assault in the Uyghur Homeland](#)”, Uyghur Human Rights Project (21 May 2019) (last accessed 27 September 2020) (identifying at least 435 intellectuals “interned, imprisoned, or forcibly disappeared”); Magnus Fiskesjö, “[China’s Thousandfold Guantánamos](#)”, *Inside Higher Ed* (8 April 2019) (last accessed 27 September 2020); Rachel Harris, “[Cultural Genocide in Xinjiang: How China Target Uyghur Artists, Academics, and Writers](#)”, *The Globe Post* (17 January 2019) (recounting the circumstances of the disappearance of Uighur singer, Sanubar Tursan).

68 See Austin Ramzy and Chris Buckley, “[The Xinjiang Papers](#)”, *The New York Times* (16 November 2019) (last accessed 27 September 2020) (‘the Xinjiang Papers’). The full text of all 403 pages reportedly leaked to the Times have not been made publicly available at the time of writing.

69 “[Document: What Chinese Officials Told Children Whose Families Were Put in Camps](#)”, *The New York Times* (16 November 2019) (last accessed 27 September 2020).

70 Ibid.

71 *The Prosecutor v André Ntagerura Emmanuel Bagambiki Samuel Imanishimwe* (Judgment and Sentence) (ICTR, Trial Chamber III, Case No ICTR-99-46-T, 25 February 2004) (‘Ntagerura (Judgment)’ [702]; *Kordić and Čerkez* (Judgement) (ICTY, Trial Chamber III, Case No IT-95-14/2, 26 February 2001) (‘Kordić and Čerkez (Judgement)’ [302].

72 *Krnjelac* (Judgment) [114].

73 Ibid [114]; *Ntagerura* (Judgment) [702]. This is also clarified in the ICC Statute by the inclusion of the language “in violation of fundamental rules of international law” in Article 7(1)(e): Bassiouni, *Crimes against Humanity*, 444.

74 See, eg, Xinjiang Victims Database, Victim-Centered Primary Evidence for the Mass Incarcerations and Immense Rights Violations in the Xinjiang Uyghur Autonomous Region ([online](#)) (last accessed 14 October 2020); Chang Xin, “[More Evidence About Camps and Prisons for Uyghurs in Xinjiang](#)”, *Bitter Winter* (24 March 2020) (last accessed 14 October 2020); Flint Duxfield and Ian Burrows, “[Uyghur woman details life inside Chinese ‘re-education camp’ in Xinjiang](#)”, *ABC News* (8 January 2019) (last accessed 14 October 2020); “[Behind the Walls: Three Uyghurs Detail their Experiences in China’s Secret ‘Re-education’ Camps](#)”, *Radio Free Asia* (September 2018) (last accessed 14 October 2020).

75 See, eg, United States Congressional-Executive Commission on China, Testimony of Mihrigul Tursan (Hearing relating to the Communist Party’s Crackdown on Religion in China, 28 November 2018) ([online](#)).

76 See, eg, “[Xinjiang: China defends ‘education’ camps](#)”, *BBC News* (17 September 2020) (last accessed 14 October 2020); Lily Kuo, “[From denial to pride: how China changed its language on Xinjiang’s camps](#)”, *The Guardian* (22 October 2018) (last accessed 14 October 2020); Jun Mai, Sarah Zheng and Laurie Chen, “[China says it may eventually phase out ‘vocational training centres’ in Xinjiang where 1 million Uyghur Muslims are reportedly held for ‘re-education’](#)”, *South China Morning Post* (13 March 2019) (last accessed 14 October 2020).

77 See *China Cables* (describing measures to inter alia “prevent escapes”).

training is ancillary to “treatment” for exposure to radical Islam.⁷⁸ One document purportedly leaked in the Xinjiang Papers provides very strong evidence that detention is arbitrary, explicitly stating that “[those detained in re-education camps] haven’t committed a crime... It is just that their thinking has been infected by unhealthy thoughts”.⁷⁹ The Karakax List and China Cables further substantiate mass internments to be largely arbitrary—in many cases, internees have been detained for “suspicious” behaviour that does not amount to a crime either under Chinese law or international law. It is very likely that the existing evidence satisfies the requirements of the crime against humanity of imprisonment.

d. Torture

Former Uighur detainees have described conditions in re-education camps as variously involving crowded cells, indoctrination that drove some to suicide, waterboarding, food deprivation as punishment, beatings, being shackled to chairs for extended periods of time, sleep deprivation, forcibly being drugged, electrical shock treatment, rape and sexual humiliation, and other forms of extreme physical and mental abuse.⁸⁰ These conditions likely satisfy the threshold of “torture” as a crime against humanity, which requires establishing: (1) the intentional infliction, by act or omission, of severe physical or mental pain or suffering upon one or more persons; (2) the person(s) were in the custody or under the control of the perpetrator; and (3) the pain or suffering did not result from, or was not inherent or incidental to, lawful sanctions.⁸¹

The existing evidence suggests that many of the practices recounted by former internees in re-education camps meet the necessary severity threshold of torture. That threshold has been described in the international jurisprudence as varying according to the circumstances,⁸² but as necessarily requiring “an important degree of pain and suffering”.⁸³ In assessing whether such acts meet the severity threshold, international tribunals have considered factors such as the nature, consistency and context of the infliction of pain, as well as its premeditation and purpose.⁸⁴ It remains unclear whether the general conditions of detention inflicted upon internees in Xinjiang camps, such as overcrowding, meet this threshold. The UN Committee against Torture has recognised that conditions of detention may themselves constitute torture,⁸⁵ however international practice suggests this is more likely to be regarded as cruel and inhuman treatment.⁸⁶ Reported inflictions of pain during interrogations and as punishment, however, are very likely to meet the required threshold. Indeed, in *Kvočka*, the ICTY explicitly recognised acts of “[b]eating, sexual violence, prolonged denial of sleep, food, hygiene, and medical assistance” as acts “likely to constitute torture”.⁸⁷ The statements of witnesses and victims of the severity of the effects of interrogation and punishment techniques also objectively indicate “severe physical or mental pain or suffering”.

The common modus operandi across reports, often involving infliction of pain as “punishment”⁸⁸ suggests

78 See, eg, China Cables; Xinjiang Papers. See also Xinjiang Victims Database, Victim-Centered Primary Evidence for the Mass Incarcerations and Immense Rights Violations in the Xinjiang Uyghur Autonomous Region ([online](#)) (last accessed 14 October 2020).

79 “Document: What Chinese Officials Told Children Whose Families Were Put in Camps”, The New York Times (16 November 2019) <https://www.nytimes.com/interactive/2019/11/16/world/asia/china-detention-directive.html> (last accessed 27 September 2020).

80 See, eg, United States Congressional-Executive Commission on China, Testimony of Mihrigul Tursan (Hearing relating to the Communist Party’s Crackdown on Religion in China, 28 November 2018) ([online](#)) esp 3-4; Philip Wen and Olzhas Auyezov, “Tracking China’s Muslim Gulag”, Reuters, 29 November 2018 (last accessed 28 September 2020); Simon Denyer, “Former inmates of China’s Muslim ‘reeducation’ camps tell of brainwashing, torture”, Washington Post, 17 May 2018 (last accessed 28 September 2020); Amie Ferris-Rotman, “Abortions, IUDs and sexual humiliation: Muslim women who fled China for Kazakhstan recount ordeals”, Washington Post, 5 October 2019 (last accessed 28 September 2020); “China turns Muslim ‘re-education’ camp detainees into cheap labour force, human rights group claims”, Agence France-Presse, 4 March 2019 (last accessed 28 September 2020); Ruth Ingram, “Confessions of a Xinjiang Camp Teacher”, The Diplomat, 17 August 2020 (last accessed 29 September 2020).

81 ICC Statute, art 7; M. Bassiouni, Crimes against Humanity, 419.

82 Kunarac (Judgement) [476].

83 Bemba (Decision on Charges) [193].

84 Krnojelac (Judgement) [182]; Prosecutor v Radoslav Brđanin (Judgement) (ICTY, Trial Chamber II, Case No IT-99-36-T, 1 September 2004) (‘Brđanin (Judgement)’) [484].

85 See, eg, CAT, Summary account of the results of the proceedings concerning the inquiry on Turkey, UN Doc. A/48/44/Add.1, 1993, [52]. See also Krnojelac (Judgement) [183].

86 See Association for the Prevention of Torture and Center for Justice and International Law, Torture in International Law, A Guide to Jurisprudence (2008) ([available online](#)) 5, 140; Prosecutor v Delalić and Others (Judgement) (ICTY, Trial Chamber, Case No IT-96-21-T, 16 November 1998) [558]; Prosecutor v Simić et al (Judgement) (ICTY, Trial Chamber II, Case No IT-95-9-T, 17 October 2003) (Simić (Judgement)’) [97]; Prosecutor v Vidoje Blagojević et al (Judgement) (ICTY, Trial Chamber I, Case No IT-02-60-T, 17 January 2005) [609]. It may therefore constitute the crime against humanity of “other inhumane acts”: see, eg, Blaškić (Judgment) [239].

87 Prosecutor v Kvočka et al (Judgement) (ICTY, Trial Chamber, Case No IT-98-30/1, 2 November 2001) [144].

88 See, eg, United States Congressional-Executive Commission on China, Testimony of Mihrigul Tursan (Hearing relating to the Communist Party’s Crackdown on Religion in China, 28 November 2018) ([online](#)) esp 3-4; Simon Denyer, “Former inmates of China’s Muslim ‘reeducation’ camps tell of brainwashing, torture”, Washington Post, 17 May 2018 (last accessed 28 September 2020); Ruth Ingram, “Confessions of a Xinjiang Camp

that the pain inflicted upon internees is largely intentional and part of sanctioned practices. For the reasons the internment camps likely constitute “imprisonment”, the custody and unlawfulness requirements of the crime of torture are also likely met. The existing evidence therefore supports the conclusion that the crime of torture has occurred in Xinjiang.

e. **Murder**

There have been reports of internees dying in Xinjiang “re-education” camps.⁸⁹ These reports raise concerns that crimes of murder—intentional killings without lawful justification⁹⁰—have occurred. The extent and circumstances of internee deaths remain unclear on currently available evidence. The reported killings will constitute crimes of murder under international law if they can be proven to have resulted from acts or omissions committed with the intention to kill *or* to cause serious bodily harm, which the perpetrator should have reasonably known *might* lead to death.⁹¹ Existing news reports of deaths in “re-education” camps largely seem to have occurred as a result of conditions within camps, including the infliction of torture, and therefore could meet the requirements of “murder”.⁹² Reports of newborn babies being killed in hospitals due to non-compliance with birth control policies would also fit the requirements of “murder”, although there is only very limited evidence of such deaths currently available.⁹³

f. **Rape**

Reports from independent media describe instances in Xinjiang re-education camps where women have been raped by officials, including by gang rape.⁹⁴ There are reports of guards taking younger or “pretty” inmates at night and returning them the next morning.⁹⁵ These allegations are consistent with an open-source letter allegedly published by a prison guard in a camp in Dawanching:

There are two tables in the kitchen, one table is for snacks and liquors, and the other one is for “doing things”. Most of the time, the officer would rape the selected girl alone. Sometimes, if he is high, he would let subordinates gang rape the girls after him. After they are done, the girl would be returned back to the cell.⁹⁶

The use of anal rape with sticks or electric batons as an interrogation technique has also been reported.⁹⁷ The accounts are consistent with credible reports of rape in “transformation through education” centres in Tibet,⁹⁸ suggesting a common re-education *modus operandi*. The reports of rape are less widespread than other reported abuse, and have generally been by lesser known or local NGOs and news outlets. However, the limitations of the existing evidence are consistent with barriers to accurate reporting and analysis of sexual and gender-based violence more generally.⁹⁹

Teacher, The Diplomat, 17 August 2020 (last accessed 29 September 2020).

89 See, eg, Network of Chinese Human Rights Defenders and Equal Rights Initiative, Joint Civil Society Report Submitted to the Committee on the Elimination of Racial Discrimination for its Review at the 96th Session of the combined fourteenth to seventeenth periodic report of the People’s Republic of China (CERD/C/CHN/14-17), 16 July 2018 ([online](#)) [28].

90 Bassiouni, Crimes against Humanity, 366, 368.

91 See generally Prosecutor v Mucić et al (Judgment) (ICTY, Trial Chamber, Case No IT-96-21-T, 16 November 1998) [439]; Blaškić (Judgment) [153], [181], [217]; Prosecutor v Krstić (Judgment) (ICTY, Trial Chamber, Case No IT-98-33-T, 2 August 2001) [485]; Prosecutor v Lukić & Lukić (Judgment) (ICTY, Trial Chamber, Case No IT-98-32/1-T, 20 July 2009) [903]; Akayesu (Judgment) [589]; Prosecutor v François Karera (Judgment and Sentence) (ICTR, Trial Chamber I, Case No ICTR-01-74-T, 7 December 2007); Prosecutor v Tharcisse Renzaho (Judgment and Sentence) (ICTR, Trial Chamber I, Case No ICTR-97-31-T, 14 July 2009) [786].

92 See, eg, Ruth Ingram, “[Confessions of a Xinjiang Camp Teacher](#)”, The Diplomat, 17 August 2020 (last accessed 29 September 2020).

93 See Hoja Gulchehra and Hoshur Shohret, “[Xinjiang Hospitals Aborted, Killed Babies Outside Family Planning Limits: Uyghur Obstetrician](#)”, Radio Free Asia, 17 August 2020 (last accessed 2 September 2020).

94 David Stavrou, “[A Million People Are Jailed at China’s Gulags. I Managed to Escape. Here’s What Really Goes on Inside](#)”, Haaretz, 17 October 2019 (last accessed 29 September 2020); Elizabeth M. Lynch, “[China’s attacks on Uighur women are crimes against humanity](#)”, Washington Post, 21 October 2019 (last accessed 29 September 2020); Amie Ferris-Rotman, “[Abortions, IUDs and sexual humiliation: Muslim women who fled China for Kazakhstan recount ordeals](#)”, Washington Post, 5 October 2019.

95 Elizabeth M. Lynch, “[China’s attacks on Uighur women are crimes against humanity](#)”, Washington Post, 21 October 2019 (last accessed 29 September 2020); Amie Ferris-Rotman, “[Abortions, IUDs and sexual humiliation: Muslim women who fled China for Kazakhstan recount ordeals](#)”, Washington Post, 5 October 2019.

96 Erkin Azat, “[A Letter from A Prison Guard in the Newly Built Concentration Camp in Dawanching](#)”, Medium, 17 May 2019 (last accessed 29 September 2020).

97 Ruth Ingram, “[Confessions of a Xinjiang Camp Teacher](#)”, The Diplomat, 17 August 2020 (last accessed 29 September 2020).

98 “Tibetan monk’s account reveals rampant use of torture and sexual abuse in China’s ‘political re-education’ centres”, *Tibetan Centre for Human Rights and Democracy*, 28 May 2018 (last accessed 29 September 2020).

99 See, eg, International Criminal Court, “Policy Paper on Sexual and Gender-Based Crimes” (June 2014) ([online](#)); Sara E. Davies and Jacqui True, “Reframing Conflict-Related Sexual and Gender-Based Violence: Bringing Gender Analysis Back In” (2015) 46(6) *Security Dialogue* 495, 497; Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003) 71-75.

g. Forced sterilisation

There is significant evidence available to establish forced sterilisation as having occurred in Xinjiang. As a matter of law, the crime of “forced sterilisation” occurs when: (1) the perpetrator deprives one or more persons of biological reproductive capacity; and (2) the conduct was neither justified by the medical treatment of the person nor carried out with their genuine consent.¹⁰⁰ Individual reports by NGOs and news agencies documenting interviews with Uighur women,¹⁰¹ as well as doctors that have treated Uighur women both in Xinjiang and abroad,¹⁰² are strong evidence that numerous women have been sterilised by Chinese authorities and without their genuine consent. The occurrence of these sterilisations is consistent with official government statistics, which document a significant decline in birth rates in Xinjiang and a disproportionate rise in sterilisations in Xinjiang as compared to the rest of mainland China.¹⁰³ Individual reports which document sterilisations as variably having occurred against patients’ wills, without genuine consent, or without informing the patient of the procedure,¹⁰⁴ prove that some, if not most, of these sterilisations have occurred forcibly. These cases therefore satisfy the legal requirements of “forced sterilisation” under Article 7 of the ICC Statute. Although there are also reports of other forms of mandatory birth control in Xinjiang, such cases are unlikely to amount to “forced sterilisation” as the crime is not intended to include birth-control measures of non-permanent effect.¹⁰⁵

h. Enslavement

In March 2020, ASPI released a report “conservatively” estimating that, between 2017 and 2019, more than 80,000 Uighurs were transferred out of Xinjiang to work in factories across China.¹⁰⁶ In many cases, the transfer has been reported as being directly from a re-education camp.¹⁰⁷ Forced labour or otherwise reducing a person to a servile status can amount to the crime of “enslavement” under international law,¹⁰⁸ which occurs when “any or all powers attaching to the right of ownership are exercised” over a person.¹⁰⁹ International jurisprudence regards as salient indications of enslavement: “elements of control and ownership; the restriction or control of an individual’s autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator”.¹¹⁰ The victim’s consent or free will is absent.¹¹¹

Chinese state media claims that Uighur participation in labour transfers is voluntary and that the programme is aimed at poverty alleviation.¹¹² However, numerous sources contradict these claims and together provide strong evidence that the indicia of enslavement are met:

- *Labour is “bought” and “sold”.* Government notices show that “organisers” are financially incentiv-

100 ICC Elements of Crimes, art 7(1)(g)-5, elements 1 and 2.

101 Gulchehra Hoja, [“Uyghur Women, Rarely Informed About Forced Birth Control Procedures, Suffer Lifelong Complications”](#), Radio Free Asia, 3 August 2020 (last accessed 2 September 2020); Gulchehra Hoja, [“Female Detainees at Xinjiang Internment Camps Face Sterilization, Sexual Abuse: Camp Survivor”](#), Radio Free Asia (30 October 2019) (last accessed 3 September 2020); Peter Stuble, [“Muslim women ‘sterilised’ in China detention camps, say former detainees”](#), Washington Post (12 August 2019) (last accessed 4 September 2020); [“China cuts Uighur births with IUDs, abortion, sterilization”](#), Associated Press (29 June 2020) (last accessed 2 September 2020).

102 Gulchehra Hoja, [“Uyghur Women, Rarely Informed About Forced Birth Control Procedures, Suffer Lifelong Complications”](#), Radio Free Asia, 3 August 2020 (last accessed 2 September 2020); Gulchehra Hoja and Shohret Hoshur, [“Xinjiang Hospitals Aborted, Killed Babies Outside Family Planning Limits: Uyghur Obstetrician”](#), Radio Free Asia (17 August 2020) (last accessed 2 September 2020).

103 See Adrian Zenz, *Sterilizations, IUDs, and Mandatory Birth Control: The CCP’s Campaign to Suppress Uyghur Birthrates in Xinjiang* (Jamestown Foundation, June 2020) (available [online](#)).

104 See Gulchehra Hoja, [“Uyghur Women, Rarely Informed About Forced Birth Control Procedures, Suffer Lifelong Complications”](#), Radio Free Asia, 3 August 2020 (last accessed 2 September 2020); Associated Press, [“China cuts Uighur births with IUDs, abortion, sterilization”](#), Associated Press, 29 June 2020 (last accessed 2 September 2020); Gulchehra Hoja and Shohret Hoshur, [“Xinjiang Hospitals Aborted, Killed Babies Outside Family Planning Limits: Uyghur Obstetrician”](#), Radio Free Asia, 17 August 2020 (last accessed 2 September 2020).

105 See Bassiouni, *Crimes against Humanity*, 442. This is, however, relevant to potential genocidal acts considered later in the Report.

106 Vicky Xiuzhong Xu, Danielle Cave, James Leibold, Kelsey Munro and Nathan Ruser, *Uyghurs for Sale: ‘Re-education’, forced labour and surveillance beyond Xinjiang* (ASPI, Policy Brief, Report No. 26/2020) (‘ASPI Forced Labour Report’). ASPI’s estimate is derived from data collected from Chinese state media and official government notices.

107 See, eg, [China turns Muslim ‘re-education’ camp detainees into cheap labour force, human rights group claims](#), Agence France-Presse, 4 March 2019 (last accessed 28 September 2020). See further ASPI Forced Labour Report, 14, 18.

108 See Kunarac (Judgement) [534]-[535], [542].

109 Kunarac (Judgement) [117]; ICC Statute Art 7(2)©; Cherif M. Bassiouni, “Enslavement as an International Crime” (1991) 23 *NYU Journal of International Law and Politics* 445, 467.

110 Kunarac (Judgement) [542].

111 *Ibid.*

112 Gu Xi, [“Mandatory ‘Poverty Alleviation’ Worse Than Being Poor”](#), Bitter Winter, 28 January 2019 (last accessed 28 September 2020). See also Adrian Zenz, “Beyond the Camps: Beijing’s Long-Term Scheme of Coercive Labor, Poverty Alleviation and Social Control in Xinjiang” (2019) 7(12) *Journal of Political Risk* ([online](#)).

ised to transfer work outside of Xinjiang and that receiving factories receive cash inducements for each worker they contract.¹¹³ Advertisements for “government-sponsored Uyghur labour” have been documented as appearing online.¹¹⁴ The Trial Chamber of the ICTY in *Kunarac* considered that monetary or other compensation for someone’s “acquisition” is “a prime example of the exercise of the right of ownership over someone”.¹¹⁵

- *Uighur workers are threatened.* Reports indicate that misbehaviour while in the labour programme is threatened with return to a re-education camp, or harm to one’s family.¹¹⁶ This arguably amounts to “threats of force or coercion” and “psychological control”, indicia of enslavement recognised in international jurisprudence.¹¹⁷
- *Work conditions are abusive.* Although Uighurs are compensated for work (allegedly less than minimum wage), multiple sources suggest that across factories utilising Uighur labour, workers are subject to “military-style management”.¹¹⁸ Outside work hours, which are extensive, they must attend language classes and are subject to political indoctrination sessions.¹¹⁹ They are also banned from practising their religion.¹²⁰ These measures amount to control of movement and physical environment, and exploitation, recognised indicators of enslavement.¹²¹
- *Freedom of movement is restricted.* Reports indicate that many of the factories in which Uighurs are working are fenced-in, and subject to high-tech, police and government official surveillance.¹²² Whether and if so when Uighurs may leave the factory is heavily restricted.¹²³ Han workers are reportedly not subject to the same restrictions.¹²⁴ These measures amount not only to a restriction of movement, but also to measures taken to prevent or deter escape.¹²⁵

Cumulatively, there is accordingly strong evidence that the deployment of Uighurs to work in factories amounts to the crime of enslavement.

i. Forcible transfer

The conditions in which Uighurs have been transferred to work placements also arguably meets the requirements of the crime of “forcible transfer” under international law,¹²⁶ defined as the compulsory movement of people from an area to another within the same state without grounds permitted under international law.¹²⁷ As with the crime of enslavement, the displacement must be involuntary.¹²⁸ Threats against Uighurs of re-internment in re-education camps as an alternative to work suggests an absence of “genuine choice”—the threshold for consent required by international jurisprudence¹²⁹—in their labour. Although far from conclusive evidence of the crime, the circumstances of deployment of Uighur workers from Xinjiang to factories across China—by dedicated trains in “batches”—are eerily reminiscent of archetypal cases of this crime found in Nazi Germany’s World War II use of forced labour.¹³⁰

113 See ASPI Forced Labour Report, 15; Adrian Zenz, “Beyond the Camps: Beijing’s Long-Term Scheme of Coercive Labor, Poverty Alleviation and Social Control in Xinjiang” (2019) 7(12) *Journal of Political Risk* ([online](#)). Although incentive payments to businesses to “take-on” labour are often an accepted element of economic policy across many societies, such payments are conditional on staff being employed in properly paid, safe and free circumstances. Therefore, it is this circumstance considered alongside those that follow in this list that render the use of financial incentives particularly problematic.

114 See ASPI Forced Labour Report, 15-17.

115 *Kunarac* (Judgement) [542].

116 Ye Ling, “[Released from Camps, Uyghurs Subjected to Forced Labor](#)”, Bitter Winter, 23 December 2019 (last accessed 28 September 2020).

117 *Kunarac* (Judgement) [543].

118 See ASPI Forced Labour Report, 15-17.

119 See, eg, Ye Ling, “[Released from Camps, Uyghurs Subjected to Forced Labor](#)”, Bitter Winter, 23 December 2019 (last accessed 28 September 2020); ASPI Forced Labour Report, 6; Adrian Zenz, “Beyond the Camps: Beijing’s Long-Term Scheme of Coercive Labor, Poverty Alleviation and Social Control in Xinjiang” (2019) 7(12) *Journal of Political Risk* ([online](#)).

120 *Ibid.*

121 *Kunarac* (Judgement) [542]-[543].

122 See, eg, Ye Ling, “[Released from Camps, Uyghurs Subjected to Forced Labor](#)”, Bitter Winter, 23 December 2019 (last accessed 28 September 2020); ASPI Forced Labour Report, 6; Adrian Zenz, “Beyond the Camps: Beijing’s Long-Term Scheme of Coercive Labor, Poverty Alleviation and Social Control in Xinjiang” (2019) 7(12) *Journal of Political Risk* ([online](#)).

123 *Ibid.*

124 *Ibid.* See also “[China turns Muslim ‘re-education’ camp detainees into cheap labour force, human rights group claims](#)”, Agence France-Presse, 4 March 2019 (last accessed 28 September 2020).

125 See *Kunarac* (Judgement) [543].

126 ICC Statute, art 7(1)(d). The ICTY has used the term “forcible displacement” to cover both the crime against humanity of deportation and the crime against humanity of forcible transfer: see *Simić* (Judgement) [123]-[124]; *Krnjelac* (Judgment) [473]-[474].

127 Bassiouni, *Enslavement as an International Crime*, 381; ICC Statute Art 7. Arguably, the circumstances of initial internment of Uighurs could also satisfy the threshold of “forcible transfer”.

128 *Simić* (Judgement) [125].

129 See *Krnjelac* (Appeals Judgment) [229]; *Simić* (Judgement) [126].

130 See Bassiouni, *Enslavement as an International Crime*, 376-377.

j. Other inhumane acts – invasive surveillance

Persuasive evidence indicates that Chinese authorities are collecting biological and personal information and processing it through technology such as the Integrated Joint Military Operations Platform ('IJOP') to predict the likelihood of "extremism" amongst Uighurs and sort them for imprisonment, "re-education", or further surveillance.¹³¹ The China Cables and Karakax List, in particular, indicate that the sorts of behaviour the IJOP tracks and punishes specifically among Uighurs include having foreign citizenship, using popular apps among Muslim communities, having more than two children, and peaceful religious activity such as donating to mosques or reading the Quran.¹³² Reports indicate that the immediate result of such surveillance amongst Uighurs is acute fear, denial of freedom of thought, conscience and religion, and suppression of minority rights to enjoy culture, religion, and language.¹³³ These effects are bolstered by surveillance measures such as the "Pair Up and Become Family" program, under which Party cadres are deployed to live with ethnic minority (mostly Uighur) families, even sleeping in the same beds as Uighur women.¹³⁴ The cadres purportedly collect information about the families, but also "present intimate and direct censorship of their religious practices and political opinions".¹³⁵

Arguably, these invasive surveillance measures constitute the crime against humanity of other inhumane acts.¹³⁶ The threshold for this crime is that the relevant acts: (1) are of "a similar character" to other prohibited acts; (2) cause "great suffering, or serious injury to body or to mental or physical health"; and (3) cause such injury "intentionally".¹³⁷ The particularly invasive nature of the surveillance apparatus employed in Xinjiang could be viewed as commensurate to the severe deprivation of liberty and attack on personal dignity involved in crimes such as those of imprisonment or torture. Although existing reports are consistent with such a conclusion,¹³⁸ further evidence is needed to substantiate the nature and extent of suffering caused by the surveillance system. Surveillance has also never been recognised as a possible crime against humanity, meaning it is unclear whether an international tribunal would view the harm inflicted by surveillance in Xinjiang as of a sufficient and similar gravity and seriousness so as to constitute a crime against humanity.

131 See, eg, Bethany Allen-Ebrahimian, "[Exposed: China's Operating Manuals for Mass Internment and Arrest by Algorithm](#)", International Consortium of Investigative Journalists (24 November 2019) (last accessed 14 October 2020); Scilla Alecci, "[How China Targets Uighurs 'One by One' for Using a Mobile App](#)", International Consortium of Investigative Journalists (24 November 2019) (last accessed 14 October 2020); Maya Wang, "[China's Algorithms of Repression: Reverse Engineering a Xinjiang Police Mass Surveillance App](#)", Human Rights Watch (1 May 2019) (last accessed 14 October 2020).

132 China Cables (see especially "Integrated Joint Operation Platform" Daily Essentials Bulletin No. 2); Karakax List; Maya Wang, "[China's Algorithms of Repression: Reverse Engineering a Xinjiang Police Mass Surveillance App](#)", Human Rights Watch (1 May 2019) (last accessed 14 October 2020).

133 See, eg, Network of Chinese Human Rights Defenders and Equal Rights Initiative, Joint Civil Society Report Submitted to the Committee on the Elimination of Racial Discrimination for its Review at the 96th Session of the combined fourteenth to seventeenth periodic report of the People's Republic of China (CERD/C/CHN/14-17), 16 July 2018 ([online](#)) [8]-[21]; Dake Kang and Yanan Wang, "[China's Uighurs told to share beds, meals with party members](#)", Associated Press (30 November 2018) (last accessed 14 October 2020); Gavin Fernando, "['This is mass rape': China slammed over programme that 'appoints' men to sleep with Uighur women](#)", New Zealand Herald (21 December 2019) (last accessed 14 October 2020).

134 This raises serious concerns of further sexual violence in Xinjiang: see Gavin Fernando, "['This is mass rape': China slammed over programme that 'appoints' men to sleep with Uighur women](#)", New Zealand Herald (21 December 2019) (last accessed 14 October 2020). There remains a lack of information, however, to determine the nature and extent of any such sexual violence. The program also raises concerns of forced marriage and pregnancy that cannot be substantiated on currently available information.

135 Network of Chinese Human Rights Defenders and Equal Rights Initiative, Joint Civil Society Report Submitted to the Committee on the Elimination of Racial Discrimination for its Review at the 96th Session of the combined fourteenth to seventeenth periodic report of the People's Republic of China (CERD/C/CHN/14-17), 16 July 2018 ([online](#)) [21].

136 It could also be argued that the targeted use of such invasive surveillance constitutes persecution. However, whether data privacy constitutes a "fundamental right" so as to attract protection under this prohibition is, at best, unclear. See further: Michael Bohlander, "'The global Panopticon': mass surveillance and data privacy intrusion as a crime against humanity?" in *Justice without Borders: Essays in Honour of Wolfgang Schomburg* (Brill, 2018) 73-102.

137 ICC Statute, art 7(1)(k).

138 See, eg, Dake Kang and Yanan Wang, "[China's Uighurs told to share beds, meals with party members](#)", Associated Press (30 November 2018) (last accessed 14 October 2020); Gavin Fernando, "['This is mass rape': China slammed over programme that 'appoints' men to sleep with Uighur women](#)", New Zealand Herald (21 December 2019) (last accessed 14 October 2020).

Possible genocide in Xinjiang

The legal definition of genocide, reflective of customary international law,¹³⁹ is enumerated in Article II of the *Convention on the Prevention and Punishment of the Crime of Genocide* ('Genocide Convention'). Article II provides that:

Genocide Convention, Article II¹⁴⁰	
...genocide means <u>any of the following acts</u> committed with the <u>intent to destroy, in whole or in part, a national, ethnical, racial or religious group</u> , 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.

Establishing genocide under international law therefore requires proof of *both* a prohibited act of genocide *and* specific intention to “destroy” a protected group, in whole or in part. In relation to the situation in Xinjiang, there is strong evidence that acts constitutive of genocide have occurred. It is less clear, however, whether the requisite intent can be proven on existing evidence. Although the presence of such intent is arguable, persisting uncertainties as to the state of the law itself in this area renders it difficult to conclude whether the situation in Xinjiang can currently be legally characterised as “genocide”. This section of the Report considers first the evidence relevant to establishing prohibited acts of genocide and then the likelihood that those acts can be inferred to have been perpetrated with the requisite intent.

1. Prohibited acts

There is evidence of varying strength to support arguments that *each* of the acts specified in Article II of the *Genocide Convention* have occurred in Xinjiang.

a. Killing members of the group

There are two material elements to establishing “killing”: death of a victim; and that the death resulted from an unlawful act or omission.¹⁴¹ In relation to the situation in Xinjiang, these elements are likely satisfied by the same evidence that may be relied upon to establish the crime against humanity of murder considered above. That evidence, especially reports of deaths of Turkic minority Muslims in “re-education” camps and of killings of Uighur babies in Xinjiang hospitals,¹⁴² is evidence that killings have occurred in Xinjiang and that the victims have been members of a protected “ethnic or religious group”, namely Uighurs and other Muslims in Xinjiang.¹⁴³

b. Causing serious bodily or mental harm to members of the group

International tribunals have interpreted “serious bodily or mental harm” as *including* “acts of torture, inhumane or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of death, and harm that damages health or causes disfigurement or injury”.¹⁴⁴ The evidence relevant to es-

139 Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion) [1951] ICJ Rep 15, 23. See also Krstić (Judgment) [580].

140 Emphasis added.

141 Akayesu (Judgment) [588]. See also ICC, Elements of Crimes, 113.

142 See above n 93.

143 Genocide Convention art II(a).

144 Prosecutor v Stakić (Judgment) (ICTY, Trial Chamber, Case No IT-97-24-T, 31 July 2003) ('Stakić (Judgment)') [516]; see also Akayesu (Judgment) [503] (ruling the term “serious bodily or mental harm, without limiting itself thereto, to mean acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution”; Prosecutor v Clément Kayishema et al (Judgment) (ICTR, Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999) [109] (defining the term as “harm that seriously injures the health, causes disfigurement or causes any serious injury to the external, internal organs or senses”); A-G Israel v Eichmann (1968) 36 ILR 5 (District Court, Jerusalem) 340 (stating that serious bodily and mental harm of

establishing the potential crimes against humanity of persecution, imprisonment, torture, forced sterilisation, and enslavement is accordingly also strong evidence that “serious bodily or mental harm” has been occasioned to Uighur and other Turkic minority Muslims.

c. **Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part**

This prohibited act has been interpreted as including “methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction”.¹⁴⁵ On existing jurisprudence, it is therefore very unlikely that “physical destruction” can be interpreted expansively to include dissolution of a group as a social entity.¹⁴⁶ Rather, the focus is on physical or biological destruction.¹⁴⁷ It could be argued that the conditions within Xinjiang camps, reportedly including overcrowding, and food and sleep deprivation,¹⁴⁸ suffice to make out the act. However, although such conditions may amount to torture or otherwise inhumane treatment, it is unclear whether they meet the threshold of this prohibited act, which has been interpreted strictly.¹⁴⁹ Similarly, there is currently insufficient evidence relating to the nature of forced labour undertaken by Uighurs to determine whether it amounts to “excessive work or physical exertion” of the degree necessary to constitute “conditions of life calculated to bring about [...] physical destruction”. It is therefore arguable that this prohibited act has occurred in Xinjiang, although the evidence is weaker than that available for other prohibited acts.

d. **Imposing measures intended to prevent births within the group**

Although the *Genocide Convention* does not make explicit the types of “measures” that constitute “measures intended to prevent births”, the ICTR clarified in its *Akayesu* judgment that “sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages” are all relevant measures.¹⁵⁰ In the case of Xinjiang, there are considerable and credible reports of forced sterilisations, forced birth control, and forced abortions having occurred against Uighur and other Turkic minorities.¹⁵¹ This evidence is bolstered by official government documents that show a significant decrease in birth rates in predominantly Uighur prefectures between 2015 and 2018, near-zero birth rate targets in certain Uighur regions, disproportionate targeting of women in Xinjiang for sterilisations or the fitting of intrauterine devices (IUDs) in recent years, and significant increases in women “in menopause” in Xinjiang.¹⁵² This evidence strongly establishes the imposition of measures “intended to prevent births” within the group.

e. **Forcibly transferring children of the group to another group**

The scope of conduct captured by this ground is unclear on existing jurisprudence.¹⁵³ It has been described as “enigmatic” because it is the closest act to cultural genocide included in the legal definition of genocide.¹⁵⁴ Claus Kreß suggests that the prohibited act is made out if “at least one child has been distanced from the group to which it belongs”.¹⁵⁵ On such a definition, there is evidence that this prohibited act has occurred in Xinjiang. NGO and press reports document numerous instances in which Uighur children have been taken

members of a group could be caused “by the enslavement, starvation, deportation and persecution [...] and by their detention in ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation, deprivation of their rights as human beings, and to suppress them and cause them inhumane suffering and torture”.

145 *Akayesu* (Judgment) [505]; see also *Prosecutor v Rutaganda* (Judgment) (ICTR, Trial Chamber, Case No ICTR-96-3-T, 6 December 1999); Nehemiah Robinson, *Genocide Convention*, 64.

146 See Claus Kreß, “The Crime of Genocide under International Law” (2006) 6(4) *International Criminal Law Review* 461, 481.

147 *Akayesu* (Judgment) [505].

148 See the above section on the potential crime against humanity of torture.

149 *Prosecutor v Sikirica et al* (Judgment on Defence Motions to Acquit) (ICTY, Trial Chamber, Case No IT-95-8-T, 3 September 2001); *Prosecutor v Jelisić* (Judgment) (ICTY, Trial Chamber, Case No IT-95-10-T, 14 December 1999); *Stakić* (Judgment) [557]; *Stakić* (Appeals Judgment) [46]-[48]. See also *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment) (ICJ, 26 February 2007) (“Bosnian Genocide Case”) [354].

150 *Akayesu* (Judgment) [507].

151 See above n 93, 101-105.

152 See Adrian Zenz, *Sterilizations, IUDs, and Mandatory Birth Control: The CCP’s Campaign to Suppress Uyghur Birthrates in Xinjiang* (Jamestown, Report, June 2020). A recent letter allegedly from the Xinjiang government to CNN also reportedly confirms a drop in birth rate in Xinjiang, a significant rise in sterilisations in the region, and a considerable gap in the ratio of new IUDs in Xinjiang and the rest of mainland China: see Ivan Watson, Rebecca Wright and Ben Westcott, “[Xinjiang government confirms huge birth rate drop but denies sterilization of women](#)”, CNN (21 September 2020) (last accessed 14 October 2020). The letter contests the purpose of the measures imposed by the government therein.

153 William A. Schabas, *Genocide in International Law* (Cambridge University Press, 2009) 201.

154 *Ibid* 201; Claus Kreß, “The Crime of Genocide under International Law” (2006) 6(4) *International Criminal Law Review* 461, 484.

155 Claus Kreß, “The Crime of Genocide under International Law” (2006) 6(4) *International Criminal Law Review* 461, 484.

from Uighur communities in Xinjiang and placed into boarding schools elsewhere in Xinjiang, usually after their parents have been detained.¹⁵⁶ These reports seem to be confirmed by official planning documents.¹⁵⁷ One such document indicates that by early 2017, nearly 500,000 Uighur children had been placed in special boarding schools after parents have been detained.¹⁵⁸ More evidence is needed to establish the scale and exact nature of the separation that has occurred between Uighur children and their parents. However, existing evidence suggests that this prohibited act has occurred.

2. Genocidal intent

A determination of genocide under international law also requires evidence of specific intent “to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”. The precise contours of the required intent have proven highly contested. The extent to which the situation in Xinjiang can be said to amount to genocide turns largely on the scope of this definition. The content, and contestation therein, of each sub-element are considered in turn before considering their application to the situation in Xinjiang.

a. Definition of sub-elements

i) “destroy”

The essence of genocide, and what sets it apart from other crimes, is the requisite intention to “destroy” a protected group. This concept was originally conceived by Raphael Lemkin as involving the “destruction of essential foundations of life” *including* political and economic institutions, culture, and language.¹⁵⁹ Lemkin envisaged physical destruction of the group as only one, albeit the ultimate, form of destruction.¹⁶⁰ However, the weight of authority holds that Lemkin’s broad notion of the concept of “destruction” is *not* that which was adopted in Article II of the Genocide Convention, which provides for the legal definition of genocide under international law. In contrast, international jurisprudence indicates that the legal definition of destruction is restricted to those forms of genocide Lemkin considered to be the most extreme: physical and biological genocide, and only where brought about by the particular acts enumerated.¹⁶¹ Legal experts and international tribunals have accordingly found that the “destruction” part of the requisite intent (in the first part of Article II) must correspond to the physical or biological destruction (defined in the second part of Article II)—that is, “the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group”.¹⁶² Notwithstanding this, “attacks on the cultural and religious property and symbols of the targeted group” may constitute relevant evidence of such an intention.¹⁶³

ii) “in whole or in part”

This term refers to the *intention* underpinning prohibited acts, not the result. Although the meaning of the term “in whole” is clear, there is persisting uncertainty as to the scope of the term “in part”. Indeed, Schabas identifies four different approaches that have been taken to the content of “in part”. The first narrowly requires that while the result may be partial destruction, the intent must be to destroy the whole group.¹⁶⁴

156 See Amy Qin, “[In China’s Crackdown on Muslims, Children Have Not Been Spared](#)”, New York Times, 28 December 2019 (last accessed 29 September 2020); Xiang Yi, “[True Colors of China’s Boarding Schools for Uyghur Children](#)”, Bitter Winter, 3 July 2020 (last accessed 29 September 2020); Yanan Wang and Dake Kang, “[China treats Uighur kids as ‘orphans’ after parents seized](#)”, Associated Press, 21 September 2018 (last accessed 29 September 2020); Li Zaili, “[Children of Arrested Uyghur Families Strictly Supervised](#)”, Bitter Winter, 29 September 2018 (last accessed 29 September 2020); Gulchehra Hoja and Shohret Hoshur, “[Children of Detained Uyghurs Face ‘Terrible’ Conditions in Overcrowded Xinjiang Orphanages](#)”, Radio Free Asia, 18 October 2017 (last accessed 29 September 2020).

157 See, eg, the documents analysed in Adrian Zenz, “Break Their Roots: Evidence for China’s Parent-Child Separation Campaign in Xinjiang” (2019) 7(7) Journal of Political Risk ([online](#)).

158 Translated and quoted in Amy Qin, “[In China’s Crackdown on Muslims, Children Have Not Been Spared](#)”, New York Times, 28 December 2019 (last accessed 29 September 2020).

159 Raphael Lemkin, *Axis Rule in Occupied Europe: Analysis of Government, Proposals for Redress* (Washington: Carnegie Endowment for World Peace, 1944) 79.

160 *Ibid* 82, 87-89.

161 *Bosnian Genocide Case* [344] (“The Court concludes that the destruction of historical, religious and cultural heritage cannot be considered a genocidal act within the meaning of Article II of the Genocide Convention”); *Krstić (Judgment)* [580]. The list of prohibited acts of genocide is also exhaustive: see Schabas, *Genocide in International Law*, 174-175.

162 ILC, “Report of the Commission to the General Assembly on the Work of its Forty-First Session”, UN Doc A/CN.4/SER.A/1989/Add.1 (Pt 2) 102 [4]. See also Schabas, *Genocide in International Law*, 272.

163 *Krstić (Judgment)* [580] endorsed in *Bosnian Genocide Case* [344].

164 See Lawrence J. Leblanc, ‘The Intent to Destroy Groups’, p. 377.

This interpretation is not confirmed by drafting materials to the Convention, or indeed the plain language of Article II. The second approach requires intention to destroy a “substantial” part of the group. This approach has support in international decisions and academic works, although there is further nuance in the approach taken to the meaning of “substantial”. A third approach takes a qualitative rather than quantitative approach in focusing on intent to destroy particularly “significant” parts of a group, such as political and administrative leaders, religious leaders, and intellectuals, or alternatively segments of the group such as its women or children. There is also support in the jurisprudence for this approach. A final approach focuses on groups geographically. Which approach is taken will likely determine whether acts of Uighur birth suppression and forcible transfer of Uighur children amount to genocide.

iii) **Groups**

The targeted group must be one of the four enumerated in Article II of the Genocide Convention: namely, national, racial, ethnical, or religious. In the case of Xinjiang, the Uighurs likely fall within both the “ethnical” and “religious” categories, as do other Turkic minority Muslims.¹⁶⁵

b. Application to the situation in Xinjiang

i) ***Acts of physical destruction in Xinjiang, acts relating to mass internment, and forced labour***

On Lemkin’s definition, there is clear evidence of an intent to “destroy” the Uighur group in Xinjiang—the physical destruction of cultural and religious sites, prohibition of cultural and religious customs, and “re-education” to achieve sinicisation analysed earlier in the Report are, *inter alia*, all strong evidence of such intent. Public speeches by Chinese officials, including Xi Jinping himself, associating religious extremism (in substance defined to include Uighur culture and Islam¹⁶⁶) with a disease or virus requiring “a period of painful, interventionary treatment” are also particularly strong evidence of an intent to destroy Uighur and Islamic culture,¹⁶⁷ which fall within Lemkin’s notion of genocide. Under the narrow interpretation of “destroy” that is currently accepted as law, however, it is difficult to infer the requisite level of intent in these acts. The concept of “re-education” at the heart of the Xinjiang camps appears to be based on an intention to “transform” rather than physically destroy—the Chinese term for re-education performed in Xinjiang is “transformation through education” (*jiaoyu zhuanhua*), the term “*zhuanhua*” literally meaning to “transform” or “convert”.¹⁶⁸ This and other evidence relating to the structure and purpose of “re-education” camps arguably suggests that their aim is transformation of the Uighur group into one that conforms with mainstream, and accepted, Chinese social identity—not physical or biological destruction. However, it is also arguable that when those measures relating to “re-education” and “transformation” are considered *alongside* the destruction of Uighur cultural and religious property, birth control, and forcible transfer, an intent of physical destruction can be imputed to the entire “transformation” scheme. That is, as contemplated in the *Bosnian Genocide Case*, other attacks on the Uighur group “may legitimately be considered as evidence of an intent to physically destroy the group”.¹⁶⁹

ii) ***Acts aimed at preventing Uighur births***

Arguably, the evidence relating to birth control measures taken in Xinjiang allows an inference of intent to destroy at least *part* of the group sufficient to establish genocide. Particularly relevant evidence includes that relating to:

- ***Extent.*** There is evidence of official documents that show a dramatic decline in natural births in Xinjiang, a significant rise in state resources dedicated to birth control measures in Xinjiang, and of en-

165 See Schabas, *Genocide in International Law*, Chapter 3.

166 See the above section on the contextual elements of potential crimes against humanity. See also Sean R. Roberts, “The biopolitics of China’s “war on terror” and the exclusion of the Uyghurs” (2018) 50(2) *Critical Asian Studies* 232.

167 See Xinjiang Papers (in particular, speeches by Xi Jinping). See also Adrian Zenz, “[“Wash Brians, Cleanse Hearts’: Evidence from Chinese Government Documents about the Nature and Extent of Xinjiang’s Extrajudicial Internment Campaign”](#) (2019) 7(11) *Journal of Political Risk* (online); Adrian Zenz, “‘Thoroughly reforming them towards a healthy heart attitude’: China’s political re-education campaign in Xinjiang” (2019) 38(1) *Central Asian Survey* 102.

168 Adrian Zenz, “‘Thoroughly reforming them towards a healthy heart attitude’: China’s political re-education campaign in Xinjiang” (2019)

38(1) *Central Asian Survey* 102, 104.

169 See *Bosnian Genocide Case* [344].

forcement of laws against “illegal” births in Xinjiang.¹⁷⁰

- *Method.* NGO and press reports, as well as academic research, indicates that numerous and concurrent measures of birth control have been implemented across areas of Xinjiang including: forced sterilisation, forced abortions, killing of newborn babies, forced birth control, forced insertion of IUDs, and separation of sexes.¹⁷¹
- *Proportion.* The existing evidence shows that these measures and their effect are disproportionately focused on Xinjiang, where the majority of China’s Uighur population is located, and in predominantly Uighur counties within Xinjiang.¹⁷² Official statements that the government is merely enforcing its family planning policy¹⁷³ are refuted by reports of women subject to birth control measures irrespective of whether they have contravened the policy.¹⁷⁴

This evidence, when viewed *alongside* the evidence of cultural and religious destruction and “re-education”, strongly supports an inference that these measures are underpinned by intent to destroy *either* a “substantial part” of the Uighur group *or* a “significant part” of the group such that the physical existence of the remainder of the Uighur group is irrevocably compromised. Although there is currently no direct proof of such a genocidal policy, “[b]y its nature, intent is not usually susceptible to direct proof” and “must usually be inferred”.¹⁷⁵ Critically, in such circumstances intent is to be deduced from facts which *cumulatively* evidence such intent *beyond reasonable doubt*.¹⁷⁶ Here, an inference of intent is supported by the evidence of other culpable acts that have been systematically directed against Uighurs, the apparent targeting of Uighur populations for enforcement of birth control policies, and the repetition of discriminatory acts against Uighurs.¹⁷⁷ The difficulty will be whether such an inference can be deduced “beyond reasonable doubt”. The ICJ’s pending decision in *The Gambia v Myanmar*, which includes allegations of genocide by “imposing measures to prevent births” may provide further clarification as to the status of the situation in Xinjiang.

iii) **Acts of forcible transfer of Uighur children**

There is uncertainty as to how the requirement of specific intent applies to the prohibited act of “forcibly transferring children of the group to another group”. William A. Schabas has stated that this prohibited act “contemplates what is in reality a form of cultural genocide” and therefore requires proof of “the intent ‘to destroy’ the group in a *cultural* sense rather than in a physical or biological sense”.¹⁷⁸ This is supported by some domestic jurisprudence, which suggests that a forcible transfer of children motivated by an intent of “absorption or assimilation” of those children into the wider community outside of the group constitutes genocide.¹⁷⁹ Under this approach, official documents relating to the transfer of Uighur children to boarding schools that cite reasons for the state’s intervention such as to “break the impact of the religious atmosphere on children at home” are relevant evidence of specific intent.¹⁸⁰ At current, there is only limited evidence of

170 See Adrian Zenz, *Sterilizations, IUDs, and Mandatory Birth Control: The CCP’s Campaign to Suppress Ughur Birthrates in Xinjiang* (Jamestown, June 2020) ([online](#)); Gulchehra Hoja and Shohret Hoshur, “Xinjiang Hospitals Aborted, Killed Babies Outside Family Planning Limits: Uyghur Obstetrician”, *Radio Free Asia* (17 August 2020) (last accessed 2 September 2020).

171 *Ibid.* See also previous sections of the Report on potential crimes against humanity of murder and forced sterilisation.

172 See Adrian Zenz, *Sterilizations, IUDs, and Mandatory Birth Control: The CCP’s Campaign to Suppress Ughur Birthrates in Xinjiang* (Jamestown, June 2020) ([online](#)).

173 See Ivan Watson, Rebecca Wright and Ben Westcott, “[Xinjiang government confirms huge birth rate drop but denies forced sterilization of women](#)”, *CNN*, 21 September 2020 (last accessed 29 September 2020).

174 See, eg, Hoja Gulchehra and Shohret Hoshur, “[Xinjiang Hospitals Aborted, Killed Babies Outside Family Planning Limits: Uyghur Obstetrician](#)”, *Radio Free Asia*, 17 August 2020 (last accessed 2 September 2020).

175 *Prosecutor v Gacumbitsi* (Judgment) (ICTR, Appeals Chamber, Case No ICTR-2001-64-A, 7 July 2006) [40].

176 *Bosnian Genocide Case* [189]; *Brđanin* (Judgement) [970]; *Prosecutor v Zdravko Tolimir* (Judgement) (ICTY, Trial Chamber II, Case No IT-05-88/2-T, 12 December 2012) [745].

177 See *Jelisić* (Judgment) [47] (noting that relevant facts and circumstances to an inference of intent include “the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts”).

178 Schabas, *Genocide in International Law*, 294 (emphasis added).

179 See Australian Human Rights and Equal Opportunity Commission, *Bringing Them Home, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997, Final Report) 270-275. The Commission concluded that the Australian practice of forcible transfer of indigenous children to non-indigenous families and institutions violated Article II(e) of the Genocide Convention, noting that “the predominant aim of Indigenous child removals was the absorption or assimilation of the children into the wider, non-Indigenous, community so that their unique cultural values and ethnic identities would disappear, giving way to models of Western culture... Removal of children with this objective in mind is genocidal because it aims to destroy the “cultural unit” which the Convention is concerned to preserve”. See also *Nulyarimma v Thompson* [1999] FCA 1192, [5]-[11]; Ben Saul, “The International Crime of Genocide in Australian Law” (2000) 22 *Sydney Law Review* 527.

180 See, eg, “[In China’s Crackdown on Muslims, Children Have Not Been Spared](#)”, *New York Times*, 28 December 2019 (last accessed

such intent. However, the contextual evidence relevant to birth suppression outlined above that supports an inference of intention may also extend to this prohibited act. In either case, further evidence is required to ascertain the exact nature and aim of intergenerational separation of Uighur families in Xinjiang.

Conclusion and recommendations

The analysis contained in this Report is merely a starting point. It is clear that the determination of the appropriate legal nomenclature to describe the situation in Xinjiang is a complex and difficult task. Notwithstanding those difficulties, this Report establishes that there is considerable evidence to conclude that: (1) *numerous* crimes against humanity have occurred in Xinjiang; and (2) it is arguable that genocidal acts have occurred in Xinjiang. These conclusions support the following recommendations:

1. The United Nations Human Rights Council should instigate an independent international commission of inquiry.
2. States, and international organisations, should use their influence and authority to persuade the Chinese government to immediately cease the commission of atrocity crimes.
3. The international community should explore ways of holding perpetrators accountable for atrocity crimes that have occurred in China.
4. Civil society should do more to collect evidence and witness testimony so as to assist efforts to hold perpetrators of atrocity crimes accountable.