

Call It Like It Is: The Genocide in Xinjiang

April 15, 2021

Call It Like It Is: The Genocide in Xinjiang

By: Sophie Barnett

This article explores China's treatment of its Uyghur minority population in Xinjiang. It relies on news reports from recognized news agencies as well as a recent report by the Newlines Institute for Strategy and Policy and the Raoul Wallenberg Centre for Human Rights (Newlines Report), which is based on public and leaked government communications, eyewitness testimony, and open-source research methods. These sources are assumed to be generally accurate in order to explore the international legal implications.

China's treatment of its Uyghurs minority population reflects the return of some of the darkest episodes from world history. There is a growing number of reports – which this post assumes to be generally accurate – of widespread evidence of systematic rape, forced labour, birth prevention, family

separation, widespread surveillance, and torture, among other acts, of millions of Uyghurs in Xinjiang. While the media reports of “re-education” internment camps that eerily resemble the concentration camps of Eastern Europe, the destruction of mosques in Xinjiang reminds us of the destruction of mosques in Bosnian municipalities in the 1990s. Additionally, Chinese government documents and speeches from the highest levels of government speak of eradicating the “malignant tumor” that is Uyghur culture – language not unlike that used by Nazis in their plans to exterminate the Jewish “rats” or by Hutu genocidaires regarding the Tutsi “cockroaches.”

While international legal scholars have swiftly concluded that a genocide is occurring in Xinjiang, the international community lags behind. The United Nations (UN) Security Council is deadlocked, as China, as a member of the Permanent Five, would veto any proposed resolution to recognize a genocide or authorize a response. On occasion, States and international bodies have imposed sanctions on and condemned China for its “serious” or “troubling” human rights violations. But few States have acknowledged the genocide directly, and those that have are wary to do so in strong terms.

Although Canada’s House of Commons recently passed a motion declaring China’s treatment of its Uyghur minority a genocide – making it the second State to do so following the United States (US) – the motion is non-binding, and most members of the Cabinet abstained. Similar to his initial reaction to the 2019 National Inquiry into Missing and Murdered Indigenous Women and Girls – which determined that Canada’s treatment of its Indigenous population amounted to genocide – Prime Minister Trudeau hesitated to use the word “genocide,” arguing that the term is “extremely loaded” and that further investigation is needed.

Under the Trump administration, the US State Department issued a similar declaration, which was later upheld by the Biden administration. Although the State Department’s Office of the Legal Advisor (OLA) subsequently backtracked, concluding that there is “insufficient evidence” to prove genocide, the State Department’s 2020 Annual Country Reports on Human Rights Practices reversed course, stating: “Too many people continued to suffer under brutal conditions in 2020. In China, government authorities committed genocide against Uyghurs, who are predominantly Muslim, and crimes against humanity including imprisonment, torture, enforced sterilization, and persecution against Uyghurs and members of other religious and ethnic minority groups.”

Across the Atlantic Ocean, the European Union has yet to recognize a genocide, despite calls to do so from Members of European Parliament. And while the Dutch Parliament recently voted in favour of recognition – making it the first European legislature to do so – the non-binding motion, like Canada’s, lacked support from the ruling party.

The international resistance to use the “genocide” label can be explained by many factors. This article explores –and dismisses – two. First, genocide is a difficult crime to prove, and there is much controversy surrounding the legal thresholds to sustain a finding. Second, a finding of genocide activates certain responsibilities under the *Genocide Convention*, which would undoubtedly anger

China. Nevertheless, this article concludes that not only is there sufficient evidence to sustain a finding of genocide in Xinjiang, but that the international community must act their according obligation to stop it.

Applying the Crime of Genocide in Xinjiang

Mens Rea

Genocide is a specific intent crime, with Article II of the *Genocide Convention* – to which China is a State party – requiring the commission of specified acts "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group." Since China's policies target millions of Uyghurs primarily within Xinjiang, there is little doubt that the "in whole or in part" standard – which is interpreted by the International Court of Justice (ICJ) in *Bosnia v Serbia* at para 198 as a "substantial part" that is "significant enough to have an impact on the group as a whole" – is met.

However, States and scholars disagree as to whether the requisite "intent to destroy" refers to physical (biological) destruction only. The State Department OLA and other States hesitant to make a finding of genocide appear to rely on the fact that drafters excluded cultural genocide from the definition of genocide under the *Genocide Convention*, and thus look squarely for evidence of the biological destruction of physical beings through imposed extinction (primarily mass killings, which are not a prominent feature of Chinese actions in Xinjiang). But as Ciara Finnegan observes, such an approach is narrow and excludes key aspects of the Chinese government's plans against the Uyghur people, including assimilationist policies, the mandatory Han Chinese "homestays" in Uyghur households, the "vocational education centres," restrictions on Uyghur education, the institutionalization of Uyghur children in state-run facilities, and the destruction of mosques and other cultural sites. As Raphael Lemkin – who founded the term "genocide" (and intended for the definition to include cultural genocide) – said in 1953 in respect of Russian action in Ukraine:

"If the Soviet programme succeeds completely, if the intelligentsia, the priests and the peasants can be eliminated, ***Ukraine will be as dead as if every Ukrainian were killed, for it will have lost that part of it which has kept and developed its culture, its beliefs, its common ideas, which have guided it and given it a soul***, which, in short, made it a nation rather than a mass of people [emphasis added]."

The same can be said with regards to the Uyghurs in Xinjiang. In line with this approach, the Newlines Report – in which a team of 50 international legal experts conclude that there is, in fact, a genocide occurring in Xinjiang – argues that "the term … is not qualified by any term connoting physical destruction" but rather "is only qualified by the phrase "in whole or in part … as such" [and thus] … "the meaning of "intent to destroy" is directed at the group's existence as such." The use of cultural destruction as evidence of specific intent to destroy was accepted by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Prosecutor v Krsti?* and the ICJ in *Bosnia v Serbia*. In *Krsti?*, the ICTY Trial Chamber held, at para 580:

“[W]here there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group.”

Relying on this passage, the Newlines Report establishes objective evidence of biological genocide to show special intent to destroy the group – using official statements from the highest levels of government (including from President Xi Jinping and other Communist Party officials), a general plan, State policy and law, a pattern of conduct, and repeated destructive acts (such as the Strike Hard Campaign, the Blueprint for Mass Interment, and the Special Campaign to Control Birth Violations). It then discusses the Chinese government’s systematic campaign to destroy “Uyghur families, communal bonds, sacred sites, and the intergenerational transmission of religion, tradition, culture, and language” as evidence of special intent to destroy. Together, the Newlines Report asserts, these pieces show that “China’s policies and practices targeting Uyghurs in the region … amounts to an intent to destroy the Uyghurs as a group, in whole or in substantial part, as such” (p.4).

China justifies these and other acts as efforts to curb alleged Uyghur acts of terrorism, as evidenced by President Xi’s launching of the People’s War on Terror in Xinjiang in 2014. However, as Newlines Report comments, the stated justifications for acts of genocide are irrelevant to a finding of the requisite intent under the *Genocide Convention*. They may nevertheless evidence awareness of certain acts and outcomes by State actors, thereby challenging any anticipated defences that the *mens rea* requirement is not satisfied.

Actus Reus

In addition to the requisite intent, Article II outlines five categories of acts of genocide. They are: (a) mass killing; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting conditions of life calculated to bring about a group’s destruction in whole or in part; (d) preventing births; and (e) forcibly transferring children to another group.

Although only one of the categories must be satisfied for a finding of genocide, the Newlines Report found evidence of all five acts. For instance, mass killings are not a prominent feature of the Chinese plans; however, there are nevertheless reports of mass deaths within internment camps and newly-built crematoria. In terms of causing serious bodily or mental harm, the BBC is one of many reputable news sources that has obtained first-hand accounts that Uyghurs are subjected to systematic torture and cruel treatment, “including rape, sexual abuse, exploitation, and public humiliation” by camp officials and Han Chinese cadres assigned to their homes. Further, the Newlines Report notes how the internment camps and other programs are designed to indoctrinate Uyghurs, driving some to suicide from the threat of solitary confinement and torture through metal prods, electric shocks, and whips.

On the deliberate infliction of conditions calculated to bring physical destruction, the Newlines Report notes how Chinese authorities “systematically target Uyghurs of childbearing years, household heads,

and community leaders for detention in unliveable conditions, impose birth-prevention measures on Uyghur women, separate Uyghur children from their parents, and transfer Uyghurs on a mass scale into forced hard labor schemes" (p.5). Victims interviewed for the Newlines Report also stated (at p. 30) that while in the camps, they are often denied access to food, bathrooms, and basic forms of hygiene.

Additionally, China has a systematic birth prevention campaign in Uyghur-concentrated areas as well as the mass internment program. In January 2021, the Chinese Embassy in the US openly admitted that the birth prevention campaign was designed to make Uyghur women "no longer baby-making machines." As the Newlines Report found, while female Uyghur detainees are "subjected to forced IUD insertions, abortions, and injections or medication halting their menstrual cycles …. Uyghur men of childbearing age are targeted for internment" Indeed, one report finds that the most cited reason for detention and internment is "birth policy violations" (p.9).

Although previously the One-Child Policy might have undermined arguments regarding China's intent to target the Uyghurs insofar as the policy targeted Han Chinese while allowing Uyghurs to have two or three children, President Xi has since "equalized" family planning policies, allowing Han Chinese to have two children as well. Most importantly, "while equal on paper, in practice Han Chinese are largely spared the abortions, sterilizations, IUD insertions and detentions for having too many children that are forced on Xinjiang's other ethnicities" and some Uyghurs "are punished even for having the three children allowed by the law." One leaked government document obtained by the Uyghur Human Rights Project, for instance, reveals that in Qaraqash county in Xinjiang, Uyghurs are sent away for one or more extra birth. Some are also described as "maliciously" violating birth policies if they have a large number of children.

The consequences of these and other measures are shocking. Between 2015 and 2018, the growth rates in the two largest Uyghur prefectures decreased by 84%, and in September 2020, the Xinjiang government reported a dramatic drop in the region's birth rate from 15.88 per 1,000 people in 2017 to 10.69 per 1,000 people in 2018.

Finally, Uyghur children who have lost their parents to detentions and forced labour schemes are being forcibly transferred to State-run orphanages and Chinese-language environments. The orphanages are overcrowded and characterized by inhumane conditions. Between 2017 and 2019, the number of children placed into State-run boarding schools in Xinjiang increased by 76.9%. As the Newlines Report explains, "[t]he systematic forcible separation of Uyghur children from their families, coupled with the widespread prevention of Uyghur births, threatens "the group's capacity to renew itself, and hence to ensure its long-term survival" or existence" (pp. 34-5).

State Responsibility

As per the International Law Commission's *Draft Articles on State Responsibility for Internationally Wrongful Acts* – which is indicative of customary international law – to hold a State accountable for an

internationally wrongful act such as genocide, the impugned conduct must be attributable to that State under international law when the impugned act constitutes a breach of an international obligation (in this case, the provisions of the *Genocide Convention*).

As the Newlines Report determines, the commission of the above-mentioned acts of genocide in Xinjiang are "necessarily attributable" to China. Specifically, China is fundamentally a "highly centralized State in full control of its territory and population" and "[t]he persons and entities perpetrating the … acts of genocide are all State agents or organs – acting under the effective control of the State – manifesting an intent to destroy the Uyghurs as a group within the meaning of Article II" (pp.5-6).

President Xi has continuously outlined the groundwork for the genocidal acts in numerous speeches, the Chinese government programs mandating Han cadre homestays are derived from official training manuals and instructions from government agencies, the birth prevention campaign is largely implemented by the Xinjiang Health Commission, the Xinjiang People's Congress passed regulations in 2017 providing the legal framework for the mass interment program, and Xinjiang's Political and Legal Affairs Commission issued the aforementioned Blueprint for Mass Interment. President Xi has also since given his approval to these and other programs and policies, which, he says, are "completely correct."

That China accordingly bears State responsibility for an ongoing genocide against the Uyghurs is supported by a separate legal opinion from Essex Court Chambers, which found a "credible case" of genocide. However, the opinion has been removed from Essex Court's website after China placed retaliatory sanctions against them.

The Duty to Prevent Genocide

Prime Minister Trudeau is correct in that the act of labelling an atrocity as a "genocide" carries critical implications. Specifically, such a recognition triggers certain obligations under the *Genocide Convention* which, these provisions being jus cogens norms and *erga omnes* obligations, apply to all States regardless of whether or not they are State parties to the *Convention* and are owed to the international community at large. But as Colum Lynch explains, States may be reluctant to act given the expected retaliation from China. Even accusing a hegemon like China of committing a genocide "carries enormous political weight, applying pressure on the United States and other countries to punish a global powerhouse whose trade, environmental, and security activities are entwined with their own." China has already made it clear that it will not accept foreign countries "interfering in [its] domestic affairs" and threatened reprisals.

Nevertheless, under Article I of the *Genocide Convention*, States have an obligation to prevent genocide. Appropriate responses vary, but may include sanctions, boycotts, and other measures – expressly imposed in response to the imminent or ongoing genocide – designed to force China's hands. As the International Court of Justice (ICJ) explained in *Bosnia v Serbia* at para 430:

“[I]t is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: ***the obligation of States parties is rather to employ all means reasonably available to them***, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; ***responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide***. In this area the notion of “due diligence”, which calls for an assessment *in concreto*, is of critical importance [emphasis added].”

Whether the State has properly discharged its obligation to prevent genocide is determined with regards to various considerations. In *Bosnia v Serbia*, the ICJ emphasized the State’s capacity to “influence effectively the action of persons likely to commit, or already committing, genocide.” Capacity depends on factors including “the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events.” Further, since a State “may only act within the limits permitted by international law,” its “capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide.”

Further, Article VIII allows States to intervene in a genocide by calling on “the competent organs of the United Nations to take such action under the [UN] Charter …. [a]s they consider appropriate for the prevention and suppression of acts of genocide.” As the ICJ explains in *Bosnia v Serbia* at para 427:

“The obligation on each contracting State to prevent genocide is both normative and compelling. It is not merged in the duty to punish, nor can it be regarded as simply a component of that duty. It has its own scope, which extends beyond the particular case envisaged in Article VIII, namely reference to the competent organs of the United Nations, for them to take such action as they deem appropriate. ***Even if and when these organs have been called upon, this does not mean that the States parties to the Convention are relieved of the obligation to take such action as they can to prevent genocide from occurring***, while respecting the United Nations Charter and any decisions that may have been taken by its competent organs [emphasis added].”

Evidently, multiple avenues are available to States to act on their responsibilities. Although China has reserved to Article IX of the *Genocide Convention*, which allows for State parties to unilaterally submit disputes including State responsibility for genocide to the ICJ and, not being a State party to the *Rome Statute*, does not recognize the jurisdiction of the International Criminal Court, this does not relieve States of their duty to prevent the genocide in Xinjiang.

A Call to Action

The international community’s relative silence on Xinjiang should evoke memories of the climate of indifference that failed to prevent prior genocides from not only occurring, but also worsening. Recall the lead up to the Rwandan Genocide, when General Roméo Dallaire sent his infamous January 1994

Genocide Fax to the UN Department of Peacekeeping Operations, which provided reasonable evidence to expect the start of hostilities against the Tutsi population. The UN Security Council proceeded to drastically reduce the size of the UN Assistance Mission for Rwanda and US officials started planning the withdrawal of their troops from the region. And never forget the May 1994 discussion paper among US Pentagon officials, which warned of the Rwandan Genocide: “Be Careful. Legal at State was worried about this yesterday – Genocide finding could commit [the US government] to actually ‘do something.’”

It is our failure to adequately respond to these abuses that emboldens genocidaires to continue their practice. This hesitancy to act is all the more troubling in the digital age, where the sheer proliferation of evidence available in comparison to prior genocides makes it hard – if not impossible – for States to plead ignorance or turn a blind eye.

For these reasons, States should recognize the evidence for what it is: China is committing a genocide against its Uyghur minority population. However, recognition is just the beginning; States must also act on their corresponding international legal obligations to stop it. Military intervention need not be the first answer but rather a last resort. One place to start would be to challenge China’s status as both an economic powerhouse and a global hegemon to be feared. States should boycott the upcoming 2022 Winter Olympics in Beijing and fight for the delivery of much-needed humanitarian aid to Xinjiang. They should also open up national borders to Uyghur refugees that are able to escape. The coordination of powerful sanctions – expressly in response to the genocide – could also catch China’s attention. And through legislation, States could remove the benefits that China derives from forced Uyghur labour. What States should not do is skirt around the issue, pretending that the imposition of sanctions for mere “human rights violations” and lofty diplomatic talks are sufficient to change China’s behaviour.

Ultimately, only a collective and undeterred effort with meaningful consequences carries the potential to yield the desired result. One State cannot stop China in isolation, but each has a role to play in halting the atrocities. We share a responsibility to stop China’s genocide against the Uyghurs. And in the process, we could perhaps finally give teeth to the words “Never Again.”

Suggested citation: Sophie Barnett, “Call It Like It Is: The Genocide in Xinjiang” (2021), 5 PKI Global Justice Journal 14.

SophieSophie is a Juris Doctor candidate at the University of Toronto. This article is the author’s reflection of her experience at the 2021 Winter Courses of The Hague Academy of International Law, for which she received a Certificate in Public and Private International Law. Both this article and the author’s attendance at The Hague Academy are supported by the Canadian Partnership for International Justice and the Social Sciences and Humanities Research Council of Canada.

Image: meandering images/Shutterstock.com