

**INTERNATIONAL CRIMINAL RESPONSIBILITY FOR CRIMES AGAINST  
HUMANITY AND GENOCIDE AGAINST THE UYGHUR POPULATION IN THE  
XINJIANG UYGHUR AUTONOMOUS REGION**

*Executive Summary*

1. On the basis of the evidence we have seen, this Opinion concludes that there is a very credible case that acts carried out by the Chinese government against the Uyghur people in XUAR amount to crimes against humanity and the crime of genocide.

**Crimes against humanity**

2. There is evidence of crimes against humanity being committed against the Uyghur population, within the meaning of Art. 7 of the Rome Statute of the International Criminal Court.
3. First, there is sufficient evidence to conclude the existence of a widespread and systematic attack on the Uyghur population of XUAR, within the meaning of Art. 7.
4. Second, there is sufficient evidence to amount to an arguable case that, as part of that attack, the *actus reus* requirements for the following specific crimes against humanity have been fulfilled:
  - a. Enslavement (Art. 7(1)(c)), by the use of forced labour by former and current inmates of detention facilities.
  - b. Imprisonment or other severe deprivation of physical liberty (Art. 7(1)(e)), constituted by widescale deprivations of liberty of members of the Uyghur population held in detention facilities without charge or trial.
  - c. Torture (Art. 7(1)(f)) in detention facilities, including the use of “tiger chairs” and sexual violence.
  - d. Rape (Art. 7(1)(g)) in detention facilities.

- e. Enforced sterilisation (Art. 7(1)(g)) of Uyghur women, as part of efforts to reduce the Uyghur population.
- f. Persecution (Art. 7(1)(h)), ranging from the deprivation of liberty to sexual violence and enslavement, directed against persons on the basis that they are members of the Uyghur population and/or Muslim.
- g. Enforced disappearance (Art. 7(1)(i)) of members of the Uyghur population.

### Genocide

- 5. We consider that there is evidence that the crime of genocide is currently being committed in XUAR.
- 6. First, the Uyghur population of XUAR constitutes an ethnical group within the meaning of Art. 6 of the Rome Statute.
- 7. Second, it is at least arguable on the available evidence that there is an intent to destroy, in whole or in part, the Uyghur population of XUAR as such. The evidence also demonstrates that the *acta rei* listed below are taking place in the context of a “manifest pattern of similar conduct” directed against the Uyghur population.
- 8. Third, in our view, there is sufficient evidence to amount to an arguable case that the *actus reus* requirements for the following specific crimes of genocide have been fulfilled, with respect to members of the Uyghur population:
  - a. Causing serious bodily or mental harm (Art. 6(b)) to Uyghurs in detention, including acts of torture and forced sterilisations.
  - b. Imposing measures intended to prevent births within the group (Art. 6(d)).
  - c. Forcibly transferring children of the group to another group (Art. 6(e)).
- 9. Aside from the issue of individual criminal liability (considered below), China as a State may be accused of being criminally responsible for genocide. There would be a high threshold for establishing such responsibility. The most significant barrier will be proving

the requisite special intent. In this respect, it may be possible to rely on the specific genocidal intent of certain senior officials; otherwise, it would be necessary to establish that a genocidal intent is the only possible inference available from the pattern of persecutory conduct.

*Individual criminal responsibility*

10. We consider that the structural elements of indirect perpetrator liability under Art. 25(3)(a) of the Rome Statute are made out in respect of each of Xi Jinping, President of the People's Republic of China and General Secretary of the Chinese Communist Party; Zhu Hailun, Party Secretary of the Xinjiang Political and Legal Committee from 2016 to 2019, and now Deputy Secretary of the Xinjiang People's Congress; and Chen Quanguo, Party Secretary of XUAR since 2016.
11. China is a tightly controlled single-party State. It is therefore highly unlikely that an attack on the scale of that which the evidence reveals, and especially systematic detention on such a scale, would be carried out by State authorities other than on the orders of senior State officials. Further, leaks of Chinese government papers provide significant evidence tying the political leadership to the attack on Uyghurs in XUAR. On the basis of those leaked documents, taken together with the other available evidence, we conclude that there is a credible case that:
  - a. Xi Jinping controls the overall direction of State policy, and has made a range of speeches exhorting the punitive treatment of Uyghurs.
  - b. Chen Quanguo and Zhu Hailun have acted upon that overall policy by devising and implementing the measures which have been carried out in the Xinjiang Uyghur Autonomous Region, including mass detention and surveillance.
12. As to the mental element necessary for individual criminal responsibility, the evidence suggests that each of these individuals has devised and implemented measures which they are aware are (and which they intend to be) committed on a widespread scale, based on a policy directed against the Uyghur population. In light of the evidence, we consider

that there is a credible case against each of these three individuals for crimes against humanity. There is also a plausible inference that each of them possesses the necessary intent to destroy the Uyghurs as a group, so as to support a case against them of genocide (as well as supporting the imposition of sanctions against them by individual States under, for example, the “Magnitsky sanctions” regime in the UK and other jurisdictions).

### Accountability

13. Serious international crimes are of concern to all States, and, in line with the authors of other reports, we consider there to be a strong imperative for national governments to take urgent action to prevent the ongoing atrocities committed against the Uyghur population of XUAR.<sup>1</sup> At the very least, national governments should render official statements recognising the atrocities being committed and stating their view that there is evidence of the commission of crimes against humanity and/or genocide. They may also consider whether it is possible for them to exercise criminal jurisdiction over any individuals suspected of the crimes, including on the basis of universal jurisdiction, and/or to impose “Magnitsky” sanctions in line with their domestic legislation. They should also initiate and engage in diplomatic efforts to demand a full and transparent investigation into the facts on the ground, the trial and punishment of those found to be responsible for any international crimes, and the cessation of further atrocities against the Uyghur population. Companies based outside China which use, or benefit from the use of, forced labour in XUAR may also face civil liability and regulatory sanctions under the domestic laws of the states in which they, or their subsidiaries, are based: this is an important current issue which we consider to be worthy of further detailed analysis.

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<sup>1</sup> See, e.g. “Responsibility of States under International Law to Uyghurs and other Turkic Muslims in Xinjiang, China” (BHRC, 2020) which sets out a list of recommendations and steps that all States can immediately take, in line with their international obligations.

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## *Introduction*

1. We are instructed by the Global Legal Action Network, the World Uyghur Congress and the Uyghur Human Rights Project to provide a written Opinion on the characterisation, under international criminal law, of acts carried out by the Chinese government in respect of the Uyghur people living in the Xinjiang Uyghur Autonomous Region (“**XUAR**”) in China. There is also evidence that other groups of Turkic origin may also be subject to similar or related forms of treatment in XUAR, but in this Opinion we have focused on the Uyghur community specifically.
2. In this Opinion, we address the potential substantive liability of certain individuals, under the Rome Statute of the International Criminal Court (“**Rome Statute**”).<sup>2</sup> We also consider the applicability of the United Kingdom’s “**Magnitsky sanctions**”<sup>3</sup> regime to those individuals.
3. This Opinion is divided into six main sections:
  - a. *First*, it makes some general observations about the use of evidence in establishing international criminal liability.
  - b. *Second*, it considers and summarises the factual evidence available to us, looking primarily at the detention and treatment of members of the Uyghur population in State-run detention facilities; forced labour in the cotton production industry; separation of children from parents; and the destruction of cultural property.
  - c. *Third*, it considers possible crimes against humanity, concluding that the actions discussed in the second section arguably constitute crimes against humanity under Art. 7 of the Rome Statute, in particular the crimes of enslavement (Art. 7(1)(c)); imprisonment or other severe deprivation of physical liberty (Art. 7(1)(e)); torture (Art. 7(1)(f)); rape and enforced

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<sup>2</sup> Rome Statute (1998).

<sup>3</sup> Global Human Rights Sanctions Regulations 2020 (UK).

sterilization (Art. 7(1)(g)); persecution (Art. 7(1)(h)); and enforced disappearance of persons (Art. 7(1)(i)). It also concludes that it is arguable that the requirements of a “widespread and systematic attack” are satisfied.

- d. *Fourth*, it considers the crime of genocide, concluding that the conduct outlined in the second section arguably amounts to genocide under Art. 6 of the Rome Statute, in particular by causing serious bodily or mental harm to members of the group (Art. 6(b)); imposing measures intended to prevent birth within the group (Art. 6(d)); and forcibly transferring children of the group to another group (Art. 6(e)). It also concludes that it is arguable that the “special intent” that is necessary to establish criminal liability for genocide is established.
  - e. *Fifth*, it considers possible avenues for engaging China’s State responsibility under international law for any crimes committed against the Uyghur population.
  - f. *Sixth*, it considers the question of individual criminal liability, focusing on Xi Jinping, Zhu Hailun, and Chen Quanguo. It concludes that, arguably, those three individuals (and potentially others) could be individually criminally liable for crimes against humanity and genocide. The Opinion also briefly considers the potential for Magnitsky sanctions to be applied to these individuals.
4. The crimes considered in this Opinion may also be relevant in other contexts, such as in establishing criminal liability under domestic law or in seeking judicial review of executive action. However, these other contexts fall outside the scope of this Opinion. The Opinion also does not address questions of jurisdiction, admissibility or immunity as may operate in international or domestic courts.

### *1. Evidence*

5. We have relied on various types of evidence in preparing this Opinion: these are described below. We consider that, when viewed as a whole, the evidence supports the conclusions reached in this Opinion. However, different types of evidence perform different functions

in supporting our conclusions and may be given different weight in establishing international criminal liability. The considerations specific to each type of evidence are briefly summarised below.

*First-hand accounts and testimonies of survivors*

6. Witness testimony has historically been the chief form of evidence in both domestic and international criminal trials. First-hand accounts by survivors and other witnesses are likely to be considered a key form of evidence in establishing the facts as to events occurring in XUAR. The evidence we have seen includes several reports that detail accounts by survivors and witnesses, some as reported to journalists and others in more formal settings, such as before the US Congress. The extent to which each report would be persuasive for international criminal purposes will depend on the rigour of each, and on the cumulative or corroborative nature of other material.

*Investigative journalism and research by scholars and non-governmental organisations*

7. The atrocities committed against the Uyghur population of XUAR have attracted attention from journalists (including in the form of long-term and detailed investigative journalism) and a range of non-governmental organisations and academics. Some of the most prominent individuals and organisations who have published on this topic are identified below.
8. For example, the Australian Strategic Policy Institute (“ASPI”), an independent think tank, has produced extensive studies on events in XUAR over the last two years. ASPI recently launched the Xinjiang Data Project website, which maps XUAR’s detention system and the destruction of mosques and significant Uyghur cultural sites in the region. Other organisations, such as the Uyghur Human Rights Project and Human Rights Watch, have also produced detailed research reports.
9. When it comes to individual researchers, several of our conclusions take into account the work of Dr Adrian Zenz. Dr Zenz is a leading figure in the analysis of events in XUAR. He is a senior fellow in China Studies at the Victims of Communism Memorial Foundation in Washington, D.C., with a research focus on “China’s ethnic policy, public recruitment



in Tibet and Xinjiang, Beijing's internment campaign in Xinjiang and China's domestic security budgets".<sup>4</sup> His research since 2017 has been instrumental in bringing events in XUAR to light. He was also the author of the analysis of the "Karakax List", to which we refer at paragraph 14 below.

10. The weight to be accorded to reports from investigative journalists or academic research will depend on the individual source and the rigour of its methodology. In our view, in light of the extensive research carried out, the heavy reliance on primary sources, and the detailed methodologies set out, the works of Dr Zenz, ASPI and similar others would be accorded significant weight and would have probative value in establishing the relevant facts.

#### Satellite imagery

11. Satellite imagery has proven to be particularly useful in exposing the treatment of Uyghurs in XUAR, where the political situation means that investigation on the ground is often difficult or impracticable. ASPI, Agence France Presse and other outlets have used satellite imagery to compile evidence about the treatment of the Uyghur population.
12. Satellite imagery is increasingly accepted as evidence in international criminal proceedings. The International Criminal Court ("ICC") is reported to have used satellite imagery in its Darfur investigations.<sup>5</sup> In the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), trial chambers have admitted aerial images which showed the digging of mass burial sites. For instance, in *Tolimir*, the Trial Chamber held that, while evidence was lacking on the method of creation of aerial images, this did not render them generally lacking in credibility.<sup>6</sup> The corroboration of the images by professional reports and by witness testimony was key to the Chamber's finding that the images were reliable and of probative value.<sup>7</sup>

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<sup>4</sup> Zenz, "Genocidal Sterilization Plans in Xinjiang" (2020) 21.

<sup>5</sup> "Evidence Matters in ICC Trials" (IBA, 2016) 27.

<sup>6</sup> *Prosecutor v Tolimir*, Judgment (12 December 2012) para 70.

<sup>7</sup> *Ibid.*

13. In our view, the extensive imaging carried out of conditions in XUAR, especially when accompanied by a detailed breakdown of the methodology employed and/or corroboration from academic sources, reports of investigative journalists and witness accounts, will be accorded significant weight in establishing the commission of international crimes in XUAR.

### *Leaked government papers*

14. Over the last year, there have been three very significant leaks of Chinese government papers relating to XUAR: the “Xinjiang Papers”; the “China Cables”; and the “Karakax List”. Each of these has been carefully verified as authentic by experts in the field,<sup>8</sup> and collectively, the leaked documents shed light on the role of senior officials, from Xi Jinping downwards, in the treatment of the Uyghurs.

## *2. Overview of the relevant evidence*

### *China's Uyghur population*

15. Uyghurs are a people living in Central Asia, in areas referred to by China as Xinjiang or XUAR, but referred to by some Uyghurs as East Turkestan.<sup>9</sup> There are around 11 million Uyghurs in XUAR, making up around half of the XUAR population.<sup>10</sup>
16. Uyghurs differ from the majority of the Han Chinese population in ethnicity (being ethnically Turkic, rather than East Asian), religion (being predominantly Muslim, while the Han Chinese population largely has no religion), and language.<sup>11</sup> Some Uyghurs and other Turkic Muslim minorities have demanded greater autonomy, and in some instances a separate State: this appears to have been seen by the central government as a threat to the Chinese State.<sup>12</sup>

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<sup>8</sup> Ramzy and Buckley, “Absolutely No Mercy” (2019).

<sup>9</sup> Wan (undated) 4.

<sup>10</sup> “Eradicating Ideological Viruses” (HRW, 2018) 10; Wan (undated) 4.

<sup>11</sup> Wan (undated) 4.

<sup>12</sup> “Eradicating Ideological Viruses” (HRW, 2018) 10

17. In the 1990s, economic incentives by the Chinese government attracted around one to two million Han Chinese settlers to XUAR. This has caused resentment among Uyghurs.<sup>13</sup> In the late 1990s and 2000s, there was a series of violent incidents by Uyghurs in XUAR.<sup>14</sup> Human rights institutions have observed that since then, the Chinese government has ruled XUAR as a “police state ... undergirded by the perception that the Uyghurs[] are an ethno-nationalist threat to the Chinese state, the belief that Xinjiang serves as a breeding ground for the ‘three evil forces’ of separatism, terrorism, and extremism...”.<sup>15</sup> In particular, in May 2014, the Chinese government launched a campaign in XUAR called the “Strike Hard Campaign against Violent Terrorism”, as part of which routine surveillance of Uyghurs increased, and controls were imposed on international movement and communication.<sup>16</sup> This campaign has also involved the measures described in the remainder of this section.

#### *Detention of members of the Uyghur population*

18. The detention of Uyghurs in the detention centres which are the subject of this Opinion has been documented since around 2016.<sup>17</sup> The Chinese government refers to its centres as “transformation through education” facilities,<sup>18</sup> and claims that they are used to teach vocational skills. However, there is evidence that the inmates are prevented from leaving: this is the account given by some former inmates; satellite photography indicates that some of the facilities are surrounded by perimeter walls, guard watchtowers, and

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<sup>13</sup> Wan (undated) 4-5; “Eradicating Ideological Viruses” (HRW, 2018) 21.

<sup>14</sup> Wan (undated) 5; “China’s Operating Manuals for Mass Internment” (ICIJ, 2019).

<sup>15</sup> Wan (undated) 5.

<sup>16</sup> “Eradicating Ideological Viruses” (HRW, 2018) 11-15, 25.

<sup>17</sup> Wan (undated) 31-32.

<sup>18</sup> The Chinese term is “教育转化”, or “jiaoyu zhuanhua” – see Arts. 14, 17 and 21 of the XUAR Regulation on De-Extremification (2017) enacted by the Standing Committee of the 13th People’s Congress of the Xinjiang Uighur Autonomous Region. We have been instructed that this term translates as “transformation through education” or “conversion through education”. In western reporting, the term “re-education” is frequently used. For simplicity, we will refer to these facilities simply as detention facilities for the purposes of this Opinion.

patrolled by armed guards;<sup>19</sup> and a leaked list of Chinese government guidelines instruct staff from the camps on preventing escapes, and on visits from relatives.<sup>20</sup>

*Scale of the detention in XUAR, and among the Uyghur population in XUAR*

19. According to recent estimates, there are currently between 500 and 1,400 facilities in XUAR, designated by the Chinese government for “transformation through education” of the Uyghur population.<sup>21</sup> The description of treatment in detention that follows in this section relates to these facilities. A recent report by ASPI has found that since 2017 alone, China has built or expanded 380 internment camps in XUAR, ranging from lowest security camps to fortified prisons.<sup>22</sup> According to the report, about half of the detention sites constructed between July 2019 and July 2020 are higher security facilities, while at the same time approximately 70 lower security camps were desecuritized, suggesting a shift in usage to higher security facilities.<sup>23</sup>
20. The US State Department, and human rights and news organisations, estimate that between 800,000 and two million people have been detained in detention facilities at some time since April 2017.<sup>24</sup> Dr Adrian Zenz estimates that “regions with substantial shares of Turkic minority populations can have combined adult internment and imprisonment shares of about 15 to 20 percent or more. Of these, only about 5 percent are typically sentenced to prison, with about 95 percent being in extrajudicial ‘vocational training’, transformation through education or in detention centres.”<sup>25</sup>

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<sup>19</sup> Wan (undated) 10; Zenz, “Wash Brains, Cleanse Hearts” (2019)

<sup>20</sup> “China’s Operating Manuals for Mass Internment” (ICIJ, 2019).

<sup>21</sup> Wan (undated) 10. See also Zenz, “Wash Brains, Cleanse Hearts” (2019), estimating 1200 such facilities.

<sup>22</sup> “Documenting Xinjiang’s Detention System” (ASPI, 2020).

<sup>23</sup> *Ibid.*

<sup>24</sup> Busby Testimony (2018); Letter from the United Nations Office of the High Commissioner on Human Rights (2018) 6; “Eradicating Ideological Viruses” (HRW, 2018) 2; “Connecting the Dots in Xinjiang” (Centre for Strategic & International Studies Human Rights Initiative, 2019) 1; “Uyghurs for Sale” (ASPI, 2020) 4; Zenz, “Wash Brains, Cleanse Hearts” (2019); Ramzy and Buckley, “China’s Detention Camps” (2018).

<sup>25</sup> Zenz, “Wash Brains, Cleanse Hearts” (2019).

Detention on the basis of practising the Uyghur culture or Muslim religion

21. Human rights organisations have reported that the main reasons for detaining Uyghurs are: having overseas connections, religious practices, and being perceived as opposing State policies.<sup>26</sup> The religious practices for which Uyghurs have been detained include fasting, “excessive” prayer, attendance of religious events and ceremonies, studying religion, owning or disseminating religious materials, wearing a veil or having a beard, praying at a mosque other than on a Friday, having a household with a religious atmosphere, and refusing an inter-ethnic marriage with a non-Uyghur.<sup>27</sup>
22. Dr Zenz has noted the “preventative nature of re-education”, meaning that Uyghurs are frequently detained merely on the basis that they “have committed so-called ‘minor crimes’” which the State considers may lead to more serious risks. In reality, however, the “minor crimes” correlate with possessing a Uyghur identity: for example, being moderately religious is perceived as a threat that a person may develop “religious extremism”, and having family members who have been detained can give rise to accusations that an individual “associate[s] with ‘dangerous’ or ‘suspicious’ people”.<sup>28</sup>

Detention without lawful basis, charge or trial and disappearance

23. Working groups and special rapporteurs from the Office of the United Nations High Commissioner for Human Rights (“UNHCHR”) have stated that “...it is alleged that no formal charges are laid against detainees, who are also not provided access to legal remedies, are denied contact outside the centres, and are held for unspecified periods of time which [are] tantamount to enforced disappearance and arbitrary detention”, and have expressed their concern at the Chinese government’s lack of response to these allegations.<sup>29</sup> They have also “expressed concern at the very high number of enforced

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<sup>26</sup> Wan (undated) 16-17; “Eradicating Ideological Viruses” (HRW, 2018) 13-14, 31-33, 42-43; “China’s Operating Manuals for Mass Internment” (ICIJ, 2019); Zenz, “The Karakax List” (2020); “Ideological Transformation” (UHRP, 2020); Smith Finley (2019) 5.

<sup>27</sup> Wan (undated) 16, 22, 26. See also “Eradicating Ideological Viruses” (HRW, 2018) 32; Zenz, “The Karakax List” (2020); Smith Finley (2019) 5.

<sup>28</sup> Zenz, “The Karakax List” (2020).

<sup>29</sup> Letter from the United Nations Office of the High Commissioner on Human Rights (2018).

disappearances of Uyghurs, which escalated with the introduction of ‘re-education facilities’”, with the whereabouts of approximately half a million individuals unknown as at November 2019.<sup>30</sup> Human Rights Watch reports interviews with former detainees and their families, “who told Human Rights Watch that the authorities had not given them any official reasons or paperwork for the detentions.”<sup>31</sup> Indeed, leaked Chinese government documents published in *The New York Times* show that officials were instructed to publicly admit that those detained in detention facilities which the Chinese government refers to as “transformation through education” facilities “haven’t committed a crime and won’t be convicted.”<sup>32</sup>

24. Human rights organisations report instances of families not being informed of the whereabouts of those detained.<sup>33</sup> UNHCHR working groups and special rapporteurs have stated that “[s]cant information about those detained is available, and in some cases, persons taken to the camps are effectively disappeared.”<sup>34</sup>

*Infliction of bodily or mental harm in detention*

25. There are four distinct categories of bodily or mental harm which emerge from the accounts of former detainees and investigations by third parties: physical harm; gender-specific and sexual harm; mental and psychological harm; and deaths. The second of these is dealt with in the section dedicated to sexual violence below.

*Physical harm*

26. There is compelling evidence that detainees are subject to a range of forms of serious physical harm. Detainees report having been punished by administration of electric shocks, forced to remain in stress positions for an extended period of time, beaten,

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<sup>30</sup> Joint Statement (2019) 9.

<sup>31</sup> “Eradicating Ideological Viruses” (HRW, 2018) 30, see also 31ff.

<sup>32</sup> Ramzy and Buckley, “Absolutely No Mercy” (2019).

<sup>33</sup> Wan (undated) 19.

<sup>34</sup> Letter from the United Nations Office of the High Commissioner on Human Rights (2018).

deprived of food, shackled and blindfolded, and forced to take unidentified drugs which caused them to experience blackouts.<sup>35</sup>

27. One of the most prominent of the torture methods used is the tiger chair. In a hearing before the US Congressional-Executive Commission on China, Mihrigul Tursun, a Uyghur woman, described her experience of the tiger chair as follows: "...I was placed in a highchair that clicked to lock my arms and legs in place and tightened when they press a button. The authorities put a helmet like thing on my head. Each time I was electrocuted, my whole body would shake violently and I could feel the pain in my veins".<sup>36</sup> Sayragul Sauytbay, a former detainee granted asylum in Sweden, also reports that prisoners were made to sit on a chair of nails. She witnessed people returning from the room covered in blood, and some without fingernails.<sup>37</sup>
28. Detention authorities have also inflicted physical pain and suffering by forcing detainees to assume painful positions. One ex-detainee, Kayrat Samarkand, was forced to wear what was termed 'iron clothes' – a suit made of metal which reportedly weighed over 50 pounds. It forced his arms and legs into an outstretched position from which he could not move at all, causing him to suffer severe back pain.<sup>38</sup> Another detainee was held in a metal outfit for 12 hours, unable to bend his head during that time.<sup>39</sup>
29. Prisoners have also reported being subjected to the forced consumption of drugs. For example, inmates were forcibly given pills or injections which had wide-ranging effects: some prisoners were cognitively weakened, women stopped getting their periods and men became sterile.<sup>40</sup> Ms Tursun also testified that she was given drugs, following which the prison officers checked her mouth with their fingers to make sure she swallowed them. She reported feeling lethargic and losing appetite after taking the drugs. She and other detainees were also forced to take unknown pills and drink a white liquid. The pills caused

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<sup>35</sup> "Responsibility of States under International Law to Uyghurs and other Turkic Muslims in Xinjiang, China" (BHRC, 2020) para 6.

<sup>36</sup> "Ex-Xinjiang Detainee Full Testimony at the US Congressional Hearing" (2018).

<sup>37</sup> "China's Operating Manuals for Mass Internment" (ICIJ, 2019).

<sup>38</sup> Schmitz (2018).

<sup>39</sup> "Eradicating Ideological Viruses" (HRW, 2018).

<sup>40</sup> Rahim (2019).

them to lose consciousness and reduced their cognition level; and the white liquid stopped some women's periods, caused extreme bleeding in some women, and, in some cases, resulted in inmates' deaths.<sup>41</sup>

#### *Mental/psychological harm*

30. Former detainees have reported experiencing physical or psychological punishments as part of what authorities described as "education", or as punishment for (actual or perceived) contraventions of prison rules.<sup>42</sup> These include being placed in solitary confinement cells, handcuffed, and/or deprived of food and drink, having to stand for 24 hours without sleep and being made to parade naked in chains.<sup>43</sup>
31. Ms Tursun testified that she was stripped naked and forced to undergo a medical examination. She also described how scores of women, chained at the wrists and ankles, were put in a 420 square foot underground cell, in which they were expected to urinate and defecate, with just one small hole in the ceiling for ventilation. She also recounted the trauma she continued to experience as a result of these episodes. In particular, she faces anxiety from fear that her family remaining in XUAR will be tortured in retaliation for her speaking out. The combination of arbitrary detention, stress, and physical and psychological punishments has left lasting health impacts on former detainees, including headaches and leg aches, memory loss, inflamed joints, high blood pressure, noise damage, and PTSD.<sup>44</sup>

#### *Deaths*

32. There are reports that an unknown number of detainees have died in the camps due to poor living conditions and lack of medical treatment. Ms Tursun told a US commission, at a November 2018 hearing, that while in detention, she witnessed 9 women die under such circumstances.<sup>45</sup> A Chinese police officer confirmed that 150 detainees had died

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<sup>41</sup> "Ex-Xinjiang Detainee Full Testimony at the US Congressional Hearing" (2018).

<sup>42</sup> "Eradicating Ideological Viruses" (HRW, 2018).

<sup>43</sup> *Ibid.*

<sup>44</sup> "Eradicating Ideological Viruses" (HRW, 2018).

<sup>45</sup> "China's Operating Manuals for Mass Internment" (ICIJ, 2019)



between June and December 2018 in a single internment camp.<sup>46</sup> In this regard, Human Rights Watch reports that detainees have experienced a high level of psychological stress in detention facilities, and on a number of occasions have attempted suicide.<sup>47</sup>

*Infliction of sexual violence in detention*

33. Women who were formerly detained in camps in XUAR have reported being forced, while in detention, to undergo abortions and/or to contraceptive devices having been implanted against their will. Many said they were subjected to sexual humiliation, including being filmed in the shower and having their sexual organs rubbed with chili paste.<sup>48</sup>

*Rape*

34. Ms Sauytbay reports that female detainees were systematically raped, and that she was forced to watch a woman be repeatedly assaulted.<sup>49</sup> Another former detainee, Ruqiye Perhat, also reports being repeatedly raped by Han Chinese guards while held in various prisons, resulting in two pregnancies, both forcibly aborted. She reports that any woman or man under the age of 35 was raped and sexually abused.
35. Former detainees have also accused policemen of systematically raping female detainees, taking “the pretty girls” away from their cells on a daily basis.<sup>50</sup> Other detainees were forced to watch, and those who turned their heads, closed their eyes, or looked shocked or angry were taken away and never seen again.<sup>51</sup>
36. Outside the detention system, there are also fears that China’s “Pair up and Become Family” programme, in which Han Chinese men are sent to XUAR to live with Uyghur women whose husbands have been sent to detention facilities, has created an environment

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<sup>46</sup> Hoshur (2019).

<sup>47</sup> “Eradicating Ideological Viruses” (HRW, 2018).

<sup>48</sup> Ferris-Rotman (2019).

<sup>49</sup> Rahim (2019).

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

for the systematic rape of Uyghur women, especially because women who refuse advances by these men are liable to be viewed as Islamic extremists.<sup>52</sup>

*Prevention of births*

37. In June 2020, a team of investigative journalists at the Associated Press reported that “the Chinese government is taking draconian measures to slash birth rates among Uighurs and other minorities as part of a sweeping campaign to curb its Muslim population, even as it encourages some of the country’s Han majority to have more children.”<sup>53</sup> Former detainees have reported that married women in detention who have had conjugal visits have been ordered to swallow unknown pills afterwards.<sup>54</sup> Uyghur women in detention have also been forcibly fitted with intrauterine contraceptive devices (“IUDs”).<sup>55</sup> Some have reported that after being released, medical checks up showed that they were sterile.<sup>56</sup>
38. On 2 September 2020, ITV News broadcast the testimony of a Uyghur doctor, now in Istanbul, Turkey.<sup>57</sup> The doctor reported that she had worked for the Chinese government as part of what she described as its “population control plan” to curtail the growth of the Uyghur population. She spoke of participating in at least 500 to 600 operations on Uyghur women including forced contraception, abortion, and sterilisation (including through removal of wombs). At least on such one occasion, a baby was still moving when it was discarded into rubbish.
39. Several recent reports, including most prominently by Dr Adrian Zenz,<sup>58</sup> detail the Chinese government’s campaign of mass female sterilisation, which targets and disproportionately affects ethnic minorities.<sup>59</sup> For example, these reports document the fact that, while the use of IUDs and sterilisation has fallen nationwide, it is rising sharply

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<sup>52</sup> Perper (2019).

<sup>53</sup> Associated Press, “China cuts Uighur Births” (2020).

<sup>54</sup> Ferris-Rotman (2019).

<sup>55</sup> *Ibid.*

<sup>56</sup> Associated Press, “China cuts Uighur Births” (2020).

<sup>57</sup> Murphy (2020).

<sup>58</sup> Zenz, “Genocidal Sterilization Plans in Xinjiang” (2020).

<sup>59</sup> See, e.g., Smith Finley (2020); Associated Press, “China cuts Uighur Births” (2020).

in XUAR.<sup>60</sup> A project entitled “Free Technical Family Planning Services to Farmers and Pastoralists” provides free “birth control surgeries” in XUAR’s southern Uyghur regions. Its aim is to reduce the regions’ 2020 birth and population growth rates by at least 0.4% below the 2016 level.<sup>61</sup> As noted by the European Parliament in a recent resolution, the research shows that Chinese authorities have implemented an official scheme of targeted birth prevention measures against Uyghur women in an effort to reduce Uyghur birth rates.<sup>62</sup>

40. In particular, Dr Zenz’s report<sup>63</sup> provides evidence that:

- a. The counties of Hotan, a capital city in southern XUAR, and its neighbour Guma, predominantly home to Uyghurs, planned to sterilise between approximately 14 and 34% of women between 18 and 49 in a single year. Per capita, this represents more sterilisations than China performed in the two decades between 1998 and 2019.
- b. Since 2018, a growing number of former female detainees have testified that they were given injections that coincided with changes in or cessation of their menstrual cycles. In the same year, published natural population growth rates in XUAR plummeted. In 2019, XUAR’s birth rates declined by 24%, whereas birth rates across the whole country fell by only 4.2%.
- c. Having children outside of the State-mandated limits has been punished with internment. Dr Zenz expresses the view that this is just one of several strategies to suppress minority birth rates.
- d. In 2018, 80% of all newly placed IUDs in China were fitted in XUAR, even though the region only accounts for 1.8% of the country’s population.

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<sup>60</sup> Associated Press, “China cuts Uighur Births” (2020).

<sup>61</sup> Zenz, “Genocidal Sterilization Plans in Xinjiang” (2020).

<sup>62</sup> European Parliament Resolution (2020/2913 (RSP)), para D.

<sup>63</sup> Zenz, “Genocidal Sterilization Plans in Xinjiang” (2020).

- e. In 2018, the XUAR region performed over seven times more sterilisations per capita than the national average. To put this into context, in January 2016, China abolished its one-child policy, and has since encouraged its citizens to have two children in order to maintain positive population growth, even giving out financial rewards such as tax breaks and wedding or childbirth subsidies.

*“Transformation through education” in detention*

41. While in detention facilities, Uyghurs are routinely forced to participate in what is euphemistically referred to as “transformation through education”, the aim of which is to erase Uyghur culture, “Sinicise” detainees into Han culture and compel detainees to assimilate Communist ideology.<sup>64</sup> Indeed, these camps operate with the express purposes of “wash[ing] clean the brains” of detainees and “strengthen[ing] the effectiveness of transformation through education”.<sup>65</sup> President Xi has referred to the need to eradicate “viruses of the mind” through “a period of painful, interventionary treatment”.<sup>66</sup>
42. Detainees must learn Mandarin Chinese and are prohibited from speaking any other languages.<sup>67</sup> Former detainees have reported that their release from the detention facilities was conditional on being able to show that they had learned over 1,000 Chinese characters, could speak Mandarin and/or could sing propagandistic songs.<sup>68</sup>
43. Authorities in the detention facilities strictly repress religious practices, including praying and growing beards.<sup>69</sup> Some detainees are forced expressly to denounce Islam<sup>70</sup> and to engage in practices that violate their religious beliefs, such as eating pork or drinking

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<sup>64</sup> “Connecting the Dots in Xinjiang” (Centre for Strategic & International Studies Human Rights Initiative, 2019) 5; Young, Bozorgmir and Yu (2019). See for example Article 4 of XUAR Regulation on De-Extremification (2017) (unofficially translated as “De-extremification shall persist in the basic directives of the party’s work on religion, persist in an orientation of making religion more Chinese and under law, and actively guide religions to become compatible with socialist society”).

<sup>65</sup> Zenz, “Wash Brains, Cleanse Hearts” (2019).

<sup>66</sup> *Ibid.*

<sup>67</sup> Ingram (2020); Wan (undated) 37; “Eradicating Ideological Viruses” (HRW, 2018) 38.

<sup>68</sup> “Eradicating Ideological Viruses” (HRW, 2018) 38–39.

<sup>69</sup> Stubbley (2019).

<sup>70</sup> Shih (2018).

alcohol.<sup>71</sup> There are reports of inmates being prohibited from washing their hands and feet because doing so is “equated with Islamic ablution”.<sup>72</sup> Some detainees, as a condition of release from the camps, are forced to sign documents promising that they will not practise their religion.<sup>73</sup>

44. There is an emphasis on indoctrinating detainees into Communist Party of China (“CCP”) ideology.<sup>74</sup> There are widespread reports of detainees being forced to “say prayers to the Communist party” (including before each meal), sing Communist songs, and attend daily flag-raising ceremonies.<sup>75</sup> They are also forced to memorise phrases such as “we are against religious extremism”.<sup>76</sup> Detainees must recite rules restricting Islam and the Uyghur language (such as rules prohibiting Islamic greetings, the use of Uyghur in public places and Uyghur language schools),<sup>77</sup> and criticise themselves and other Uyghurs for engaging in Uyghur cultural and religious practices.<sup>78</sup> They are taught that Uyghurs are a “backward” population and that, for example, Uyghur women are known for having dozens of sexual partners.<sup>79</sup> A leaked government document instructs detention facility employees to “help [detainees] understand deeply why their past behaviour was illegal, criminal and dangerous”.<sup>80</sup> Detainees are accorded scores based on how quickly they have learned Mandarin and are adopting CCP ideology, with a high score likely to lead to privileges such as an earlier release, contact with family members or more comfortable accommodation, and a low score likely to lead to punishment within the detention facilities.<sup>81</sup>

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<sup>71</sup> Young, Bozorgmir and Yu (2019); Stubbley (2019); Denyer (2018).

<sup>72</sup> Shih (2018).

<sup>73</sup> Wan (undated) 38.

<sup>74</sup> “Eradicating Ideological Viruses” (HRW, 2018) 36.

<sup>75</sup> “Connecting the Dots in Xinjiang” (Centre for Strategic & International Studies Human Rights Initiative, 2019) 22; “Eradicating Ideological Viruses” (HRW, 2018) 37–38; Shih (2018); Denyer (2018).

<sup>76</sup> “Eradicating Ideological Viruses” (HRW, 2018) 39; Shih (2018).

<sup>77</sup> “Eradicating Ideological Viruses” (HRW, 2018) 39–40.

<sup>78</sup> Shih (2018); Wan (undated) 37–38.

<sup>79</sup> Shih (2018).

<sup>80</sup> Young, Bozorgmir and Yu (2019).

<sup>81</sup> Young, Bozorgmir and Yu (2019); “China ‘Brainwashes’ Uighurs in Prison Camps” (2019); Shih (2018).

45. Reportedly, detainees must “complete their studies” and fulfil stringent “graduation” criteria before being released, which requires a minimum of one year in detention.<sup>82</sup> Even once they “graduate”, detainees are frequently involuntarily sent to factories across China where their “transformation through education” continues.<sup>83</sup>

#### *Forced labour in the cotton production industry*

46. There is evidence of the extensive use of forced labour in XUAR’s cotton industry (XUAR’s primary crop), sourced from China’s regular prison system,<sup>84</sup> from Uyghur detention facilities designated by the Chinese government as being for “transformation through education”, and from camps designated as job training facilities for rural (and in fact, predominantly Uyghur) labourers. As this Opinion is concerned with treatment targeted towards the Uyghur population, this section will discuss only the latter two categories.

#### *The XPCC and cotton producing companies*

47. The Xinjiang Production and Construction Corps (“XPCC”) is an organisation involved in the production and processing of raw cotton and finished products.<sup>85</sup> Its various subsidiaries are estimated to produce around 33.5% of China’s entire cotton output.<sup>86</sup> The XPCC is, however, more than a commercial enterprise: it is described by the Centre for Strategic & International Studies as “a unique paramilitary organization that provides border defense, builds and administers towns, and engages in commercial activities.”<sup>87</sup> The XPCC reports directly to the CCP, including the XUAR CCP leadership.<sup>88</sup> Human rights institutions have estimated that many, if not all, of the 5000 subsidiary companies of XPCC use prison labour.<sup>89</sup>

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<sup>82</sup> Zenz, “Wash Brains, Cleanse Hearts” (2019).

<sup>83</sup> “Uyghurs for Sale” (ASPI, 2020) 8, 18.

<sup>84</sup> “Cotton: The Fabric Full of Lies” (Citizen Power Institute, 2019) 7ff; “Connecting the Dots in Xinjiang” (Centre for Strategic & International Studies Human Rights Initiative, 2019) 8.

<sup>85</sup> “Cotton: The Fabric Full of Lies” (Citizen Power Institute, 2019) 40.

<sup>86</sup> “Connecting the Dots in Xinjiang” (Centre for Strategic & International Studies Human Rights Initiative, 2019) 8.

<sup>87</sup> Ibid.

<sup>88</sup> “Cotton: The Fabric Full of Lies” (Citizen Power Institute, 2019) 6.

<sup>89</sup> “Cotton: The Fabric Full of Lies” (Citizen Power Institute, 2019) 37.

Use of forced labour from Uyghur detention facilities

48. Human rights organisations report that recently, new cotton factories and textile hubs have been built either physically connected with detention facilities officially designated by the Chinese government for “transformation through education” of Uyghurs, or near to them. These organisations also report that inmates in the detention facilities are required to provide unpaid or low-paid labour in the factories.<sup>90</sup>
49. It has also been reported that in April 2014, Chinese authorities began to provide incentives such as monetary compensation, tax exemptions and electricity subsidies for building cotton production facilities near the detention facilities, and for companies in the cotton industry to employ inmates and those recently released from the facilities.<sup>91</sup>
50. There are also reports of forced labour in the cotton industry by recently released inmates of the detention centres.<sup>92</sup> One human rights organisation posits that “when the government claims that detainees have been ‘released’ or that they have ‘found employment’, it could simply mean that detainees have been sent to a factory – instead of a classroom’ – while still remaining locked in the same cell.”<sup>93</sup> The Centre for Strategic & International Studies estimates that “at least 100,000 ex-detainees in Xinjiang would be working potentially in conditions of forced labour”.<sup>94</sup>
51. ASPI has reported that former detainees from the detention facilities are transported to factories in provinces other than XUAR immediately upon their release, and it estimates that at least 80,000 Uyghurs were transferred in this way between 2017 and 2019.<sup>95</sup> These

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<sup>90</sup> Wan (undated) 43; Ramzy and Buckley, “China’s Detention Camps” (2018); “Cotton: The Fabric Full of Lies” (Citizen Power Institute, 2019) 25; Zenz, “Beyond the Camps” (2019).

<sup>91</sup> Wan (undated) 43-44; “Connecting the Dots in Xinjiang” (Centre for Strategic & International Studies Human Rights Initiative, 2019) 7; Zenz, “Beyond the Camps” (2019); Ramzy and Buckley, “China’s Detention Camps” (2018).

<sup>92</sup> Wan (undated) 44; “Cotton: The Fabric Full of Lies” (Citizen Power Institute, 2019) 22; “Connecting the Dots in Xinjiang” (Centre for Strategic & International Studies Human Rights Initiative, 2019) 7, 11; Zenz, “The Karakax List” (2020); “Ideological Transformation” (UHRP, 2020); Zenz, “Beyond the Camps” (2019); Ramzy and Buckley, “China’s Detention Camps” (2018).

<sup>93</sup> Wan (undated) 44.

<sup>94</sup> “Connecting the Dots in Xinjiang” (Centre for Strategic & International Studies Human Rights Initiative, 2019) 8.

<sup>95</sup> “Uyghurs for Sale” (ASPI, 2020) 4, 14.

workers are guarded and live in fortified camps, are paid less than their Han counterparts, and are threatened with a return to the detention facilities designated for “transformation through education” if they disobey work assignments.<sup>96</sup>

*Detention of rural Uyghur labourers in “job training” facilities*

52. Since 2017, the XUAR government has launched a campaign to train and employ the rural workforce in manufacturing industries, especially textiles and apparel.<sup>97</sup> This is part of a policy of using “employment” in the cotton industry to reduce poverty and promote social stability.<sup>98</sup> The campaign focuses on ethnic minorities, including Uyghurs; human rights organisations have reported that “Xinjiang’s poverty elevation [*sic.*] program [which the job training facilities are part of] has aggressively targeted on [*sic.*] the poor Uighurs in Southern Xinjiang.”<sup>99</sup> The XUAR government has an announced aim, by 2023, to have 650,000 workers in the textile and garment industries in southern Uyghur minority regions – equal to around one twentieth of the entire Uyghur population in XUAR.<sup>100</sup>
53. The vocational training includes CCP indoctrination, forced learning of Mandarin Chinese, and vocational skills.<sup>101</sup> It takes place in camps, typically lasting for around a month.<sup>102</sup> Zenz concludes that “[b]oth the context and the terminology of this skills training indicates that it is most likely not part of the [detention facilities designated for “transformation through education”] or wider internment camp network. However, it is clear that the general setup and infrastructure of this type of general skills training for

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<sup>96</sup> “Uyghurs for Sale” (ASPI, 2020) 6-7.

<sup>97</sup> “Connecting the Dots in Xinjiang” (Centre for Strategic & International Studies Human Rights Initiative, 2019) 5; “Cotton: The Fabric Full of Lies” (Citizen Power Institute, 2019) 21.

<sup>98</sup> “Connecting the Dots in Xinjiang” (Centre for Strategic & International Studies Human Rights Initiative, 2019) 5; “Cotton: The Fabric Full of Lies” (Citizen Power Institute, 2019) 21; Zenz, “Beyond the Camps” (2019),

<sup>99</sup> “Cotton: The Fabric Full of Lies” (Citizen Power Institute, 2019) 25. See also “Connecting the Dots in Xinjiang” (Centre for Strategic & International Studies Human Rights Initiative, 2019) 5; Zenz, “Beyond the Camps” (2019).

<sup>100</sup> Reported in “Connecting the Dots in Xinjiang” (Centre for Strategic & International Studies Human Rights Initiative, 2019) 5; Zenz, “Beyond the Camps” (2019).

<sup>101</sup> “Cotton: The Fabric Full of Lies” (Citizen Power Institute, 2019) 21; “Connecting the Dots in Xinjiang” (Centre for Strategic & International Studies Human Rights Initiative, 2019) 6; Zenz, “Xinjiang’s New Slavery” (2019); Dou and Deng (2019).

<sup>102</sup> Zenz, “Xinjiang’s New Slavery” (2019).



rural surplus laborers is not all that different from the region's internment camp system." In particular, "[i]t is unclear whether this form of employment is in fact much more voluntary than that of [detention facilities designated for "transformation through education"] graduates", and the two types of forced labour "are being combined, making it virtually impossible to distinguish labor involving higher coercion from that potentially involving less coercion."<sup>103</sup> Human rights organisations have reported that in some instances, civilians recruited as part of the job training and poverty alleviation campaign were forced to live in the same dormitories as former inmates of the detention facilities.<sup>104</sup>

54. Human rights organisations have also reported that there are indications that attendees are coercively taken to the job training camps, and/or transferred to work in the factories,<sup>105</sup> or are threatened with detention if they did not work in a factory.<sup>106</sup> The Centre for Strategic & International Studies has also reported that minorities are often paid below the minimum wage – sometimes, they are paid as little as former detainees, or sometimes not at all.<sup>107</sup>

#### *Separation of children from parents*

55. There is evidence of widespread inter-generational separation of Uyghur families. In some contexts, the separation has been largely incidental to other policies, including those outlined in this Opinion. For example, individuals who are detained in facilities or forced into "job placements" far from their home are routinely detached from their families as a result.<sup>108</sup> Increased passport and border controls and the Chinese authorities' attempts to eliminate Uyghurs' contact with relatives who live abroad have led to individuals losing

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<sup>103</sup> Zenz, "Beyond the Camps" (2019). See also Zenz, "Xinjiang's New Slavery" (2019).

<sup>104</sup> "Connecting the Dots in Xinjiang" (Centre for Strategic & International Studies Human Rights Initiative, 2019) 6-7. See also Adrian Zenz, 'Xinjiang's New Slavery' *Foreign Policy* (Washington, 11 December 2019).

<sup>105</sup> "Cotton: The Fabric Full of Lies" (Citizen Power Institute, 2019) 22; "Connecting the Dots in Xinjiang" (Centre for Strategic & International Studies Human Rights Initiative, 2019) 5-7; Zenz, "Beyond the Camps" (2019).

<sup>106</sup> "Connecting the Dots in Xinjiang" (Centre for Strategic & International Studies Human Rights Initiative, 2019) 6.

<sup>107</sup> *Ibid*, 6, 11.

<sup>108</sup> Wan (undated) 28.

contact with their family members, including their children.<sup>109</sup> Both factories where forced labour occurs and “vocational training centres” in which adults are detained (as described at paragraphs 48 to 51, and 52 to 54 of this Opinion, respectively) frequently have nurseries and pre-schools attached to them, with the ostensible purpose of relieving parents of the duties of caring for their children, but in reality facilitating the forced separation of family members.<sup>110</sup>

56. In addition to the family dismemberment that is incidental to other programmes, there are reports of distinct, systematic efforts to break up Uyghur families as an end in itself. In November 2016, Chen Quanguo (Party Secretary of XUAR) issued an order that all “orphans” in XUAR should be placed in State institutions by 2020.<sup>111</sup> The term “orphan” is defined broadly in the order, to include “children who have lost their parents or whose parents cannot be found”, which has been interpreted by some regional authorities to include children with a parent or two parents who have been incarcerated.<sup>112</sup> Since early 2018, governmental documents have mandated special treatment for Uyghur children of “couples where both partners are detained in re-education ... [or] in vocational training center[s]”. Such children are classified as constituting a “special needs category” who are entitled to be placed in “centralised care”; in reality this is often done non-consensually.<sup>113</sup> As a result of such directives, it is believed that hundreds or thousands of children left in the care of extended families following the detention of their parents have been forcibly removed to State institutions.<sup>114</sup> Authorities in certain areas of XUAR have imposed quotas for the number of orphans who must be institutionalised.<sup>115</sup> Infants as young as a few months old have been removed from their families.<sup>116</sup>

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<sup>109</sup> Wan (undated) 28; “Xinjiang Children Separated from Families” (HRW, 2019).

<sup>110</sup> Zenz, “Break their Roots” (2019).

<sup>111</sup> “Children Caught in Xinjiang Crackdown” (HRW, 2018).

<sup>112</sup> Wan (undated) 28.

<sup>113</sup> Zenz, “Break their Roots” (2019).

<sup>114</sup> Wan (undated) 28.

<sup>115</sup> ‘China: Xinjiang Children Separated from Families’ (Human Rights Watch, 15 September 2019) <<https://www.hrw.org/news/2019/09/15/china-xinjiang-children-separated-families>>.

<sup>116</sup> Zenz, “Break their Roots” (2019).

57. Chinese authorities in XUAR have also taken measures to separate from their families Uyghur children who are not classified as “orphans”, by forcibly transferring them to boarding schools where their parents have limited visiting rights, and where the children are only allowed home on weekends and during holidays.<sup>117</sup> A 2017 policy document expressly states that the intention of this policy is to “break the impact of the religious atmosphere on children at home”.<sup>118</sup>
58. In a recent resolution, the European Parliament referred to the findings of research suggesting that, by the end of 2019, over 880,000 Uyghur children had been placed in boarding facilities.<sup>119</sup> Further, the extent of forced family separation is apparent from the scale of government investment in both orphanages and boarding schools. Between the start of 2017 and September 2018, the XUAR government published procurement notices to build or expand at least 45 institutions with collectively enough beds to house 5,000 children.<sup>120</sup> Given the secrecy surrounding the policies resulting in forced separation of families, up-to-date statistics are not readily available. It is believed, however, that there are hundreds of State-run boarding schools in XUAR.<sup>121</sup>
59. State institutions are often given euphemistic names such as “kindness schools”, “shelter houses” or “rescue, care and protection centres”.<sup>122</sup> The reality is that, aside from children’s forcible presence there, reports of mistreatment are abundant. Uyghur children are reportedly subject to harsh conditions resembling those that exist in adult facilities. For example, there are reports that the institutions are surrounded by barbed wire, electric fencing and surveillance cameras; that children’s food is limited; that they are denied sufficiently warm clothes and hygiene facilities; and that they are locked in small spaces for long periods of time.<sup>123</sup> There are also apparent efforts to erase children’s ethnic and religious identities. Children are forced to learn Mandarin Chinese, punished for speaking

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<sup>117</sup> Zenz, “Break their Roots” (2019); “China is Putting Uighur Children in ‘Orphanages’” (2018); Qin (2020).

<sup>118</sup> Qin (2020)

<sup>119</sup> European Parliament Resolution (2020/2913 (RSP)), para D.

<sup>120</sup> “China is Putting Uighur Children in ‘Orphanages’” (2018).

<sup>121</sup> Qin (2020).

<sup>122</sup> Zenz, “Break their Roots” (2019).

<sup>123</sup> Wan (undated) 29–30; Zenz, “Break their Roots” (2019).

their native languages and prevented from learning religion.<sup>124</sup> There are reports that Uyghur children have their names changed to Han Chinese names and that some orphanages allow Han families to adopt Uyghur children.<sup>125</sup> Children are taught to repeat propagandistic slogans such as “love the party, love the motherland and love the people”.<sup>126</sup>

### **Physical destruction of cultural property**

60. Part of Chinese authorities’ efforts to erase Uyghur culture has been physically to demolish cultural property. ASPI describes this as “a systematic and intentional campaign to rewrite the cultural heritage of the XUAR”,<sup>127</sup> and similarly the European Parliament has referred to “the deliberate and systematic destruction of mosques”.<sup>128</sup> Satellite imagery<sup>129</sup> and first-hand witness accounts evidence the scale of such physical destruction. The Uyghur Human Rights Project estimates that a total of 10,000–15,000 cultural sites have been destroyed or defaced, such as by having identifiable religious or cultural elements removed.<sup>130</sup> The purpose appears to have been to “eradicat[e] tangible signs of the region’s Islamic identity from the physical landscape”.<sup>131</sup> Destroying or defacing cultural sites also suppresses the Uyghur population’s ethnic identity<sup>132</sup>: it prevents Uyghurs from practising their religion (such as by attending prayer sessions, conducting religious burials and attending pilgrimages and shrine festivals), connecting with previous generations, transmitting their cultural and religious identity to their children, and engaging in traditional Uyghur community-building practices, such as meeting socially in graveyards.<sup>133</sup>

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<sup>124</sup> “Xinjiang Children Separated from Families” (HRW, 2019); “China is Putting Uighur Children in ‘Orphanages’” (2018); Qin (2020).

<sup>125</sup> Sawut (2019).

<sup>126</sup> Qin (2020).

<sup>127</sup> “Cultural Erasure” (ASPI, 2020) 03.

<sup>128</sup> European Parliament Resolution (2020/2913 (RSP)), para. F.

<sup>129</sup> Agence France Press, “Xinjiang’s Disappearing Graveyards and Mosques” (undated); Rivers (2020); Kuo (2019).

<sup>130</sup> “Demolishing Faith” (UHRP, 2019) 38.

<sup>131</sup> *Ibid*, 2.

<sup>132</sup> “No Space to Mourn” (2019).

<sup>133</sup> “Eradicating Ideological Viruses” (HRW, 2018) 71–72; “No Space to Mourn” (2019); Kuo (2019).

61. Mosques are among the most frequent targets.<sup>134</sup> Using satellite imagery, ASPI estimates that approximately 16,000 mosques in XUAR (65% of the total before the destruction programmes began) have been destroyed or damaged as a result of government policies, mostly since 2017.<sup>135</sup> Where mosques have been allowed to remain standing, they have in numerous cases been stripped of Muslim symbols (such as crescents, domes, minarets and gatehouses) and/or otherwise de-sanctified, such as by having copies of State policies concerning “de-extremification” reproduced on their walls.<sup>136</sup> In some cases, religious items such as prayer mats and Qurans have been removed from mosques.<sup>137</sup>
62. At the same time, Uyghurs have been compelled to remove traditional Islamic architectural features from their homes, and other buildings (such as department stores) have had Islamic design elements forcibly modified.<sup>138</sup>
63. ASPI estimates that 30% of the important Islamic sacred sites in XUAR have been demolished, mostly since 2017, and an additional 28% have been damaged or altered in some way.<sup>139</sup> In particular, authorities have also targeted Uyghur graveyards, many containing the remains of generations of Uyghur families. A report published in 2019 concludes that at least 45 cemeteries have been exhumed and destroyed.<sup>140</sup> A further investigation published in January 2020 reported that more than 100 cemeteries had been destroyed, mostly within the preceding two years.<sup>141</sup> At least one of those cemeteries was more than 1,000 years old.<sup>142</sup> Reportedly, families are given only a few days’ notice to collect their relatives’ remains.<sup>143</sup> The destruction of graveyards prevents Uyghurs from engaging in cultural practices, such as leaving gifts at the graves of deceased family

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<sup>134</sup> Kuo (2019); Harris (2019).

<sup>135</sup> “Cultural Erasure” (ASPI, 2020) 03.

<sup>136</sup> “Demolishing Faith” (UHRP, 2019) 29; Wan (undated) 24; Kuo (2019).

<sup>137</sup> “Eradicating Ideological Viruses” (HRW, 2018) 71.

<sup>138</sup> “Demolishing Faith” (UHRP, 2019) 29.

<sup>139</sup> “Cultural Erasure” (ASPI, 2020) 03.

<sup>140</sup> “No Space to Mourn” (2019).

<sup>141</sup> Rivers (2020)

<sup>142</sup> Ibid.

<sup>143</sup> Wan (undated) 25.

members.<sup>144</sup> Exhumation is often conducted disrespectfully, with human remains being left behind.<sup>145</sup> The graves of prominent historical Uyghur figures have been targeted.<sup>146</sup>

64. Authorities have also demolished other sites of cultural significance to Uyghurs. For example, the Ordam *mazar* (shrine), an ancient site of pilgrimage where the grandson of the first Islamic Uyghur king died in battle, dating back to the 10<sup>th</sup> century, has been totally destroyed.<sup>147</sup> The Old Town of Kashgar, which was the ancient cultural centre of Uyghur civilisations, was subject to a programme of “modernisation” in 2014. This involved tearing down 65,000 homes (more than two-thirds of the centuries-old houses in the city) and resettling 220,000 Uyghur residents. While some residents could return, many were forced to live in apartment blocks on the outskirts of the city.<sup>148</sup>

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65. Following this summary of the key evidence as to events in XUAR, we turn to the relevant legal framework.

### *3. Legal Analysis – Crimes against Humanity*

66. Art. 7 of the Rome Statute defines crimes against humanity as follows:

1. For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
  - (a) Murder;
  - (b) Extermination;
  - (c) Enslavement;
  - (d) Deportation or forcible transfer of population;

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<sup>144</sup> Ibid.

<sup>145</sup> Wan (undated) 25; “No Space to Mourn” (2019).

<sup>146</sup> Wan (undated) 25; “No Space to Mourn” (2019).

<sup>147</sup> “Cultural Erasure” (ASPI, 2020); Davidson (2020).

<sup>148</sup> Levin (2014).

- (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.

67. Art. 7(1) sets out general requirements in the chapeau, and also specific types of misconduct, in Art. 7(1)(a) to (k), which will constitute the *actus reus* of the offence. Further explanation is provided in the “Elements of Crimes”<sup>149</sup> which, under Art. 9 of the Rome Statute, “shall assist the Court in the interpretation and application” of (among others) Arts. 6 and 7.

#### General requirements in the chapeau of Art. 7

68. The chapeau of Art. 7 of the Rome Statute contains what are often referred to as “contextual elements” of crimes against humanity – the general conditions in which the *actus reus* of the crime must have been committed, which need not be satisfied with respect to that *actus reus* itself.<sup>150</sup> The three contextual elements, explored in turn below, are a

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<sup>149</sup> These are replicated from the Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3–10 September 2002, part II.B and the Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May–11 June 2010.

<sup>150</sup> Werle and Jessberger (2014) 340.

“widespread or systematic attack”, the perpetration of that attack against a “civilian population”, and the perpetrator’s “knowledge” of that attack.

“Widespread or systematic attack”

69. The *actus reus* of a crime against humanity must be committed as part of a broader “attack”. According to Art. 7(2)(a) of the Rome Statute, an “attack” is a “course of conduct involving the multiple commission of acts against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”<sup>151</sup> This need not be a military attack,<sup>152</sup> and each of the individual acts constituting the attack need not be crimes when viewed in isolation from each other.

70. The “policy” that underpins the attack, which is referred to in Art. 7(2)(a), can be one adopted either by the State or by some other organised group. It does not have to be a formal programme,<sup>153</sup> and its existence can be inferred from the totality of the circumstances, including events, political platforms, public statements, propaganda programmes, and the creation of political or administrative structures.<sup>154</sup> However, the policy must contemplate the general type of *actus reus* of which the individual perpetrator is accused.<sup>155</sup> The “policy” does not have to be a formal programme,<sup>156</sup> and its existence can be inferred from the totality of the circumstances, including events, political platforms, public statements, propaganda programmes, and the creation of political or administrative structures.<sup>157</sup>

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<sup>151</sup> Rome Statute (1998) art. 7(2)(a).

<sup>152</sup> Elements of Crimes (2013) art 7, para 3; *Prosecutor v Mrkšić, Radić and Šljivančanin*, Judgment (27 September 2007) para 436.

<sup>153</sup> Werle and Jessberger (2014) 342.

<sup>154</sup> Werle and Jessberger (2014) 342.

<sup>155</sup> Cassese and others (2013) 107.

<sup>156</sup> Werle and Jessberger (2014) 342.

<sup>157</sup> *Ibid*, 342.



71. The attack must be either widespread or systematic — it need not be both.<sup>158</sup> The former refers to the scale of the attack and/or the number of victims, while the latter refers to the organised nature of the acts and the improbability of their having occurred randomly.<sup>159</sup>
72. An attack is “widespread” if there is “massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims”.<sup>160</sup> The attack’s widespread character can be derived either from its extension over a broad geographical area, or from there being a large number of victims.<sup>161</sup>
73. An attack is “systematic” if it was organised and planned.<sup>162</sup> In *Blaškić*, the ICTY held that a systematic attack has the following ingredients:<sup>163</sup>
- a. There is a political objective, i.e. a plan pursuant to which the attack is perpetrated or an ideology that aims to destroy, or persecute, the attacked community. That plan does not need to be expressly declared or formally adopted by the State,<sup>164</sup> but can be inferred from circumstances like the political background and political programmes, media messaging and incendiary propaganda, the imposition of discriminatory measures, and the scale of acts of violence;<sup>165</sup>

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<sup>158</sup> Bantekas (2010) 196; *Prosecutor v Blaškić*, Judgment (3 March 2000) para 207; *Prosecutor v Kordić & Čerkez*, Judgment (26 February 2001) para 178; *Prosecutor v Jelisić*, Judgment (14 December 1999) para 53; *Prosecutor v Mrkšić, Radić and Šljivančanin*, Judgment (27 September 2007) para 437; *Prosecutor v Kunarac, Kovac and Vuković*, Appeal Judgment (12 June 2002) para 93.

<sup>159</sup> *Prosecutor v Mrkšić, Radić and Šljivančanin*, Judgment (27 September 2007) para 437; *Prosecutor v Kunarac, Kovac and Vuković*, Appeal Judgment (12 June 2002) paras 428-429; *Prosecutor v Blaškić*, Judgment (29 July 2004) para 101.

<sup>160</sup> *Prosecutor v Akayesu*, Judgment (2 September 1998) para 580.

<sup>161</sup> Werle and Jessberger (2014) 339.

<sup>162</sup> Werle and Jessberger (2014) 340; *Prosecutor v Akayesu*, Judgment (2 September 1998) para 580.

<sup>163</sup> *Prosecutor v Blaškić*, Judgment (3 March 2000) para 203; *Prosecutor v Kordić & Čerkez*, Judgment (26 February 2001) para 179.

<sup>164</sup> *Prosecutor v Akayesu*, Judgment (2 September 1998) para 580.

<sup>165</sup> Bantekas (2010) 197; *Prosecutor v Blaškić*, Judgment (3 March 2000) para 204; *Prosecutor v Jelisić*, Judgment (14 December 1999) para 53. The existence of a plan or policy is a very powerful factor by itself in demonstrating that an attack was systematic – see for instance the Trial Chamber judgment in *Kordić & Čerkez*, which said that the existence of a plan or policy is “indicative of the systematic character of offences”: *Prosecutor v Kordić & Čerkez*, Judgment (26 February 2001) para 182.

- b. Crimes are perpetrated on a large scale against a civilian group;
- c. Significant public or private resources are prepared and used; and
- d. High-level political and/or military authorities are implicated in the definition and establishment of the plan.

74. Subject to the conclusion on specific types of *actus reus* (below), there appears to be sufficient evidence to conclude the existence of an attack on the Uyghur population of XUAR, that is both widespread and systematic. As outlined in the second section of this Opinion, there is evidence of a government policy to arrest and detain without charge members of the Uyghur population, to commit various acts of violence and torture upon them in detention, to put them to work in factories, to commit acts of sexual violence against them (including forced sterilisations), to forcibly remove their children and to destroy their cultural property. It is reasonably clear that the various types of *actus reus* considered in Section 2 of this Opinion, above, were committed pursuant to that State policy, such that they could cumulatively be described as a campaign against the Uyghur population. The number of victims, as well as the spread of the campaign over the entire XUAR region, mean that the attack can be described as “widespread”.

75. In light of the conclusion that there is a widespread attack, it is not also necessary to conclude that the attack was systematic. However, there is at least an arguable case that the “systematic” requirement is also satisfied. The second, third and fourth of the *Blaškić* elements are clearly present: the attacks are perpetrated on a large scale; significant resources are used in building and managing a network of detention facilities and subsidising the construction of new factories nearby; and leaked documents from the Chinese government, as well as the nature of a widescale detention programme and the links between this programme and official regulations, indicate that high-level political authorities are almost certainly implicated. As for the first *Blaškić* element, the existence of a political objective, this may prove to be more complex to make out. Some commentators and human rights organisations have observed that the motivation for the campaign against the Uyghur population is not simple antipathy against that population *per se*, but due to the population having been identified as likely to commit crimes or cause

trouble for the state, and as a form of preventative justice.<sup>166</sup> However, on balance, this would likely be considered a political objective that can underpin a systematic attack — in particular, firstly, because the political objective is still being used to frame and motivate a systematic campaign targeted against the population; and secondly, because framing an attack against a minority group in terms of law and order objectives or preventative action to protect the State is a conventional tactic.<sup>167</sup>

“Civilian population”

76. A “civilian population” is usually accepted as referring to a group of people not taking active part in armed hostilities.<sup>168</sup> In order to qualify as a population, it is enough that there is a “group of people linked by shared characteristics that in turn make it the target of an attack.”<sup>169</sup> Werle and Jessberger note that the relevant shared characteristic might be “[t]he occupancy of a certain area”.<sup>170</sup> This does not mean that a territory’s entire population must be affected by the attack – so long as enough individuals were targeted, or in such a way that the attack was directed against the population and not a limited number of individuals.<sup>171</sup>

77. In our opinion, the campaign by the Chinese state is clearly targeted against a civilian population, being the Uyghur population of XUAR, there being no suggestion that the Uyghur population generally is taking active part in armed hostilities.

“Knowledge of the attack”

78. The perpetrator must “engag[e] in particular unlawful conduct with the knowledge that such acts are committed on a widespread scale or based on a policy against a specific civilian population.”<sup>172</sup> The perpetrator must know of the wider attack, and that his

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<sup>166</sup> See e.g. Zenz, “The Karakax List” (2020) quoted at paragraph 22 above; “Ideological Transformation” (UHRP, 2020) 17ff.

<sup>167</sup> See e.g. the Rwandan genocide.

<sup>168</sup> Bantekas (2010) 198.

<sup>169</sup> Werle and Jessberger (2014) 334.

<sup>170</sup> *Ibid.*

<sup>171</sup> *Prosecutor v Kunarac, Kovac and Vukovic*, Appeal Judgment (12 June 2002) para 90; *Prosecutor v Kunarac, Kovac and Vukovic*, Judgment (22 February 2001) para 424.

<sup>172</sup> Bantekas (2010) 197.

misconduct is linked to it.<sup>173</sup> The person need not have known all the characteristics of the attack, or the precise details of the plan or policy.<sup>174</sup>

79. It is not necessary that the accused intended his acts to be directed against the targeted civilian population, or was motivated by the same reasons that underlie the attack as a whole — so long as he knew that they formed part of a broader attack targeted against that population.<sup>175</sup>

80. This will be considered further in Section 6 of this Opinion, which discusses individual criminal responsibility.

**Specific conduct constituting a crime against humanity**

**Enslavement (Art. 7(1)(c))**

81. Enslavement means that “the perpetrator exercised any or all of the powers attaching to a right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.”<sup>176</sup> The crime extends beyond traditional “chattel” slavery.<sup>177</sup> In *Kunarac*, the ICTY Trial Chamber listed factors or indicia of enslavement: “control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.”<sup>178</sup>

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<sup>173</sup> Cassese and others (2013) 99; *Prosecutor v Blaškić*, Judgment (3 March 2000) para 247.

<sup>174</sup> ‘Elements of Crimes (2013) art 7, para 2; Bantekas (2010) 200; Cassese and others (2013) 99; *Prosecutor v Mrkšić, Radić and Šljivančanin*, Judgment (27 September 2007) para 439; *Prosecutor v Kunarac, Kovac and Vuković*, Appeal Judgment (12 June 2002) para 102; *Prosecutor v Kunarac, Kovac and Vuković*, Judgment (22 February 2001) para 434.

<sup>175</sup> *Prosecutor v Mrkšić, Radić and Šljivančanin*, Judgment (27 September 2007) para 439; *Prosecutor v Tadić*, Appeal Judgment (15 July 1999) paras 248, 270, 272; *Prosecutor v Kunarac, Kovac and Vuković*, Appeal Judgment (12 June 2002) para 103.

<sup>176</sup> ‘Elements of Crimes (2013) art 7(1)(c), para 1. See also *Prosecutor v Krnojelac*, Judgment (15 March 2002) para 350.

<sup>177</sup> Werle and Jessberger (2014) 334.

<sup>178</sup> *Prosecutor v Kunarac, Kovac and Vuković*, Judgment (22 February 2001) para 543. Approved in *Prosecutor v Kunarac, Kovac and Vuković*, Appeal Judgment (12 June 2002) para 119.

82. Deprivations of liberty constituting enslavement “may, in some circumstances, include exacting forced labour”.<sup>179</sup> The ICTY Appeals Chamber in *Kunarac*, quoting from the International Military Tribunal at Nuremberg in *US v Oswald Pohl*, noted that people who are otherwise well treated are still slaves “if without lawful process they are deprived of their freedom by forceful restraint”, and it described “compulsory uncompensated labour” as “the admitted fact of slavery”.<sup>180</sup> The ICTY Trial Chamber in *Kunarac* noted that an indication of enslavement might be “the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship”.<sup>181</sup> In *Krnojelac*, the ICTY Trial Chamber said that whether labour by detained persons constitutes enslavement depends on whether “the relevant persons had no real choice as to whether they would work.”<sup>182</sup>
83. In our opinion, there is sufficient evidence to amount to a clearly arguable case of enslavement of members of the Uyghur population. If held to be sufficiently proved, the use of forced labour from current inmates of detention facilities would clearly amount to enslavement. Labour from former inmates would also appear to meet that description, in light of the evidence that their ostensible release from the facilities is illusory and in fact they have no liberty to leave at will.
84. It is also possible that enslavement is constituted by the labour provided by those people who have passed through the facilities described by the Chinese government as providing job training. This depends upon the strength of the evidence that their presence in the facilities, and the labour subsequently provided, is coerced. Evidence that these people were paid below the minimum wage and less than other workers, and that they were kept in the same or similar facilities to those detained in the facilities designated by the government as being for “transformation through education”, supports an argument that they were enslaved.

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<sup>179</sup> ‘Elements of Crimes (2013) art 7(1)(c), n11.

<sup>180</sup> *Prosecutor v Kunarac, Kovac and Vukovic*, Appeal Judgment (12 June 2002) para 123, quoting from *United States v Pohl and others*, Judgment (3 November 1947). See also *Prosecutor v Krnojelac*, Judgment (15 March 2002) para 359.

<sup>181</sup> *Prosecutor v Kunarac, Kovac and Vukovic*, Judgment (22 February 2001) para 542.

<sup>182</sup> *Prosecutor v Krnojelac*, Judgment (15 March 2002) para 359.

Imprisonment or other severe deprivation of physical liberty (Art. 7(1)(e))

85. The ICTY jurisprudence has propounded the following elements for imprisonment as a crime against humanity: first, there was deprivation of liberty;<sup>183</sup> second, the deprivation of liberty was imposed arbitrarily i.e. without legal justification and/or due process of law;<sup>184</sup> third, the act or omission leading to deprivation of liberty is done with the intent to deprive a person arbitrarily of liberty, or with knowledge that this is likely.<sup>185</sup> If the deprivation of liberty is authorised under domestic law but is contrary to international law, then it will still be arbitrary and can constitute a crime against humanity.<sup>186</sup>
86. There is clear evidence of widescale deprivations of liberty constituting imprisonment as a crime against humanity against the Uyghur population of XUAR. This is certainly true with respect to the detention facilities, given the abundant evidence from former inmates, observers, journalists, leaked government documents and human rights organisations that very large numbers of Uyghurs are arrested without charge and detained without trial, and without basis in Chinese law (let alone under international law standards). Leaked Chinese government documents, referred to at paragraph 23 above, appear to admit that this is the case. Although some commentators and human rights organisations argue that the same applies to so-called “job training facilities”, the evidence that attendees are coerced such that their attendance constitutes a deprivation of liberty is less clear.

Torture (Art. 7(1)(f))

87. Under the Rome Statute, torture as a crime against humanity means the intentional infliction of severe pain and suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in, or incidental to, lawful sanctions.<sup>187</sup> The principal

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<sup>183</sup> *Prosecutor v Kordić & Čerkez*, Judgment (26 February 2001) para 302.

<sup>184</sup> *Prosecutor v Kordić & Čerkez*, Judgment (26 February 2001) para 302; *Prosecutor v Krnojelac*, Judgment (15 March 2002) para 114.

<sup>185</sup> *Prosecutor v Krnojelac*, Judgment (15 March 2002) para 115.

<sup>186</sup> *Ibid*, para 114.

<sup>187</sup> Rome Statute (1998) art 7(2)(e).

distinction between this definition of torture, and that found in other conventions such as the 1987 United Nations Convention Against Torture, is that there is no requirement that the infliction of pain or suffering is done for a specific purpose.<sup>188</sup>

88. The material elements of this crime are (1) the infliction of severe pain and suffering, whether physical or mental; and (2) that the infliction is on a person in the custody or under the control of the accused. The Pre-Trial Chamber in *Bemba* considered that, although there is no definition of the threshold of “severe”, “it is constantly accepted in applicable treaties and jurisprudence that an important degree of pain and suffering has to be reached”.<sup>189</sup> It was held in *Kvočka* that the objective severity of the harm inflicted must be first assessed, before considering subjective criteria such as the physical or mental effect on the victim.<sup>190</sup> The ICTY has also held that when assessing the seriousness of acts charged as torture, one must “take into account all the circumstances of the case, including the nature and context of the infliction of pain, the premeditation and institutionalisation of the ill-treatment, the physical condition of the victim, the manner and method used, and the position of inferiority of the victim. The extent that an individual has been mistreated over a prolonged period of time will also be relevant.”<sup>191</sup>

89. We consider that the material elements are satisfied on the present facts. In particular, the use of electric “tiger chairs”, sexual violence, and violations of reproductive rights suffered by Uyghurs are by their very nature acts of torture. The administration of psychoactive drugs as reported by former detainees can also amount to torture.<sup>192</sup> For example, where drugs known to cause extreme bleeding have been forcibly administered to women, there is a strong case that the severity threshold is met.

90. The instances of torture recounted in the evidence considered in Section 2 of this Opinion have taken in place in detention facilities where the victims have been in the custody, and

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<sup>188</sup> Elements of Crimes (2013) art 7(1)(f), fn 14.

<sup>189</sup> *Prosecutor v Bemba* (Decision) (15 June 2009) para 193.

<sup>190</sup> *Prosecutor v Kvočka and others*, Judgment (2 November 2001) paras 142-143.

<sup>191</sup> *Prosecutor v Krnojelac*, Judgment (15 March 2002) para 182.

<sup>192</sup> See also e.g. Inter-American Convention to Prevent and Punish Torture (1985), art 2 and Title 18, United States Code, section 2340A, 2340(2)(B) in which the definitions of torture capture the forcible administration of psychoactive drugs.

under the control, of armed prison guards. Further, the pain and suffering has not been inherent in, or incidental to, lawful sanctions. The concept of “lawful sanctions” refers to sanctions which are consistent with international law standards, i.e. sanctions which accord with practices widely accepted as legitimate by the international community.<sup>193</sup> Thus, the mere fact that a State authorises certain treatment or punishment would not make that treatment or punishment a lawful sanction and would not exclude criminal responsibility for the crime against humanity of torture. That said, Uyghurs in detention do not appear to be subject to any lawful sanctions. In fact, as discussed above at paragraphs 23 to 24, there is a credible case that the detentions are arbitrary.<sup>194</sup> However, and in any event, the treatment to which some Uyghurs in detention facilities have been subjected, causing immense pain and suffering, is not inherent or incidental to their detention. Instead, it is in addition to the fact of their detention, specifically designed to cause pain and suffering, and therefore does not fall within the lawful sanctions exception.

91. As to the mental element, Art. 7(2)(e) requires that the infliction of pain and suffering must be intentional. This means that Art. 30 of the Rome Statute, which sets up a general requirement for the double elements of intent and knowledge, is not applicable here. This was confirmed by the Pre-Trial Chamber in *Bemba*, which concluded that the term “intentional” in Art. 7(2)(e) excluded the separate requirement of knowledge set out in Art. 30(3).<sup>195</sup> It is therefore not necessary to demonstrate that the perpetrator knew that the harm inflicted was severe. It is sufficient that the perpetrator intended to inflict pain or

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<sup>193</sup> See Special Rapporteur Report on the Human Rights of All Persons Subjected to any Form of Detention or Imprisonment (1997) para 8.

<sup>194</sup> See also Committee on the Elimination of Racial Discrimination (2018), which referred to “numerous reports of detention of large numbers of ethnic Uighurs and other Muslim minorities held incommunicado and often for long periods, without being charged or tried, under the pretext of countering terrorism and religious extremism” and called on China to “halt the practice of detaining individuals who have not been lawfully charged, tried and convicted for a criminal offence in any extra-legal detention facilities”. See also Daum (2019) where Jeremy Daum, a Senior Fellow at Yale Law School’s Paul Tsai China Center further argues that nothing in the Counter-terrorism Law or the revised XUAR Regulation on De-Extremification (2017), which purports to be the basis for the detention camps, allow for prolonged detention, suggesting that the detentions are themselves contrary to Chinese law and without lawful basis. He however notes that it is unlikely that the Regulation was put forward without the knowledge of central authorities.

<sup>195</sup> *Prosecutor v Bemba* (Decision) (15 June 2009) para 194.



suffering and that the victim endured severe pain or suffering.<sup>196</sup> Given the nature of the acts described above, it is implausible that the perpetrators did not intend to inflict pain or suffering. We consider that the infliction was intentional and the mental element is thus made out.

Grave sexual violence (Art. 7(1)(g))

*Rape*

92. Rape is one of the expressly enumerated forms of sexual violence that can constitute a crime against humanity under Art. 7(1)(g) of the Rome Statute. Pursuant to the Elements of Crimes, rape is committed where (1) the perpetrator invades the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body; and (2) the invasion is committed by force, or by threat of force or coercion, or the invasion was committed against a person incapable of giving genuine consent.<sup>197</sup> As to the mental element, the perpetrator must have committed the act of rape with intent and knowledge within the meaning of Art. 30 of the Rome Statute.<sup>198</sup>

93. We consider there to be credible evidence of rape perpetrated against Uyghur women, especially within detention facilities. The instances of rape in detention, recounted by former detainees, and as outlined in Section 2 of this Opinion, support the conclusion that acts of penetration were committed by force, or by threat of force or coercion. In this regard, there is no requirement of physical force and coercion has been held to be inherent in certain circumstances, such as armed conflict or military presence.<sup>199</sup> Threats, intimidation and other forms of duress which prey on fear of desperation may also constitute coercion.<sup>200</sup> We consider that similarly, coercion is inherent in the context of the

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<sup>196</sup> *Ibid*, para 194.

<sup>197</sup> Elements of Crimes (2013) art 7(1)(g)-1, paras 1 and 2.

<sup>198</sup> *Prosecutor v Bemba* (Decision) (15 June 2009) para 163.

<sup>199</sup> *Prosecutor v Bemba* (Decision) (15 June 2009) para 162; *Prosecutor v Ntaganda*, Judgment (8 July 2019) para 935.

<sup>200</sup> *Prosecutor v Ntaganda*, Judgment (8 July 2019) para 935.

detention facilities along with the presence of armed guards. Reports of the infliction of sexual violence in detention, and of the infliction of bodily and mental harm as punishment, including acts outlined in paragraphs 25 to 31 above, which constitute the crime against humanity of torture, evidence the presence of a coercive environment. It can also be inferred that the guards took advantage of this coercive environment to commit acts of rapes.<sup>201</sup> There is accordingly no need to prove a lack of consent,<sup>202</sup> and the *actus reus* elements of this crime are supported by the available evidence. We also consider that intent to engage in the conduct of rape and knowledge (at the very least) that the acts were committed by taking advantage of a coercive environment can be inferred from the evidence and the mental element of this crime is also made out.<sup>203</sup>

94. To establish that rape is committed as part of a “widespread or systematic attack”, it does not need to be shown that the accused subjectively intended that his acts were committed pursuant to or in furtherance of a policy – it is sufficient that a nexus between the act and the attack is established,<sup>204</sup> and that the accused had knowledge of that nexus. In *Bemba*, Pre-Trial Chamber II found that acts of rape were committed as part of a widespread attack directed against the population, in circumstances where rapes occurred when civilians resisted the looting of their goods by soldiers, and repeated acts of rape were used as a method to terrorise the population.<sup>205</sup>
95. As outlined in Section 2 of this Opinion, multiple accounts by former detainees recount instances of rape by armed guards while in detention, which (as concluded above) is arguably itself part of a widespread attack against Uyghurs. It is also possible to infer that individual rapes committed in detention facilities are part of a method to terrorise and silence the population within the camps. In this regard, and in the context of other acts of sexual violence (such as enforced sterilisation), a nexus can be established between the

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<sup>201</sup> Elements of Crimes (2013) art 7(1)(g)-1, para 2; *Prosecutor v Bemba*, Judgment (21 March 2016) para 104; *Prosecutor v Ntaganda*, Judgment (8 July 2019) paras 935, 945.

<sup>202</sup> *Prosecutor v Bemba*, Judgment (21 March 2016) para 106.

<sup>203</sup> *Prosecutor v Bemba*, Judgment (21 March 2016) paras 111 – 112.

<sup>204</sup> *Prosecutor v Katanga*, Judgment (7 March 2014) para 1165.

<sup>205</sup> *Prosecutor v Bemba* (Decision) (15 June 2009) paras 168 – 188.

rapes and an attack on the Uyghur population where a climate of fear with regard to the commission of rapes can be discerned.<sup>206</sup>

96. There have, however, been difficulties in establishing criminal responsibility for acts of rape which constitute crimes against humanity. These are evident in the fact that, while rape has been charged in the majority of cases before the ICC, there is presently only one conviction of rape by the ICC, and only as recently as 2019.<sup>207</sup>

#### *Enforced sterilisation*

97. To constitute the crime of enforced sterilisation, the material elements are that (1) the perpetrator deprived one or more persons of biological reproductive capacity; and (2) the conduct was neither justified by the medical or hospital treatment of the person or persons concerned, nor carried out with their genuine consent.
98. As to the first element, the Elements of Crimes make it clear that the deprivation referred to is not intended to include birth-control measures which have a non-permanent effect in practice.<sup>208</sup> This means that sterilisations, as well as any other measures which permanently deprive an individual of biological reproductive capacity, can qualify.
99. *Prima facie*, the fitting of IUDs does not qualify as enforced sterilisation under Art. 7, as IUDs are not permanent and can be removed. However, the question is whether there is “a non-permanent effect in practice”. IUDs can have a permanent effect in practice - for example, for women who are unable to get an IUD removed, or who may find after removal that they are no longer naturally able to bear children, either due to their age or to the harm they have suffered in detention centres. In those instances, and pursuant to

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<sup>206</sup> *Ibid*, fn 266.

<sup>207</sup> On 8 July 2019, the ICC Trial Chamber 1 convicted Bosco Ntaganda, a Congolese warlord, as an indirect co-perpetrator of crimes against humanity, including rape and sexual slavery, and war crimes. The very first conviction of rape by the ICC was only as recently as 21 March 2016, of Jean-Pierre Bemba. However, on 8 June 2018, the Appeals Chamber decided by a majority to acquit him and overturn his convictions. It found that the Trial Chamber’s conclusion that Mr Bemba had failed to take all necessary and reasonable measures to prevent or repress the commission of crimes by his subordinates was materially affected by errors and he was therefore not individually liable for the crimes as a commander.

<sup>208</sup> Elements of Crimes (2013) art 7(1)(g)-5, fn 19.

Art. 30 of the Rome Statute, where the perpetrators mean to cause this consequence, or are aware that this will occur in the ordinary course of events, criminal responsibility can attach for the crime against humanity of enforced sterilisation.

100. As to the second material element, we consider it to be clear that these operations are carried out without the genuine consent of the persons involved. The Zenz report refers to detainees testifying that they were given injections and that they were forcibly fitted with IUDs prior to internment or subjected to sterilisation surgeries.<sup>209</sup> In some cases, the women were taken to hospitals for these purposes by armed police guards, evidencing a lack of genuine consent.<sup>210</sup>

101. The evidence we have seen also does not suggest that non-consensual sterilisations carried out on Uyghur women are justified by any medical or hospital treatment of the persons concerned. The scale at which they have reportedly been carried out points in the other direction. The UN Interagency Statement on eliminating forced, coercive and otherwise involuntary sterilisation considers that “sterilisation for prevention of future pregnancy cannot be justified on grounds of medical emergency, which would permit departure from the general principle of informed consent.”<sup>211</sup>

Persecution (Art. 7(1)(h))

102. Persecution is committed where the perpetrator has committed an act that:<sup>212</sup>

- a. “[S]everely deprived, contrary to international law, one or more persons of fundamental rights”. The ICTY Trial Chamber in *Kordić and Čerkez* said that the “acts must reach a similar level of gravity” as the *actus rei* of other crimes against humanity;<sup>213</sup> but because persecution is “a crime of cumulative effect”,

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<sup>209</sup> Zenz, “Genocidal Sterilization Plans in Xinjiang” (2020). See also Associated Press, “China cuts Uighur Births” (2020), which follows interviews with 30 ex-detainees and reports that once in detention camps, women are subjected to forced IUDs and what appear to be pregnancy prevention shots. They are also force-fed birth control pills or injected with fluids, often with no explanation.

<sup>210</sup> Ibid.

<sup>211</sup> WHO (2014) 15.

<sup>212</sup> Elements of Crimes (2013) art 7(1)(h).

<sup>213</sup> *Prosecutor v Kordić & Čerkez*, Judgment (26 February 2001) para 195.

the level of gravity may be satisfied looking at the cumulative effect of individual acts of persecution;<sup>214</sup>

- b. “The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such”<sup>215</sup>;
- c. “Such targeting was based on political, racial, national, ethnic, cultural, religious, gender ... or other grounds that are universally recognized as impermissible under international law”; and
- d. “The conduct was committed in connection with any act referred to in article 7, paragraph 1 of the Statute or any crime within the jurisdiction of the Court”.

103. The *actus reus* of persecution consists of an act or omission that discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law. The *mens rea* is that the act of persecution was taken because of an aspect of the victim’s identity which has protected status, as listed in Art. 7(1)(h).<sup>216</sup> Thus, the persecution can take the form of acts directed against the group as a whole (such as discriminatory laws), but it can also take the form of acts aimed at individuals as representatives of the group.<sup>217</sup>

104. The acts can be legal, physical or economic in nature; thus, the ICTY Trial Chamber in *Blaškić* found that “...the crime of ‘persecution’ encompasses not only bodily and mental harm and infringements upon individual freedom but also acts which appear less serious, such as those targeting property, so long as the victimised persons were specially selected on grounds linked to their belonging to a particular community.”<sup>218</sup>

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<sup>214</sup> *Prosecutor v Kordić & Čerkez*, Judgment (26 February 2001) para 199; *Prosecutor v Krnojelac*, Judgment (15 March 2002) para 434.

<sup>215</sup> Elements of Crimes (2013) art 7(1)(h).

<sup>216</sup> Bantekas (2010) 193; *Prosecutor v Blaškić*, Judgment (3 March 2000) para 235; *Prosecutor v Blaškić*, Judgment (29 July 2004) para 131; *Prosecutor v Krnojelac*, Judgment (15 March 2002) paras 431-432.

<sup>217</sup> Werle and Jessberger (2014) 373.

<sup>218</sup> *Prosecutor v Blaškić*, Judgment (3 March 2000) para 233.

105. Werle and Jessberger say also that “the destruction of cultural heritage or places of religious worship may qualify as persecution if it has serious effects on a strongly religious population.”<sup>219</sup> In *Kordić and Čerkez*, the ICTY Trial Chamber held that destruction or wilful damage to religious buildings, when done with a discriminatory intent, can amount to persecution. This is because “it manifests a nearly pure expression of the notion of ‘crimes against humanity’ for all of humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects”.<sup>220</sup>
106. In our opinion, it is clear that there have been acts of persecution against the Uyghur population: in particular, deprivation of liberty, torture, rape and other forms of sexual violence, and enslavement. There is clear evidence that these acts were committed on the basis of the individual victims’ membership of the Uyghur population and/or their Muslim religion. The latter is particularly clearly demonstrated by the evidence that people are targeted for detention in detention facilities on the basis of their performing acts of religious worship or living in a religious way.
107. There is also strong evidence of widespread, targeted destruction or defacement of Uyghur cultural property including mosques, graveyards, sites of historical significance and architectural landmarks. In accordance with the case law set out above, there is an arguable case that this conduct is a further form of persecution falling within Art. 7(1)(h).
108. Finally, the systematic separation of Uyghur children from their parents, described in Section 2 of the Opinion above, may constitute persecution within the meaning of Art. 7(1)(h) of the Rome Statute.

*Enforced disappearance (Art. 7(1)(i))*

109. Enforced disappearance entails the arrest, detention or abduction of a person, accompanied by a refusal to acknowledge it or to give information on the whereabouts of the person.<sup>221</sup> The detention and refusal to give information must have been by or with

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<sup>219</sup> Werle and Jessberger (2014) 376.

<sup>220</sup> *Prosecutor v Kordić & Čerkez*, Judgment (26 February 2001) para 207.

<sup>221</sup> Elements of Crimes (2013) art 7(1)(ii) para 1.

the authorisation, support or acquiescence of a State or political organisation, and the perpetrator must have “intended to remove [the victim] from the protection of the law for a prolonged period of time”.<sup>222</sup>

110. In our opinion, there is evidence to support a case of enforced disappearance as a crime against humanity. Human rights organisations and UNHCHR bodies have commented on the widescale refusal by Chinese government bodies to provide information to the families of those detained as to their whereabouts and the likely length of their detention, as quoted at paragraphs 23 and 24 above.

#### *4. Legal analysis – Genocide*

111. Art. 6 of the Rome Statute defines the crime of genocide as follows:

“For the purpose of this Statute, ‘genocide’ means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.”

112. This definition replicates that contained in Article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (“**the Genocide Convention**”), to which China is a party. It is supplemented by the more detailed list of components of the crime contained in the Elements of Crimes. According to the Elements of Crimes, it is a necessary element of each form of conduct which is capable of amounting to genocide that

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<sup>222</sup> Elements of Crimes (2013) art 7(1)(ii) paras 5 – 6.

“[t]he conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction”.<sup>223</sup>

113. In light of the above definitions, this section considers, first, the general requirements for the crime of genocide (irrespective of the specific conduct which may constitute the crime), consisting of: (i) the existence of a protected group; (ii) the intention to destroy the group as such; and (iii) a manifest pattern of similar conduct.
114. Secondly, this section addresses three forms of conduct which are capable of constituting the crime of genocide and which, on the evidence set out in this report, are most readily established in relation to the Uyghur population of XUAR — namely: (i) causing serious bodily or mental harm to members of the group; (ii) imposing measures intended to prevent births within the group; and (iii) forcibly transferring children of the group to another group.
115. Thirdly, this section addresses the various possibilities for engaging the international responsibility of China as a State for the commission of genocide against the Uyghur population of XUAR, either as a principal perpetrator of the crime or as a result of its failure to prevent and punish genocide.
116. As will be apparent from the analysis below, there are several elements that are common to the crime of genocide and various crimes against humanity. For example, both categories of crime rarely occur as isolated events and typically occur in a broader context of atrocities committed against a population, including in particular with the participation or complicity or at least the acquiescence of State authorities.<sup>224</sup> There is also some intersection between the conduct which can form the *actus reus* of each or both crimes, such as causing serious bodily or mental harm to victims. To the extent possible, cross-references are made to sections of the analysis of crimes against humanity above which address such mutually relevant phenomena. However, the two categories of crime also possess distinct elements, most clearly in relation to the *mens rea* for each of them. In

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<sup>223</sup> Elements of Crimes (2013) arts 6(a) para 4; 6(b) para 4; 6(c) para 5; 6(d) para 5; 6(e) para 7.

<sup>224</sup> Cassese (2002) 339.



particular, the crime of genocide requires a special or specific intent to destroy a particular group, which is not required for crimes against humanity.

### General requirements for the crime of genocide

#### The existence of a protected group

117. Art. 6 refers to the commission of certain conduct against, and the intent to destroy, “a national, ethnical, racial or religious group”. A group meeting one or more of these descriptions is frequently referred to in academic commentary as a “protected group”.<sup>225</sup>
118. There appears to be a strong basis for concluding that the Uyghur population of XUAR is a protected group. Although this population may fall within a number of the types of protected groups, perhaps its most obvious classification is as an “ethnic” group, for two reasons:
- a. Under international criminal case law, an ethnic group has been defined as “a group whose members share a common language or culture”.<sup>226</sup> This open-textured definition is sufficiently broad to capture the Uyghur population of XUAR, which possesses a distinct language and, unlike the majority Han Chinese population, Turkic ethnicity.<sup>227</sup>
  - b. In any event, a population may be classified as a protected group if it is “identified as such by others, including perpetrators of the crimes”.<sup>228</sup> Chinese authorities themselves classify Uyghurs as a distinct ethnic minority.<sup>229</sup>

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<sup>225</sup> See e.g. Schabas (2016) 135.

<sup>226</sup> *Prosecutor v Akayesu*, Judgment (2 September 1998) para 513.

<sup>227</sup> See paragraph 16 of this Opinion.

<sup>228</sup> *Prosecutor v Kayishema and Ruzindana*, Judgment (21 May 1999) para 98. For example, the fact that “the Tutsi constituted a group referred to as ‘ethnic’ in official classifications” led the ICTR to classify them as a protected group: *Prosecutor v Akayesu*, Judgment (2 September 1998) para 702.

<sup>229</sup> See National Bureau of Statistics of China, 2010 Population Census (2010), cited in Wan (undated) 58, fn 310.

*The intent to destroy, in whole or in part, a protected group, as such*

119. As with crimes against humanity, the crime of genocide must be accompanied by an intent to commit the underlying acts. Indeed, the acts enumerated below “are by their very nature conscious, intentional or volitional acts”.<sup>230</sup> However, genocide entails a further mental element, often referred to as the necessary “specific” or “special” intent (or *dolus specialis*)<sup>231</sup> — namely, an “intent to destroy, in whole or in part, a [protected] group, as such”.

120. There are multiple elements to the “specific intent” requirement, which are addressed in turn below.

*Intent: the “purpose-based” and “knowledge-based” approaches*

121. There are competing approaches to what will satisfy the term “intent” in the context of Art. 6. According to the “purpose-based” theory, the perpetrator must have acted with the aim or desire of destroying the group.<sup>232</sup> On this approach, mere knowledge on the part of the perpetrator that the acts may contribute to the destruction of the group is not sufficient, if such destruction is not the perpetrator’s goal.

122. The alternative, “knowledge-based” approach posits that the requisite intent exists provided that the perpetrator is aware of the efforts to destroy the protected group, irrespective of whether they hold that purpose themselves.<sup>233</sup> However, the preponderance of case law has not favoured this approach, confirming that individuals “who are only aware of the genocidal nature of the campaign, but do not share the genocidal intent, can only be held liable as accessories” to the crime but not as principals.<sup>234</sup>

123. Given that mere knowledge of a genocidal programme and/or possible genocidal effect is insufficient, proving the requisite destructive purpose can be difficult. For that

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<sup>230</sup> *Bosnian Genocide Case* [2007] para 186.

<sup>231</sup> *Ibid*, 187.

<sup>232</sup> Jeßberger (2009) 105. See e.g. *Prosecutor v Jelisić*, Judgment (5 July 2001) paras 46, 51; *Prosecutor v Rutaganda*, Judgment (26 May 2003) para 524.

<sup>233</sup> Schabas (2016) 133; Werle and Jessberger (2014) 314.

<sup>234</sup> *Prosecutor v Al Bashir* (Decision) (4 March 2009) para 139(ii), fn 154.

reason, international courts and tribunals have developed principles concerning when the relevant purpose may be inferred. Specifically, such a purpose may, “in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as 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”.<sup>235</sup> In this context, the fact that an accused acted within the scope of an overarching genocidal policy, while not in itself sufficient to establish the *mens rea* of this crime, is frequently an indicator of the perpetrator’s purpose.<sup>236</sup> Engagement in certain forms of conduct that do not themselves constitute genocidal acts — such as belonging to political parties that vilify the protected group, making derogatory statements against the protected group, forcibly transferring members of the group, and destroying cultural institutions, monuments or religious sites of the protected group — can all contribute to a finding of the relevant destructive purpose.<sup>237</sup>

124. Whether an individual will be found to have held the necessary purpose in carrying out acts that may constitute genocide is, naturally, a highly fact-sensitive question. It may be more easily made out in relation to high-ranking officials who are responsible for orchestrating and/or directing a genocidal policy (see further Section 6 below on individual criminal responsibility). Conversely, it may be more difficult to establish on the part of lower-ranked individuals who “pass on instructions and/or physically implement such a genocidal campaign”<sup>238</sup> but whose individual aim in doing so may be difficult to ascertain.

125. In establishing the requisite intent, assistance may be derived from numerous factors which the evidence indicates have coincided with individual possibly genocidal acts, such as the widespread and systematic character of the programme against the Uyghur

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<sup>235</sup> *Prosecutor v Jelisić*, Judgment (5 July 2001) para 47.

<sup>236</sup> *Ibid*, para 48.

<sup>237</sup> *Prosecutor v Tolimir*, Judgment (12 December 2012) para 745; *Prosecutor v Seromba*, Judgment (12 March 2008) paras 173–182; *Prosecutor v Krstić*, Judgment (19 April 2004) para 33; *Prosecutor v Kayishema and Ruzindana*, Judgment (Reasons) (1 June 2001) paras 159–160; *Prosecutor v Kayishema and Ruzindana*, Judgment (21 May 1999) para 93.

<sup>238</sup> *Prosecutor v Al Bashir* (Decision) (4 March 2009) para 139(ii), fn 154.

population of XUAR (see paragraphs 69 to 75) and the destruction of cultural property, including religious and cultural sites (see paragraphs 60 to 65, and 107 above).

*The intent “to destroy” the protected group*

126. Art. 6 of the Rome Statute refers to an intent “to destroy” the protected group. Destruction in the form of physical or biological extermination will always fulfil this criterion. There is also authority for the proposition that destruction “is not limited to physical or biological destruction of the group’s members, since the group (or a part of it) can be destroyed in other ways, such as by transferring children out of the group (or the part) or by severing the bonds among its members”.<sup>239</sup> A group may be destroyed if its “characteristics — often intangible — binding together a collection of people as a social unit” are irreparably severed or the conduct taken against the group means that “the group can no longer reconstitute itself”.<sup>240</sup> Indeed, several of the specific forms of conduct which Art. 6 identifies as genocidal acts (such as causing serious bodily or mental harm to members of the group, forcibly transferring children, and preventing births) may occur without exterminating living members of the group.<sup>241</sup>

127. It is not clear from the evidence to date that there is evidence of an intention to physically exterminate living Uyghurs; indeed, Chinese authorities which reap economic advantages from Uyghur forced labourers have some incentive to keep the majority alive.<sup>242</sup> However, in our view, an intention to destroy the Uyghur population of XUAR as a group — that is, as a cohesive social and cultural entity — is more readily made out. This evidence includes that relating to the infliction of bodily and mental harm in detention (see paragraphs 25 to 31 above), the forcible removal of Uyghur children from the Uyghur population (see paragraphs 55 to 59 above), and efforts to prevent births within the Uyghur population (see paragraphs 37 to 40 above).

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<sup>239</sup> *Prosecutor v Krajišnik*, Judgment (27 September 2006) para 854.

<sup>240</sup> *Prosecutor v Blagojević and Jokić*, Judgment (17 January 2005) paras 659, 666.

<sup>241</sup> Werle and Jessberger (2014) 318.

<sup>242</sup> Wan (undated) 58.

*The destruction of the protected group “in whole or in part”*

128. The crime of genocide may be committed even if the intent is not to destroy a protected group in its entirety, provided that there is an intent to destroy a “substantial” part of it,<sup>243</sup> especially where that part is concentrated in a particular geographic locality.<sup>244</sup>

129. The evidence before us makes it clear that the campaign against the Uyghur population of XUAR does not consist of isolated attacks against a small number of individuals. Rather, it targets hundreds of thousands of Uyghurs — on any measure, a “substantial” number — who are concentrated in a particular geographical location. Accordingly, in our view there is a strong case that the requirement of an intent to destroy the group “in whole or in part” is satisfied.

*The destruction of the protected group “as such”*

130. The requirement that the genocidal conduct target a protected group “as such” means that:

“the said acts must have been committed against one or more persons because such person or persons were members of a specific group, and specifically, because of their membership in this group. Thus, the victim is singled out not by reason of his individual identity, but rather on account of his being a member of a national, ethnical, racial or religious group. The victim of the act is, therefore, a member of a given group selected as such, which, ultimately, means the victim of the crime of genocide is the group itself and not the individual alone.”<sup>245</sup>

131. In our view, there can be little doubt, based on the evidence, that the acts committed against the Uyghur population of XUAR are carried out on the basis of individuals’ membership in a group. Evidence supporting this conclusion is set out above in relation to, for example, detention on the basis of practising the Uyghur culture or Muslim religion (see paragraphs 21 to 22 above), the forcible removal of Uyghur children (see paragraphs

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<sup>243</sup> See e.g. *Prosecutor v Krstić*, Judgment (2 August 2001) para 12; *Bosnian Genocide Case* [2007] para 198.

<sup>244</sup> See e.g. *Bosnian Genocide Case* [2007] para 199.

<sup>245</sup> *Prosecutor v Rutaganda*, Judgment (6 December 1999) para 60.

55 to 59 above) and the targeting of Uyghur women for non-consensual sterilisation, abortion and birth control (see paragraphs 37 to 40 above).

*A manifest pattern of similar conduct or the destructive effect of conduct taken in isolation*

132. The Elements of Crimes stipulates, in respect of each form of genocidal act, that the conduct in question must have taken place “in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction”.<sup>246</sup> Although the latter description may be available for particular acts, for the purposes of this Opinion, the more important consideration is whether there is “a manifest pattern of similar conduct”.<sup>247</sup>

133. This requirement has been interpreted as “implicitly exclud[ing] random or isolated acts of genocide”.<sup>248</sup> It has been considered to “align genocide with crimes against humanity”,<sup>249</sup> although it is not formulated in the same words as the “widespread or systematic attack” requirement of the latter. Indeed, the “manifest pattern of similar conduct” requirement has been considered satisfied in circumstances where the attacks committed against a protected group “were large in scale, systematic and followed a similar pattern”,<sup>250</sup> showing the similarities between the two tests.

134. Above, we have set out our view that there is sufficient evidence to establish that the attacks on the Uyghur population of XUAR are both widespread and systematic (see

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<sup>246</sup> Elements of Crimes (2013) arts 6(a) para 4; 6(b) para 4; 6(c) para 5; 6(d) para 5; 6(e) para 7.

<sup>247</sup> We note that there is some controversy over whether this requirement exists as a matter of customary international law. For decisions casting doubt on this requirement as a matter of customary international law, see *Prosecutor v Krstić*, Judgment (19 April 2004) para 224; *Prosecutor v Popović and others*, Judgment (30 January 2015) para 436. However, the ICJ has held that, “[s]ince it is the group, in whole or in part, which is the object of the genocidal intent, the Court is of the view that it is difficult to establish such intent on the basis of isolated acts”: *Croatia-Serbia Genocide Case* [2015] para 139. Even in the context of the Rome Statute, some commentators have characterised the requirement as a procedural requirement relating to the jurisdiction of the ICC, rather than as a substantive element of the crime of genocide (see, for example, Jeßberger (2009) 95; Werle and Jessberger (2014) 311–312), although the ICC itself does not appear to have adopted this approach: *Prosecutor v Al Bashir* (Decision) (4 March 2009) para 124. In any context, there is some uncertainty over whether this requirement must be fulfilled. We assume, for the sake of argument, that the requirement must be fulfilled.

<sup>248</sup> *Prosecutor v Popović and others*, Judgment (10 June 2010) para 829.

<sup>249</sup> Schabas (2016) 131.

<sup>250</sup> *Prosecutor v Al Bashir* (Second Decision) (12 July 2010) para 16.

paragraphs 69 to 75 above). As well as fulfilling the necessary requirements for crimes against humanity, we consider that the same evidence would in all probability fulfil the requirement of a “manifest pattern of similar conduct” in relation to the crime of genocide.

**Specific conduct capable of amounting to genocide**

**Causing serious bodily or mental harm (Art. 6(b))**

135. For the purposes of Art. 6(b) of the Rome Statute, harm that is “serious” need not be permanent or irreversible, but it must entail damage “that results in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life”.<sup>251</sup>
136. Acts causing serious “bodily harm” include, as “quintessential examples”, “torture, rape, and non-fatal physical violence that causes disfigurement or serious injury to the external or internal organs”,<sup>252</sup> such as mutilation and being beaten with rifle butts and sticks.<sup>253</sup> Sexual violence may also occasion serious bodily harm.<sup>254</sup>
137. Serious “mental harm” need not be caused by any physical force or have any physical manifestations.<sup>255</sup> Acts which have damaging long-term psychological effects, such as sexual violence, have been treated as capable of occasioning serious mental harm.<sup>256</sup>
138. We consider that the evidence before us establishes that acts causing serious bodily and mental harm have been committed against the Uyghur population of XUAR. There is evidence of the infliction of bodily and mental harm on Uyghurs in detention (see paragraphs 25 to 31 above), much of which would plainly rise to the level of being “serious”. Indeed, in the context of crimes against humanity, we have concluded that much of this conduct probably constitutes torture and/or inhumane acts causing great suffering or serious injury to body or to mental or physical health (see paragraphs 87 to

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<sup>251</sup> *Prosecutor v Krstić*, Judgment (2 August 2001) para 513.

<sup>252</sup> *Prosecutor v Seromba*, Judgment (12 March 2008) para 46.

<sup>253</sup> *Prosecutor v Akayesu*, Judgment (2 September 1998) paras 711, 720, 722.

<sup>254</sup> *Ibid*, para 706.

<sup>255</sup> Werle and Jessberger (2014) 304.

<sup>256</sup> *Prosecutor v Tolimir*, Judgment (12 December 2012) para 739 (concerning forcible transfer); *Prosecutor v Blagojević and Jokić*, Judgment (17 January 2005) para 654 (concerning forcible transfer); *Prosecutor v Akayesu*, Judgment (2 September 1998) para 731 (concerning sexual violence).

91 above). Additionally, forced sterilisations (as described in paragraphs 37 to 40 above) are a form of both mutilation and serious sexual violence and are therefore capable of occasioning serious bodily and/or mental harm within the meaning of Art. 6(b) of the Rome Statute.

*Imposing measures intended to prevent births within the group (Art. 6(d))*

139. Sterilisation and forced birth control are among the conduct that can fall within Art. 6(d) of the Rome Statute.<sup>257</sup> Rape can also be encompassed within the provision if it meets the general requirements of the crime of genocide (including in particular the intent to destroy the protected group in whole or in part), which may be the case if a particular instance of rape is intended to cause such trauma that the victim decides not to reproduce or their ability to procreate is otherwise compromised.<sup>258</sup>

140. There is prolific credible evidence (see paragraphs 37 to 40 above) of Uyghur women being subject to measures that prevent them from reproducing, either temporarily or permanently (such as by having IUDs non-consensually implanted or through forced removal of their wombs), as well as forced abortions. Such acts would, in our view, clearly constitute a form of genocidal conduct under Art. 6(d). There is also evidence of Uyghur women being raped in detention. If it could be established that “the circumstances of the commission of such acts, and their consequences”<sup>259</sup> are such that women are physically or mentally prevented from procreating as they otherwise would, this may also qualify as conduct falling with Art. 6(d).

*Forcibly transferring children of the group to another group (Art. 6(e))*

141. According to the International Court of Justice (“ICJ”), the forcible removal of children from the protected group can “entail the intent to destroy the group physically, in whole or in part, since it can have consequences for the group’s capacity to renew itself, and

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<sup>257</sup> See e.g. *Prosecutor v Tolimir*, Judgment (12 December 2012) para 743; *Prosecutor v Akayesu*, Judgment (2 September 1998) para 507.

<sup>258</sup> *Prosecutor v Akayesu*, Judgment (2 September 1998) para 508; *Croatia-Serbia Genocide Case* [2015] para 166.

<sup>259</sup> *Croatia-Serbia Genocide Case* [2015] para 166.



hence to ensure its long-term survival”.<sup>260</sup> There is some academic support for the idea that this act can be committed in any circumstances where children are separated from their own group, irrespective of whether they are placed with another group.<sup>261</sup>

142. There is evidence of Uyghur children being forcibly removed from their parents. This includes their non-consensual placement in orphanages when one or both parents are in detention, and their mandatory placement in boarding schools. The fact that children are deprived of the opportunity to practise their Uyghur culture (for example, by being punished for speaking their native languages and prevented from learning religion), that they are sometimes given Han names, and that they are sometimes subject to adoption by Han ethnic families, all bolsters the evidence that their forced removal is carried out with the intention of destroying the Uyghur population as an ethnic group as such.

#### State responsibility for genocide

##### State responsibility for the crime of genocide

143. Either alternatively to or alongside considering whether individuals are guilty of the crime of genocide, it may be possible to argue that China as a State bears international responsibility for the commission of genocide. The biggest challenge to establishing such responsibility lies in establishing that China possessed the necessary specific intent to destroy the Uyghur population of XUAR as such.

144. In the *Bosnian Genocide Case* before the ICJ, the respondent (Serbia and Montenegro) had argued that the Genocide Convention was limited to obliging States Parties to take measures to prevent and punish acts of genocide, but did not envisage that a State may itself be found responsible as a principal to the crime of genocide.<sup>262</sup> The Court rejected this argument, finding that “the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide” by the State through its authorities.<sup>263</sup> The Court found that, where a State is accused of responsibility for committing genocide, the

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<sup>260</sup> *Croatia-Serbia Genocide Case* [2015] para 136.

<sup>261</sup> See e.g. Werle and Jessberger (2014) 307–308.

<sup>262</sup> *Bosnian Genocide Case* [2007] para 176.

<sup>263</sup> *Ibid*, paras 166, 179.

necessary specific intent to destroy a protected group in whole or in part “has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist”, and further that, “for a pattern of conduct to be accepted as evidence of [the special intent’s] existence, it would have to be such that it could only point to the existence of such intent”.<sup>264</sup> In the subsequent *Croatian Genocide Case*, the ICJ affirmed that, “in order to infer the existence of *dolus specialis* from a pattern of conduct, it is necessary and sufficient that this is the only inference that could reasonably be drawn from the acts in question”.<sup>265</sup>

145. In the *Al Bashir* case, the Pre-Trial Chamber of the ICC accepted that a genocidal intent on the part of a State (there, Sudan) could be established if the requisite special intent were established on the part of “those who shared the control of the ‘apparatus’ of the State of Sudan”.<sup>266</sup> It accepted that inferences as to the State’s “genocidal intent ‘may properly be drawn from all evidence taken together, even where each factor on its own may not warrant such an inference’”, but that such inference “must be the only reasonable inference available on the evidence”.<sup>267</sup> In that case, the prosecution had pointed to numerous different factors which, it submitted, supported an inference of Sudan’s genocidal intent, including: (i) the State’s strategy of denying and concealing alleged crimes; (ii) official statements and public documents which revealed the existence of a genocidal State policy; and (iii) “the nature and extent of the acts of violence committed by [State of Sudan] forces against the [protected groups]”.<sup>268</sup>

146. The Court did not reject that, in principle, each of these factors could evidence genocidal intent, but found that none of these factors in this case supported a conclusion that a genocidal intent was the only reasonable inference available. Even in the context of a finding that serious war crimes and crimes against humanity had been committed against the protected groups in question, the Court was satisfied that there were “several factors indicating that the commission of such crimes can reasonably be explained by

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<sup>264</sup> *Ibid*, para 373.

<sup>265</sup> *Croatia-Serbia Genocide Case* [2015] para 148.

<sup>266</sup> *Prosecutor v Al Bashir* (Decision) (4 March 2009) para 150.

<sup>267</sup> *Ibid*, paras 153–154, 156.

<sup>268</sup> *Ibid*, para 164.

reasons other than the existence of [Sudan's] genocidal intent to destroy in whole or in part the [protected] groups", such as a mere "persecutory intent".<sup>269</sup>

147. As is evident from the case law, there would be a high threshold for establishing that China was internationally responsible for genocide as a principal perpetrator. Although, in our view, there is clear evidence of the existence of a protected group and the commission of conduct that is potentially genocidal, the most significant barrier will be proving the *dolus specialis*. In this respect, it may be possible to rely on the specific genocidal intent of certain senior officials, in light of the credible evidence that those officials have orchestrated State policy in relation to the Uyghur population of XUAR and that in doing so those officials had the necessary genocidal intent (see Section 6, on individual criminal liability, below). Otherwise, it would be necessary to establish that a genocidal intent is the only possible inference available from the pattern of persecutory conduct.

##### *5. State responsibility for the crime of genocide, crimes against humanity and other international obligations*

148. Whether or not China is considered responsible for crimes against humanity or the crime of genocide as a principal, its responsibility may be engaged for the purposes of international law more generally.

149. Specifically, the Genocide Convention (to which China is a party) imposes on States certain obligations, including (at the most general level) an obligation "to prevent and to punish" the crime of genocide (Art. I). More specific obligations include the following:

- a. Art. IV states that "[p]ersons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals". The acts referred to in Art. III consist of genocide, conspiracy to commit genocide, direct and public

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<sup>269</sup> *Ibid*, para 204.

incitement to commit genocide, attempt to commit genocide and complicity in genocide.

- b. Under Art. V, States Parties “undertake to enact ... the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in article III”.
- c. Under Art. VI, States Parties undertake either to try persons charged with genocide in their national courts or allow them to be tried by an international criminal tribunal.

150. The ICJ has confirmed that the standard for State responsibility in relation to these obligations is lower than in relation to criminal responsibility for genocide as a principal. In relation to the duty to prevent genocide, “it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed”.<sup>270</sup>

151. In our view, the evidence presented in this Opinion clearly surpasses the threshold of establishing a “serious danger” that genocide has been and/or will be committed. China’s responsibility to prevent genocide, and its obligation to punish genocide (at least by carrying out an investigation into suspected genocidal acts), are therefore engaged.

152. Despite this, we are not aware of any efforts within China to investigate the conduct referred to in this report as potentially constituting the crime of genocide — let alone ensuring that those who may be responsible for the crime (or any of the ancillary crimes in Art. III of the Genocide Convention) have been charged and prosecuted. We are also not aware of efforts to suppress potentially genocidal conduct; to the contrary, there is significant evidence that Chinese authorities (ranging from local officials to the upper echelons of the CCP) are complicit in and even directing the conduct in question. We consider these acts and omissions to engage China’s responsibility under international law. However, there is currently no international court or tribunal with jurisdiction to

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<sup>270</sup> *Bosnian Genocide Case* [2007] paras 421–422, 432.

adjudicate the question of China's responsibility for genocide, as China has lodged a reservation to Article IX of the Genocide Convention (which would otherwise have allowed a State to commence ICJ proceedings in respect of a dispute "relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III").

153. Similarly, the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD") imposes an obligation on State Parties "to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms".<sup>271</sup> Specific obligations include the following:

- a. Under Art. 2(1)(a), "each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation".
- b. Art. 2(1)(c) states that "each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists".
- c. Art. 4 states that "State Parties condemn all propaganda and all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination..."
- d. Under Art. 5, "State Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law..."

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<sup>271</sup> CERD (1965), art 2.

154. In our view, while the application of CERD is not the main focus of this Opinion, the evidence presented in this Opinion demonstrates that there is a very credible case that China is in breach of its obligations under CERD, and its responsibility under international law is therefore engaged. In a 2018 Report, the Committee on the Elimination of Racial Discrimination recommended that China take specific steps to address the treatment of ethnic Uyghurs and Muslim minorities in the XUAR.<sup>272</sup> China categorically denied the claims contained in the report.<sup>273</sup>

155. In ratifying CERD, China submitted reservations that preclude the application of Art. 22 of CERD, under which any dispute between two or more State Parties as to the interpretation or application of the Convention could be referred to the ICJ if it is not settled by negotiation or the dispute process contained in the Convention. The ICJ has confirmed that these conditions need to be fulfilled in order for the ICJ to have jurisdiction.<sup>274</sup> However, it is still open to States to invoke China's responsibility for alleged violations of the CERD, by engaging the inter-State dispute mechanism in CERD.<sup>275</sup> More generally, China's responsibility could be invoked for breaches of crimes against humanity, in so far as they constitute breaches of *jus cogens* norms under customary international law. However, as can be inferred from the few cases in which State responsibility has been found, it has proven very difficult in practice to successfully prosecute a case for State responsibility for crimes against the individual of this general nature.<sup>276</sup>

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<sup>272</sup> Committee on the Elimination of Racial Discrimination (2018) paras 40 – 41.

<sup>273</sup> RFA Uyghur Service (2020).

<sup>274</sup> *Georgia v Russian Federation* [2011]. See also *Ukraine v Russia Federation* [2019] in which the ICJ ruled that it had jurisdiction to entertain claims made by Ukraine against Russia for violations under CERD committed in Crimea.

<sup>275</sup> "Responsibility of States under International Law to Uyghurs and other Turkic Muslims in Xinjiang, China" (BHRC, 2020) 52.

<sup>276</sup> An example is in *Armed Activities* [2005], where the ICJ found Uganda responsible for serious violations of humanitarian law and human rights committed by Uganda's military forces in the eastern part of the Democratic Republic of Congo.

## ***6. Individual accountability***

156. We are also asked to address the potential accountability of a range of individuals for the treatment of the Uyghurs, detailed in Section 2 above. In this section of the Opinion, we address (a) potential individual criminal liability for genocide and crimes against humanity, and briefly (b) other avenues of individual accountability.

### **Relevant individuals**

157. In terms of the criminal liability of identified individuals, we are asked to consider the position of:

- a. Xi Jinping, President of the People's Republic of China and General Secretary of the Chinese Communist Party.
- b. Zhu Hailun, Party Secretary of the Xinjiang Political and Legal Committee (XPLC) from 2016 to 2019, and now Deputy Secretary of the Xinjiang People's Congress.
- c. Chen Quanguo, Party Secretary of the XUAR since 2016.

### **Individual criminal liability**

158. In this section of the Opinion we do not address the question of whether any individuals could be prosecuted by the ICC.<sup>277</sup> This raises further jurisdictional issues, including the fact that China is not a party to the Rome Statute, along with additional threshold matters which the ICC would have to consider in due course, including admissibility.<sup>278</sup>

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<sup>277</sup> A further possibility for prosecution would be under the domestic laws of individual States, including under principles of universal jurisdiction. Such a prosecution may also raise jurisdictional issues, including in relation to immunities enjoyed by officials of a foreign State.

<sup>278</sup> We note that in 2020, two groups of Uyghurs, the "East Turkistan Government in Exile" and the "East Turkistan National Awakening Movement", filed a request with the ICC, seeking an investigation of Rome Statute offences which may have been committed by the forced removal of Uyghurs from Cambodia to Tajikistan: Simons (2020). Cambodia and Tajikistan are both parties to the Rome Statute,

159. Instead, we focus on the question of whether there is, or may be, sufficient evidence to establish a credible substantive case against individuals for genocide or crimes against humanity, irrespective of any procedural or jurisdictional hurdles to their prosecution in The Hague. Identifying a credible case against individuals for genocide or crimes against humanity is of broader significance, given that the prohibition of both crimes amounts to *jus cogens*, and that customary international law and treaty law impose an obligation on all States to prevent and, where appropriate, to punish such conduct.

**Requirements for individual criminal liability under the Rome Statute**

160. Above, we have addressed the elements of genocide and crimes against humanity, as defined in the Rome Statute.

161. Those offences are made up of the acts and omissions of numerous individuals, which, as we have explained above, fall to be analysed collectively to assess whether the totality of the conduct fulfils the requirements of the relevant offences: for example whether, taking matters as a whole, there has been a “widespread or systematic attack” on the civilian population within the definition of a crime against humanity, and/or whether there has been a “manifest pattern of similar conduct” as is necessary to establish the crime of genocide.

162. This section of our analysis considers whether, if genocide and/or crimes against humanity can be established on the basis of the evidence as a whole, Xi Jinping, Chen

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so the jurisdictional argument was that the relevant offences fell within the Court’s jurisdiction on that basis. A legal basis for this argument is to be found in the ICC’s 2018 decision that it had jurisdiction over the deportation of Rohingya from Myanmar (not a party to the Statute) to Bangladesh (a party to the Statute): ICC Decision on Request for a Ruling on Jurisdiction (2018). However, in its *Report on Preliminary Examination Activities 2020* (14 December 2020) paras 70-76, the Office of the Prosecutor has stated that it does not intend to open an investigation into these matters, on the basis that the forced transfers, while serious, do not appear in themselves, to amount to the crime against humanity of deportation, and the real crimes in issue are the alleged crimes against humanity and genocide taking place within the territory of China. A request for reconsideration of this decision, pursuant to article 15(6) has been filed with the ICC on the basis of new facts or evidence.



Quanguo and/or Zhu Hailun could be criminally liable based on their own specific role in those matters.

163. The question of individual criminal responsibility is addressed in Part III of the Rome Statute. The key provisions for present purposes are Art. 25(3), which lists the ways in which a person may commit one of the crimes under the Statute (also referred to as the “modes of participation”), and Art. 30, which sets out the necessary mental element.

Article 25(3): modes of participation

164. Art. 25(3) provides that:

“In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

- (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
- (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
  - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
  - (ii) Be made in the knowledge of the intention of the group to commit the crime;
- (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
- (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. [...]” (Emphasis added)

165. This provision has been described as embodying a “novel and all-embracing theory of liability”<sup>279</sup> which “provides an exhaustive list of participation modes covering every possible way in which a person can contribute to the commission of a crime”. It contains a lengthy, and in many respects potentially overlapping, list of ways in which a person may participate in one of the crimes in the Statute.<sup>280</sup>
166. Each of the elements of Art. 25(3) has been the subject of extensive academic commentary, as well as decisions by the ICC’s Pre-Trial and Appeals Chambers. The interpretation of many of the elements remains in an evolving state, particularly in light of the relatively small number of cases which the ICC has handled.
167. Art. 25(3) draws a basic distinction between perpetrators, in Art. 25(3)(a), and those who participate in the other ways listed in the remainder of Art. 25(3). It is generally accepted that Art. 25(3)(a) was a novel development in international criminal justice, in that it provides for what has been termed indirect participation.<sup>281</sup> This concept opens up the possibility of prosecuting those in leadership roles as actual perpetrators of crimes, even when the relevant physical acts were committed through others. This removes the need to invoke doctrines such as incitement or assistance in order to target the political leadership.
168. The concept of indirect participation is particularly relevant to the present analysis. Although Art. 25(3) caters for participation at all possible levels of a State’s official hierarchy, we are here concerned with the liability of very senior individuals in respect of whom liability would not be based on the physical commission of any element of the crimes, and where the lesser ancillary modes of participation (such as aiding and abetting) may not properly reflect their seniority or the pivotal nature of their role.

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<sup>279</sup> Van Sliedregt (2012) 75; see also *ibid*, Chapters 4 and 5 for an account of the development of Art. 25(3), and Chapter 6 for an analysis of each of the elements of Art. 25(3). See further Ambos (2014), Chapter IV; Swart (2009) 82.

<sup>280</sup> The starting point for Art. 25(3) was the corresponding article in the International Law Commission’s Draft Code of Crimes Against the Peace and Security of Mankind.

<sup>281</sup> Ambos (2014) 145.

169. There are several cases in which the ICC has considered the individual liability of those at the highest levels of government, and the criteria for finding such persons liable as indirect perpetrators. In the *Lubanga* arrest warrant decision, the Pre-Trial Chamber identified the requirements for indirect perpetration liability as:

- a. The existence of a hierarchical relationship, or a hierarchically organised group;
- b. The indirect perpetrator having the “final say” as to the policies and practices of the group; and
- c. Awareness by them of their “unique role”.<sup>282</sup>

170. A similar approach was taken by the *Bemba* Pre-Trial Chamber, which attributed participation to the defendant in that case “as a result of his authority over his military organisation.”<sup>283</sup>

171. Perhaps the most significant decision in this context is that of the *Katanga and Chui* Pre-Trial Chamber.<sup>284</sup> There, the Chamber expressly adopted the doctrine of the “perpetrator behind the perpetrator”<sup>285</sup> to describe the basis for liability of those who mastermind or control, rather than carry out, mass crimes. The Pre-Trial Chamber held that “[t]he underlying rationale of this model of criminal responsibility is that the perpetrator behind the perpetrator is responsible because he controls the will of the direct perpetrator.”<sup>286</sup> It held that “assigning the highest degree of responsibility for commission of a crime — that is, considering him a principal — to a person who uses another, individually responsible person to commit a crime, is not merely a theoretical possibility in scarce legal literature, but has been codified in article 25(3)(a) of the Statute.”<sup>287</sup> The basis for such liability is the

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<sup>282</sup> *Prosecutor v Lubanga* (Decision) (10 February 2006) paras 94 - 96.

<sup>283</sup> *Prosecutor v Bemba* (Decision) (10 June 2008) para 78: “as a result of his authority over his military organisation, Jean-Pierre Bemba had the means to exercise control over the crimes committed by MLC troops deployed in the CAR.” See also Ambos (2014) 156.

<sup>284</sup> *Prosecutor v Katanga and Ngudjolo Chui* (Decision) (30 September 2008).

<sup>285</sup> *Ibid*, para 496.

<sup>286</sup> *Ibid*, para 497.

<sup>287</sup> *Ibid*, para 499.

defendant's control over the organisation which carried out the acts on the ground,<sup>288</sup> also described as his or her "control over an organised apparatus of power".<sup>289</sup>

172. Importantly for the present analysis, the Chamber went on to define the various "aspects of an organisational apparatus of power that allow it to serve the object and purpose of enabling the perpetrator behind the perpetrator to commit crimes through his subordinates."<sup>290</sup> The Chamber considered that:

- a. The organisation "must be based on hierarchical relations between superiors and subordinates. The organisation must also be composed of sufficient subordinates to guarantee that superiors' orders will be carried out, if not by one subordinate, then by another."<sup>291</sup>
- b. Further, "it is critical that the chief, or the leader, exercises authority and control over the apparatus and that his authority and control are manifest in subordinates' compliance with his orders. His means for exercising control may include his capacity to hire, train, impose discipline, and provide resources to his subordinates."<sup>292</sup>
- c. "The leader must use his control over the apparatus to execute crimes, which means that the leader, as the perpetrator behind the perpetrator, mobilises his authority and power within the organisation to secure compliance with his orders."<sup>293</sup>

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<sup>288</sup> *Ibid*, para 500.

<sup>289</sup> *Ibid*, para 510. For the importance of an organisational perspective on these types of crime, see also Swart (2009) 89: "International crimes are largely collective phenomena. They usually require the cooperation of many actors, who are more often than not members of collectivities. These collectivities may be large or small, having an official or unofficial status, being public or private bodies. What they have, to a larger or smaller degree, in common is that they are involved in planning, steering, controlling and coordinating the activities of their members. It is, therefore, both inevitable and legitimate for international criminal law to approach the phenomenon of individual liability for international crimes from an organizational perspective."

<sup>290</sup> *Prosecutor v Katanga and Ngudjolo Chui* (Decision) (30 September 2008) para 511.

<sup>291</sup> *Ibid*, para 512.

<sup>292</sup> *Ibid*, para 513.

<sup>293</sup> *Ibid*, para 514.

- d. The leader's control over the apparatus must allow him to "utilise his subordinates as 'a mere gear in a giant machine' in order to produce the criminal result 'automatically'".<sup>294</sup> This requires a large supply of "subordinates" within the organisation, such that "[a]ny one subordinate who does not comply may simply be replaced by another who will."<sup>295</sup>
- e. Thus the Chamber concluded that "[t]he leader's ability to secure this automatic compliance with his orders is the basis for his principal — rather than accessorial — liability. The highest authority does not merely order the commission of a crime, but through his control over the organisation, essentially decides whether and how the crime would be committed."<sup>296</sup>

173. A further case involving a defendant at the highest level of government is that of *Al Bashir*, concerning the former President of Sudan. The Pre-Trial Chamber in that case confirmed the issue of a warrant against Mr Al Bashir as "indirect perpetrator, or as an indirect co-perpetrator" in the commission of crimes against humanity and war crimes, on the basis that there were reasonable grounds to believe that he "played an essential role in coordinating the design and implementation of the common plan".<sup>297</sup> The Pre-Trial Chamber went on to hold that there was sufficient evidence of indirect co-perpetrator liability because, "there are reasonable grounds to believe that Omar Al Bashir (i) played a role that went beyond coordinating the implementation of the common plan; (ii) was in full control of all branches of the 'apparatus' of the State of Sudan, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Forces, the [National Intelligence and Security Service] and the [Humanitarian Aid Commission], and (iii) used such control to secure the implementation of the common plan."<sup>298</sup>

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<sup>294</sup> *Ibid*, para 515.

<sup>295</sup> *Ibid*, para 516.

<sup>296</sup> *Ibid*, para 518.

<sup>297</sup> *Prosecutor v Al Bashir* (Decision) (4 March 2009) para 221.

<sup>298</sup> *Ibid*, para. 222. Ambos, in considering this decision and the requirements of Article 25(3)(a), identifies three possible levels of wrongdoers, depending on their seniority:

a. "[T]hose persons belonging to the leadership level ... who take the decisions with regard to the criminal events as a whole; only those leaders, due to their total and undisturbed control over the

174. The criteria developed in these cases are highly relevant to the situation in XUAR, and will be considered further below when examining the evidence relating to the leadership roles of specific individuals.

175. As well as liability as an “indirect perpetrator” under the principles discussed above, Art. 25(3) also includes other modes of participation: as set out above, these include ordering, soliciting, inducing or inciting the commission of the crimes. These may also be relevant to the position of senior leaders.

Art. 30: the mental element

176. Art. 30 provides that:

- “1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
  - (a) In relation to conduct, that person means to engage in the conduct;
  - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, ‘knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. ‘Know’ and ‘knowingly’ shall be construed accordingly.”<sup>299</sup>

177. These requirements must be read alongside the specific mental elements relating to the individual offences discussed above.

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organization, are able to control the course of events by means of the organizational structures, that is, they possess ‘domination over the decision’ ... the strategic, systemic overall control over the organized injustice of the (state) system; thus, they normally qualify as indirect perpetrators by means of organization control.”

b. “At the second level, we find those persons of the mid-hierarchy who implement the decisions of the top level by way of planning and organizing the microcriminal enterprises, thereby exercising some form of control over a part of the organization...”

c. “The third and last level consists of the executors ... who are, as persons committing the crime with their own hands, direct perpetrators, and as such possess the power over the act ... but at the same time qualify only, with a view to the overall context, as accomplices in the larger criminal enterprise.” Ambos (2014) 178.

<sup>299</sup> See Ambos (2014) Chapter VII, The Subjective Requirements of International Crimes; Van Sliedregt (2012) Chapter 3.

*The mental element in respect of genocide*

178. The mental element in respect of genocide under the Rome Statute was considered above at paragraphs 117 to 134. In the context of individual criminal liability, the requirements can be summarised as follows: the perpetrator must know that the object of the attack is one of the groups covered by Art. 6 (since this is a factual circumstance within the meaning of Art. 30(3) of the Rome Statute). In addition to this, he or she must act with the necessary intent to destroy, discussed above. Ambos describes this requirement as “a special subjective element which gives the genocide offence a peculiar feature.”<sup>300</sup> As to the context element, that is, that conduct took place “in the context of a manifest pattern of similar conduct directed against that group”, the perpetrator must be aware that he or she acts in the context of a genocidal destruction and not as an isolated, sole perpetrator. However, “the perpetrator would not, on the one hand, need to have knowledge of all details of such a plan or a policy, nor, on the other hand, would his negligent ignorance of the general plan suffice.”<sup>301</sup>

*The mental element in respect of crimes against humanity*

179. This has also been considered above at paragraphs 78 to 79. In summary, the perpetrator must engage in unlawful conduct with the knowledge that such acts are committed on a widespread scale or based on a policy against a specific civilian population. The perpetrator must know of the wider attack, and that his or her misconduct is linked to it. The person need not have known all the characteristics of the attack, or the precise details of the plan or policy. Further, it is not necessary that the accused intended his or her acts to be directed against the targeted civilian population, or was motivated by the same reasons that underlie the attack as a whole, as long as he or she know that they formed part of a broader attack targeted against that population.<sup>302</sup>

180. With both genocide and crimes against humanity, the ways in which the mental element is framed, along with the elements of the offence, can fit more naturally with

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<sup>300</sup> Ambos (2014) 279.

<sup>301</sup> *Ibid.*

<sup>302</sup> See references cited at paragraphs 78 to 79 above, and also Ambos (2014) 283-4.

commission of crimes on the ground rather than participation as a leader. However, as the case law discussed above at paragraphs 169 to 173 indicates, these definitions will be adapted as appropriate to cover the position of those who order and control rather than physically taking part.

#### Other relevant provisions

181. Art. 27 of the Rome Statute states that there is no exemption from criminal responsibility on the basis of an individual's official capacity, including Head of State or Government. This means that none of the individuals with whom we are concerned, including Mr Xi, could rely on their official status to avoid liability for crimes under the Rome Statute or prosecution by the ICC (although this provision would not remove any immunity to which they are entitled if they were to be prosecuted before the domestic courts of any State).

182. Art. 28(b) of the Rome Statute imposes liability on "superiors" in certain circumstances where they culpably fail to prevent the commission of crimes by subordinates under their effective authority and control. This can be an additional means of imposing liability on individuals who did not commit offences on the ground and, unlike Article 28(a), which is restricted to military commanders, Article 28(b) can be engaged within civilian control structures and outside the scope of any armed conflict.

#### Application of these principles to relevant individuals

183. Having outlined the legal framework under the Rome Statute for individual criminal responsibility of those in leadership roles, it is necessary to assess the available evidence in relation to Xi Jinping, Zhu Hailun and Chen Quanguo.

184. At the outset it is important to note that the responsibility of leaders can be more difficult to establish to the criminal standard, than the responsibility of those who commit offences on the ground. Rather than evidence from victims and witnesses, which independent investigators including NGOs and journalists can assemble (and have done in large quantities in relation to XUAR), evidence against the political leaders may be more difficult to assemble. As one commentator puts it, "international crimes (genocide, crimes



against humanity, and war crimes) regularly occur in a certain collective context of commission which tends to conceal the concrete contributions of the individual actors and, in any case, makes them difficult to isolate.”<sup>303</sup> The concrete contributions of the political leaders are particularly prone to concealment, since senior people can argue that the wrongdoing was devised and carried out by those closer to events on the ground.

185. Having made that general observation, there are a number of features of the situation in XUAR which make it significantly easier to attribute responsibility to senior figures. This is not a situation where there are, for example, crimes against humanity being committed by military forces in the context of an armed conflict, where senior leaders could seek to argue that the military forces got out of control. The situation in XUAR involves systematic detention on a huge scale, in purpose-built facilities, combined with other complex State-run systems such as the technological monitoring of Uyghurs’ communications and the establishment of a vast network of boarding schools predominantly for Uyghur children.

186. China is a tightly-controlled single-party State.<sup>304</sup> As a basic inference, it is highly unlikely that activity on this scale could or would be carried out on behalf of the State other than on the orders of extremely senior figures, including the President and those who are responsible for running XUAR.

187. However, inference is not the only means of tying the political leadership to these events: there have, over the last year, been three very significant leaks of Chinese government papers relating to XUAR. Each of these has been carefully verified as authentic by experts in the field,<sup>305</sup> and collectively the leaked documents shed light on the role of senior officials, from Xi Jinping downwards, in the treatment of the Uyghurs.

188. We have only been able to assess these documents on the basis of published analyses and summaries in the press and in relevant academic journals, rather than by analysis of

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<sup>303</sup> Ambos (2014) 84.

<sup>304</sup> See for example “The Party leads on everything” (MERICS, 2019). This analysis, among many others, underscores Xi Jinping’s extreme centralisation of power and the top-down nature of decision-making within the Chinese Communist Party.

<sup>305</sup> Ramzy and Buckley, “Absolutely No Mercy” (2019).

the primary sources ourselves. Any criminal prosecution would involve very detailed forensic analysis of the entire set of materials. That said, the publicly available analyses of the leaked documents contain a number of significant points, which we summarise below along with the publicly available reasoning process used by the US when imposing Magnitsky sanctions on specific individuals.

*The “Xinjiang Papers”*

189. These leaked papers, obtained by *The New York Times*,<sup>306</sup> include nearly 200 pages of internal speeches by Xi Jinping and other leaders, and more than 150 pages of directives and reports on the surveillance and control of the Uyghur population in XUAR. *The New York Times* indicates that “[t]he papers were brought to light by a member of the Chinese political establishment who requested anonymity and expressed hope that their disclosure would prevent party leaders, including Mr. Xi, from escaping culpability for the mass detentions.” The report of these papers notes that experts in the field have examined the documents carefully, and have concluded that they are authentic.

190. *The New York Times* indicates that, according to these documents:

- a. Xi Jinping “laid the groundwork for the crackdown in a series of speeches delivered in private to officials during and after a visit to Xinjiang in April 2014, just weeks after Uighur militants stabbed more than 150 people at a train station, killing 31. Mr. Xi called for an all-out ‘struggle against terrorism, infiltration and separatism’ using the ‘organs of dictatorship’, and showing ‘absolutely no mercy.’”
- b. “The internment camps in Xinjiang expanded rapidly after the appointment in August 2016 of Chen Quanguo, a zealous new party boss for the region. He distributed Mr. Xi’s speeches to justify the campaign and exhorted officials to ‘round up everyone who should be rounded up.’”

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<sup>306</sup> Ramzy and Buckley, “Absolutely No Mercy” (2019).

191. The documents also cast light on the government's treatment of officials who resist the relevant policies:

- a. *The New York Times* discusses the case of Wang Yongzhi, the CCP official in charge of the Yarkand region in XUAR, who became so uncomfortable with the detention campaign that he ordered the release of over 7,000 inmates in September 2017. The Xinjiang Papers include a document recording the CCP's internal investigation into his actions, which led to his being detained, stripped of his powers, and prosecuted for "gravely disobeying the party central leadership's strategy for governing Xinjiang."
- b. *The New York Times* also reports that the documents show that in 2017, the Party opened 12,000 investigations—twenty times more than in the previous year—into other XUAR officials for similar infractions, and purged or otherwise punished thousands of XUAR officials who resisted or failed to sufficiently carry out the mass detention campaign.

#### *The "China Cables"*

192. The second set of leaked documents has been termed the "China Cables". It was obtained by the International Consortium of Investigative Journalists ("ICIJ") from a Uyghur in exile, who in turn apparently obtained it from a source in XUAR.<sup>307</sup> Again, experts in the field have expressed the view that the documents are authentic.

193. The documents, which are given the middle level of three Chinese government security classifications, include:

- a. An operations manual dated November 2017 setting out detailed guidelines for managing the detention camps in XUAR. According to the ICIJ, the documents indicate that this manual was specifically approved by Zhu Hailun, who was at that time in charge of security in XUAR. The ICIJ states that:

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<sup>307</sup> "China's Operating Manuals for Mass Internment" (ICIJ, 2019).

“The lengthy ‘telegram’ – inscribed with Zhu’s name at the top and labeled ‘ji mi’, Chinese for ‘secret’ – presents a master plan for implementing mass internment, including more than two dozen numbered guidelines. Titled ‘Opinions on the Work of Further Strengthening and Standardizing Vocational Skills Education and Training Centers,’ it was issued by the Xinjiang Autonomous Region’s Political and Legal Affairs Commission, the Communist Party committee responsible for security measures in Xinjiang.”

- b. Four intelligence briefings, known as “bulletins,” providing guidance on the daily use of the Integrated Joint Operations Platform (“IJOP”). In July 2020, the US Department of the Treasury imposed sanctions on the Xinjiang Public Security Bureau (“XPSB”) and its previous and current leaders, Huo Liujun and Wang Mingshan.<sup>308</sup> The US Department of the Treasury describes the IJOP in the following terms:

“The XPSB has deployed the “Integrated Joint Operations Platform” (IJOP), an Artificial Intelligence (AI)-assisted computer system that created biometric records for millions of Uyghurs in the Xinjiang region. The XPSB, through the IJOP, uses digital surveillance systems to track Uyghurs’ movements and activities, to include surveilling who they interact with and what they read. In turn, IJOP uses this data to determine which persons could be potential threats; according to reports, some of these individuals are subsequently detained and sent to detention camps, being held indefinitely without charges or trial. The IJOP AI platform is one of the first examples of governments using AI for racial profiling. According to press reporting, the IJOP technology looks exclusively for Uyghurs, based on their appearance, and keeps records of their movements. The mass detention of Uyghurs is part of an effort by PRC authorities to use detentions and data-driven surveillance to create a police state in the Xinjiang region.”

#### The “Karakax List”

- 194. This document was apparently provided to Dr Adrian Zenz in early 2020, by the same source who provided the China Cables to the ICIJ.<sup>309</sup> The document relates to the county of Karakax (Qaraqash), in Hotan Prefecture in XUAR. It is a detailed internal spreadsheet

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<sup>308</sup> US Treasury, “Treasury Sanctions Chinese Entity and Officials Pursuant to Global Magnitsky Human Rights Accountability Act” (2020).

<sup>309</sup> Zenz, “The Karakax List” (2020).

which shows how the individual ‘cases’ of 311 Uyghurs were handled, including their progress into detention facilities and the targeting of their families.

195. Dr Zenz, who has analysed the document carefully, states that it “allows us to develop a more fine-grained understanding of the ideological and administrative processes that preceded the internment campaign.”<sup>310</sup> Based on that document, taken together with the other leaked documents considered above, he draws a number of conclusions, the following of which are the most relevant to the current analysis:

- a. As to the concrete steps which Chen Quanguo undertook when appointed to the role of CCP Secretary in XUAR, Dr Zenz identifies the following:
  - i. Setting up surveillance and policing security infrastructure.
  - ii. Preparing and launching a village-based work team campaign, which formed the groundwork for local internment decisions.
  - iii. Hugely expanding the network for the State custody of children whose parents had been detained.
  - iv. Finally, “[overseeing] the construction of a vast array of new internment facilities, evidently a highly secret campaign for which we have almost no data. A handful of public construction bids, analyzed by the author in his 2018 research paper, indicate that most of these notices were issued from March 2017 onwards, with a peak in June that year.
- b. “Chen [Quanguo] must have been installed by the central government, possibly during a meeting at the Two Sessions in Beijing in March 2016 where Xi Jinping, Chen, and Chen’s predecessor in Xinjiang, Zhang Chunxian, were all in the same place.”

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<sup>310</sup> *Ibid.*

- c. “[T]he internment campaign and the related replacement of Zhang with Chen was almost certainly premeditated. It must have been planned by a group of people, likely involving Zhang, Chen, and high-level central government figures. At least some of the face-to-face meetings may have taken place during the Two Sessions in March 2016 in Beijing.”
- d. “It is unclear who first thought of the mass internment campaign. It might have been Chen, based on resulting long-term outcome requirements set by Beijing. Two things, however, are clear. The overall implementation of this campaign involved the central government, at some point almost certainly Xi Jinping himself. And, when Chen assumed his new post in Xinjiang in late August 2016, he executed a premeditated plan.”

196. We cannot evaluate the soundness of these conclusions against the underlying evidence. All such conclusions would be forensically examined and rigorously tested in any prosecution process. However, we consider that they deserve significant weight, given that (a) Dr Zenz is one of the leading figures in the analysis of events in XUAR; and (b) those conclusions are compatible with the conclusions which have been drawn by other commentators who have examined this body of evidence, in particular *The New York Times* and the ICIJ. Other expert commentators have reached similar views: see for example a recent, thorough survey which identifies a number of inferences which can be drawn from the evidence:<sup>311</sup>

- a. “[T]he central party leadership was responsible for dispatching Chen Quanguo to Xinjiang in August 2016, knowing him to be the architect of gridstyle securitization in Tibet from 2011 to 2015, and expecting him to duplicate this in Xinjiang.”
- b. “[A]fter observing the mass internment programme Chen had established in Xinjiang, it rewarded him on 25 October 2017 by making him a member of the Politburo.”

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<sup>311</sup> Smith Finley (2019) 16-17.

- c. “[T]he centre has regularly acknowledged the existence of the programme in domestic communications. In May 2018, PRC minister of justice Zhang Jun urged Xinjiang authorities to extensively expand the drive for ‘transformation through education’ (a euphemism for political re-education) in an ‘all-out effort’ to fight separatism and extremism...”
- d. “[I]n the wake of international condemnation of the internment camps, the central state moved in August 2018 from denying their existence to recasting them as benign ‘vocational training centres’ that ‘rehabilitate extremists’.”

#### US Magnitsky sanctions

197. The United States has recently imposed sanctions on Chen Quanguo and Zhu Hailun.<sup>312</sup> While the imposition of sanctions does not require proof of wrongdoing to the criminal standard, from the perspective of the present analysis it is significant to see the conclusions which the United States has reached about the conduct of those two individuals. The US Treasury notice imposing the sanctions refers to Chen’s “notorious history of intensifying security operations in the Tibetan Autonomous Region to tighten control over the Tibetan ethnic minorities.” It states that:

- a. “Following his arrival to the [XUAR] region, Chen began implementing a comprehensive surveillance, detention, and indoctrination program in Xinjiang, targeting Uyghurs and other ethnic minorities through the XPSB.”
- b. “As a part of Chen’s plans, the large-scale construction of mass detention camps, labelled ‘training centers,’ greatly escalated in 2017.”
- c. “As the Party Secretary of the XPLC, Zhu established the policies and procedures for managing these detention camps with the purported goal of using the camps to fight terrorism and maintain stability. Zhu’s policies outlined how the detention camps would operate, to include not allowing

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<sup>312</sup> US Treasury, “Treasury Sanctions Chinese Entity and Officials Pursuant to Global Magnitsky Human Rights Accountability Act” (2020).

‘escapes’ and ‘abnormal deaths.’ At the same time, former detainees of these detention camps report that deaths occurred among fellow detainees after torture and abuse at the hands of the security officials. A large focus of these detention camps was constant surveillance, even while detainees remain totally cut off from the outside world.”

198. The sanctions notice designates Chen as “a foreign person who is or has been a leader or official of an entity, including any government entity, that has engaged in, or whose members have engaged in serious human rights abuse relating to the leader’s or official’s tenure”, and Zhu as “a foreign person who is responsible for or complicit in, or has directly or indirectly engaged in, serious human rights abuse.”

#### Discussion

199. Applying the criteria for indirect perpetration liability under Art. 25(3)(a) of the Rome Statute as set out in the *Lubanga* and *Katanga and Chui* decisions of the ICC (see paragraphs 169 to 173 above), it is clear on the evidence that:

- a. The CCP is a hierarchically organised group, and there exists a hierarchical relationship between those at different levels of the group. In fact, it appears to be a particularly extreme case of a hierarchy, with centralised control and strict discipline.
- b. There exist sufficient members of the organisation to ensure a constant supply of subordinates who will carry out the orders of their leaders. Further, any subordinates who resist are able to be easily replaced, as well as disciplined and punished: see the case of Wang Yongzhi. This underlines the capacity of those senior in the hierarchy to impose control on their subordinates.
- c. It appears likely that (a) Xi Jinping has the “final say” as to the policies and practices of the organisation; and (b) below that level, Chen Quanquo and Zhu Hailun have (Zhu less so since 2019) a high level of directorial control over the practical implementation of policies on the ground in XUAR, including devising new practical initiatives to fulfil the overall wishes of the CCP.



- d. Each of those individuals, it must be inferred, will be fully aware of their own unique role and the extent of their power. Each of them could be described as mobilising their authority and power within the organisation to secure compliance with their orders.

200. Thus the structural elements of indirect perpetrator (and potentially co-perpetrator) liability under Art. 25(3)(a) would appear to be in place in respect of each of Xi Jinping, Chen Quanguo and Zhu Hailun. As discussed above, this mode of participation is likely to be the best fit for individuals in such senior positions. In those circumstances it is not necessary to draw upon the other modes of participation in Art. 25(3), although we note that, in particular, the concepts of ordering, soliciting and inducing the commission of a crime could be available on the evidence as an alternative to indirect participation under Art. 25(3)(a). These lesser modes of participation would also be relevant to lower-ranking individuals and private actors.

201. The next question is whether these individuals have in fact, within that structure, participated in the crimes of genocide and/or crimes against humanity, within the definitions of those offences and with the mental element required by Art. 30 of the Rome Statute.

202. On the basis of the evidence reviewed above, we consider that:

- a. As we concluded in Sections 3 and 4, there is a very credible case that the treatment of the Uyghurs in XUAR amounts to crimes against humanity and involves both individual genocidal acts and a “manifest pattern of similar conduct directed against that group”.
- b. In the specific context of the Chinese State, such a range of complex and systematic acts, requiring significant logistical and financial resources, would almost certainly be impossible to implement if it did not reflect the wishes and purpose of the political leadership, including Mr Xi and those in charge of XUAR itself, in particular Mr Chen and Mr Zhu. Each of them plays a central

role in the type of organised apparatus of power which the ICC has identified in its caselaw on the individual responsibility of senior political figures.

- c. There are key aspects of the *actus reus* of the offences which the Government no longer even denies. Until around 2018, it denied the existence of the detention facilities. When that denial became untenable from 2018 onwards, because of the mounting evidence of the existence and purpose of those centres (including the leaked documents discussed above), the strategy of the Government has changed to attempting to justify those centres on the basis of security, “transformation through education” and employment.<sup>313</sup> While certain aspects are denied, including the use of violence, there is thus now no denial that the Government is running those camps. In other words, some of the aspects of the *actus rei* stem from acknowledged government policy.
- d. From the leaked documents, taken together with the rest of the evidence discussed above, it appears that:
  - i. Mr Xi controls the overall direction of State policy, and has made a range of speeches exhorting the punitive treatment of the Uyghurs.
  - ii. Mr Chen and Mr Zhu have acted upon that overall policy by devising and implementing the measures which have been carried out in XUAR, including mass detention and surveillance.

203. Applying the mental element required for a crime against humanity, each of these individuals can be taken to have devised and implemented measures which they are aware are (and which they intend to be) committed on a widespread scale and are based on a policy against the Uyghur population. They can be taken to know of (and in fact intend to initiate, direct and contribute to) the wider attack. It appears likely that they precisely intend acts to be targeted against the Uyghur population. On the available

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<sup>313</sup> See e.g. Smith Finley (2019) 17: “in the wake of international condemnation of the internment camps, the central state moved in August 2018 from denying their existence to recasting them as benign ‘vocational training centres’ that ‘rehabilitate extremists’. One might say it now sought to justify its activities as ‘necessary measures’.”

evidence there is thus, in our view, a credible case against each of these three individuals for crimes against humanity.

204. In many respects, the requirements for the mental element of genocide overlap with those for crimes against humanity. However, the specific intent to destroy is an additional mental element, unique to genocide. As discussed above, this has proved difficult to establish in a number of specific cases. However, as we noted above, such a purpose may, “in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as 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”.<sup>314</sup> Above, in Section 2, we have summarised the vast scale and systematic nature of the acts directed against the Uyghur population. We have also considered the range of State conduct from which one could readily infer an intention to destroy the Uyghur population of XUAR as a group, including the infliction of bodily and mental harm in detention (see paragraphs 25 to 31, and 135 and 138 above), the forcible removal of Uyghur children from their families (see paragraphs 55 to 59, and 141 to 142 above), and efforts to prevent births within the group (see paragraphs 37 to 40, and 139 to 140 above). We have also considered the acts directed against the cultural property of the Uyghur population (see paragraphs 60 to 65, and 107 above).

205. Taken together, we consider that, although intent to destroy is inevitably challenging to prove, there is credible evidence of the necessary intent in this case. The evidence reviewed above suggests the close involvement of Xi Jinping, Chen Quanguo and Zhu Hailun in initiating and implementing a range of measures which, taken together, target Uyghurs with a severity and to the extent that one could infer an intent to destroy the group as such. In those circumstances, we consider that there is a plausible inference that each of those three individuals possess the necessary intent to destroy, so as to support a case against them of genocide.

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<sup>314</sup> *Prosecutor v Jelisić*, Judgment (5 July 2001) para 47.

206. Given the vast scale and complexity of the measures being taken against the Uyghur population, there may be many additional individuals who could also be criminally liable, including lower-ranking officials and, potentially, individuals working for companies which use Uyghur forced labour or otherwise collaborate with the State in relation to XUAR. The scope of this Opinion is confined to the issues of state responsibility, and the responsibility of very senior officials, for the crimes discussed above, and the evidence which we have reviewed for those purposes does not allow us to draw conclusions on potential international criminal liability for lower-ranking officials and individuals working for companies which use forced labour. However, we do note that, while there is no corporate criminal liability under the Rome Statute,<sup>315</sup> individual criminal liability under the Rome Statute would extend to employees of private actors along with those working directly for the State. In each case, a relevant mode of participation, and the necessary mental element, would need to be identified, along with a sufficient connection to one or more criminal acts. Companies connected with XUAR may also qualify for Magnitsky sanctions: this is discussed further in the following section.

### *The imposition of sanctions*

207. Above, we noted that a number of individuals, including Chen Quanquo and Zhu Hailun, are now the subject of Magnitsky sanctions by the US.<sup>316</sup> Similar regimes exist in the UK under the Global Human Rights Sanctions Regulations 2020 (“the

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<sup>315</sup> Such liability is, however, included in the International Law Commission’s Draft articles on Prevention and Punishment of Crimes Against Humanity (2019).

<sup>316</sup> A broader range of measures have also been passed in the US: the Department of the Treasury records that “On July 1, 2020, the U.S. Department of State, along with the U.S. Department of the Treasury, the U.S. Department of Commerce, and the U.S. Department of Homeland Security, issued the Xinjiang Supply Chain Business Advisory, advising businesses with potential supply chain exposure to Xinjiang to consider the reputational, economic, and legal risks of involvement with entities that engage in human rights abuses in Xinjiang, such as forced labor. On May 22, 2020, the U.S. Department of Commerce added nine PRC entities related to human rights abuses in the Xinjiang region to the Commerce Entity List; this action complemented the October 2019 addition to the Commerce Entity List of 28 entities engaged in the PRC repression campaign in the Xinjiang region. Also, in October 2019, the U.S. Department of State announced a visa restriction policy under section 212 (a)(3)(C) of the Immigration and Nationality Act for PRC and Chinese Communist Party (CCP) officials responsible for, or complicit in, human rights abuses in Xinjiang.” US Treasury, “Press Release: Treasury Sanctions Chinese Entity and Officials Pursuant to Global Magnitsky Human Rights Executive Order” (2020)

**Regulations”**),<sup>317</sup> and under the recently-introduced EU Council Regulation 2020/1998.<sup>318</sup> The UK regime was used for the first time in July 2020, when the UK Government announced the imposition of sanctions against 49 individuals and organisations involved in serious human rights violations relating to Russia, Saudi Arabia, Myanmar and North Korea.<sup>319</sup>

208. The Regulations set out detailed legal criteria for the imposition of such sanctions. In summary, the Secretary of State has the power to impose sanctions on individuals who are considered to have been involved in activities which, if carried out by or on behalf of a State within the territory of that State, would amount to a serious violation by that State of an individual’s:

- a. right to life;
- b. right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment; or
- c. right to be free from slavery, not to be held in servitude or required to perform forced or compulsory labour.<sup>320</sup>

209. The factors which the UK Government will take into account in deciding whether or not to impose such sanctions have been set out in published guidance.<sup>321</sup> According to the guidance, the following factors, among others, will be taken into account:

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<sup>317</sup> Global Human Rights Sanctions Regulations 2020 (UK).

<sup>318</sup> Council Regulation (EU) 2020/1998 of 7 December 2020, concerning restrictive measures against serious human rights violations and abuses. This was followed by a detailed and strongly-worded resolution by the European Parliament: European Parliament Resolution (2020/2913 (RSP)).

<sup>319</sup> FCDO, “First Sanctions” (2020).

<sup>320</sup> See Regulation 4(2) and Regulation 6. Sanctions can be imposed on an “involved person”, which includes a natural who is “responsible for or engages in such an activity; facilitates, incites, promotes or provides support for such an activity; conceals evidence of such an activity; provides certain goods or services that contribute to such an activity or to a person who is engaged in such an activity; profits or benefits from such an activity; fails to fulfil a duty to investigate such an activity.” Sanctions are also available in respect of legal persons.

<sup>321</sup> FCDO, “Global Human Rights Sanctions” (2020).

- a. The Government's human rights priorities. The current "priority themes" are said to include "media freedom, combatting modern slavery, preventing sexual violence in or related to conflict, freedom of religion or belief, torture prevention and the protection of human rights defenders."
- b. The nature of the victim. The guidance states that "HMG is likely to give particular attention to activities that are carried out in relation to individuals who seek to obtain, exercise, defend or promote human rights, such as journalists, civil society activists, human rights defenders and whistle-blowers."
- c. The seriousness of the conduct: "HMG is likely to consider the scale, impact and nature both of the human rights violation or abuse and a person's involvement in that human rights violation or abuse, including whether the conduct has a systematic nature or is part of a pattern of behaviour."
- d. "International profile and collective action: HMG is likely to give particular consideration to cases where international partners have adopted, or propose to adopt, sanctions and where action by the UK is likely to increase the effect of the designation in addressing the issue in question."
- e. The involvement of non-State actors.
- f. The status and connections of the involved person: "In circumstances where there are a range of persons who could be considered for designation by virtue of their involvement in a human rights violation or abuse, HMG is likely to consider which designation(s) would have most impact in providing accountability for the violation or abuse in question. This may involve considering, for example, the position of the person in the hierarchy of an organisation, and whether the person has particular links to the UK, including whether such persons would be particularly affected by travel or financial restrictions under the Regulations."
- g. The effectiveness of other measures, including law enforcement.

210. Based on the above analysis of individual criminal liability, we consider that there is clearly a powerful argument that Xi Jinping, Chen Quango and Zhu Hailun meet the legal criteria in the Regulations for the imposition of sanctions in the UK, particularly in respect of the use of forced labour. As to the criteria set out in the guidance, the case of XUAR falls within several of the “priority themes”, including combatting modern slavery, freedom of religion or belief, and torture prevention. As we have discussed above, the human rights violations in XUAR are on a mass scale and appear to be systematic, and these three individuals are clearly in very senior roles in the hierarchy (although we do not know whether they have any particular links to the UK). Further, the US, a key UK ally, has taken vigorous action under its own sanctions regime, similar action by the EU may be imminent, and the impact of those sanctions would be increased by a UK designation. In light of all the evidence, we consider that it would be possible to put together a powerful case in favour of UK sanctions in relation to XUAR. Related to this, we also note that, on 12 January 2021, the UK Government announced a package of measures directed at UK organisations in the public and private sectors, aimed at ensuring that they are neither complicit in, nor profiting from, human rights violations in XUAR.<sup>322</sup>

211. As noted above, the UK human rights sanctions regime also applies to legal persons, public and private. Following the individual sanctions discussed above, the US has recently imposed further sanctions on the XPCC, describing it as “a paramilitary organization in the XUAR that is subordinate to the Chinese Communist Party (CCP)”, and which “enhances internal control over the region by advancing China’s vision of economic development in XUAR that emphasizes subordination to central planning and resource extraction.” It states that Chen Quanguo “is the current First Political Commissar of the XPCC, a role in which he has exercised control over the entity”, and that “[t]he XPCC has helped implement Chen’s CCP policy in the region.” The XPCC was designated

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<sup>322</sup> FCDO, Home Office, DIT, “Business Measures” (2021). The UK Foreign Secretary, Dominic Raab, states in the announcement that “The evidence of the scale and severity of the human rights violations being perpetrated in Xinjiang against the Uyghur Muslims is now far reaching. Today we are announcing a range of new measures to send a clear message that these violations of human rights are unacceptable, and to safeguard UK businesses and public bodies from any involvement or linkage with them.” Guidance for UK businesses on the human rights risks, among other risks, involved in doing business with China has been updated - FCDO, “Overseas Business Risk – China” (updated 2021).

for “being owned or controlled by, or for having acted or purported to act for or on behalf of, directly or indirectly, Chen.” Two further individuals were designated: Peng Jiarui, the Deputy Party Secretary and Commander of the XPCC, and Sun Jinlong, a former Political Commissar of the XPCC.

212. While individual accountability has been the focus of our analysis, we consider that there is clearly also scope to seek sanctions against the XPCC, and potentially private companies which are involved in, and/or profit from, the use of forced labour in XUAR. There may also be potential civil avenues of redress available in domestic courts in respect of companies which use forced labour in XUAR. We note that, for example, recent decisions of the UK and Canadian Supreme Courts<sup>323</sup> indicate the possibility that, where the evidence is sufficient, UK or Canada-based companies may face civil liability for the involvement of their subsidiaries in serious human rights violations, including the use of forced labour. As noted above,<sup>324</sup> the UK Government has also very recently highlighted the range of legal and regulatory risks facing UK companies which enable, profit from, or fail to take sufficient steps to guard against, the use of forced labour in XUAR in their supply chains. Such civil and regulatory means of prevention and redress are a complex topic which would deserve careful consideration in their own right: for the purposes of the present Opinion, we note that this is a rapidly-emerging and potentially very significant means of responding to the crimes discussed in this Opinion.

### *Conclusion*

213. For the reasons given above, we consider that there is a very credible case that crimes against humanity of enslavement, torture, rape, enforced sterilisation and persecution,

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<sup>323</sup> Respectively, *Lungowe and others v Vedanta Resources plc and another* [2019] UKSC 20; [2019] 2 WLR 1051; *Nevsun Resources Ltd v Araya* 2020 SCC 5. In the latter decision, the Canadian Supreme Court allowed to proceed to trial a civil claim against a Canadian company, alleging its complicity in the use of forced labour in a mine in Eritrea. The legal basis of the claims is novel, including allegations of the violation of customary international law principles relating to forced labour, torture, slavery, and crimes against humanity.

<sup>324</sup> See footnote 318 above.



and the crime of genocide, are being committed against the Uyghur population of XUAR, China.

214. Serious international crimes are of concern to all States, and, in line with the authors of other reports, we consider there to be a strong imperative for national governments to take urgent action to prevent the ongoing atrocities committed against the Uyghur population of XUAR.<sup>325</sup> At the very least, national governments should render official statements recognising the atrocities being committed and stating their view that there is evidence of the commission of crimes against humanity and/or genocide. They may also consider whether it is possible for them to exercise criminal jurisdiction over any individuals suspected of the crime and/or to impose Magnitsky sanctions in line with their domestic legislation. They should also initiate and engage in diplomatic efforts to demand a full and transparent investigation into the facts on the ground, the trial and punishment of those found to be responsible for any international crimes, and the cessation of further atrocities against the Uyghur population.

**Alison Macdonald QC**  
**Jackie McArthur**  
**Naomi Hart**  
**Lorraine Aboagye**

**26 January 2021**

Essex Court Chambers  
24 Lincoln's Inn Fields  
London  
WC2A 3EG UK

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<sup>325</sup> See, e.g. "Responsibility of States under International Law to Uyghurs and other Turkic Muslims in Xinjiang, China" (BHRC, 2020) which sets out a list of recommendations and steps that all States can immediately take, in line with their international obligations.