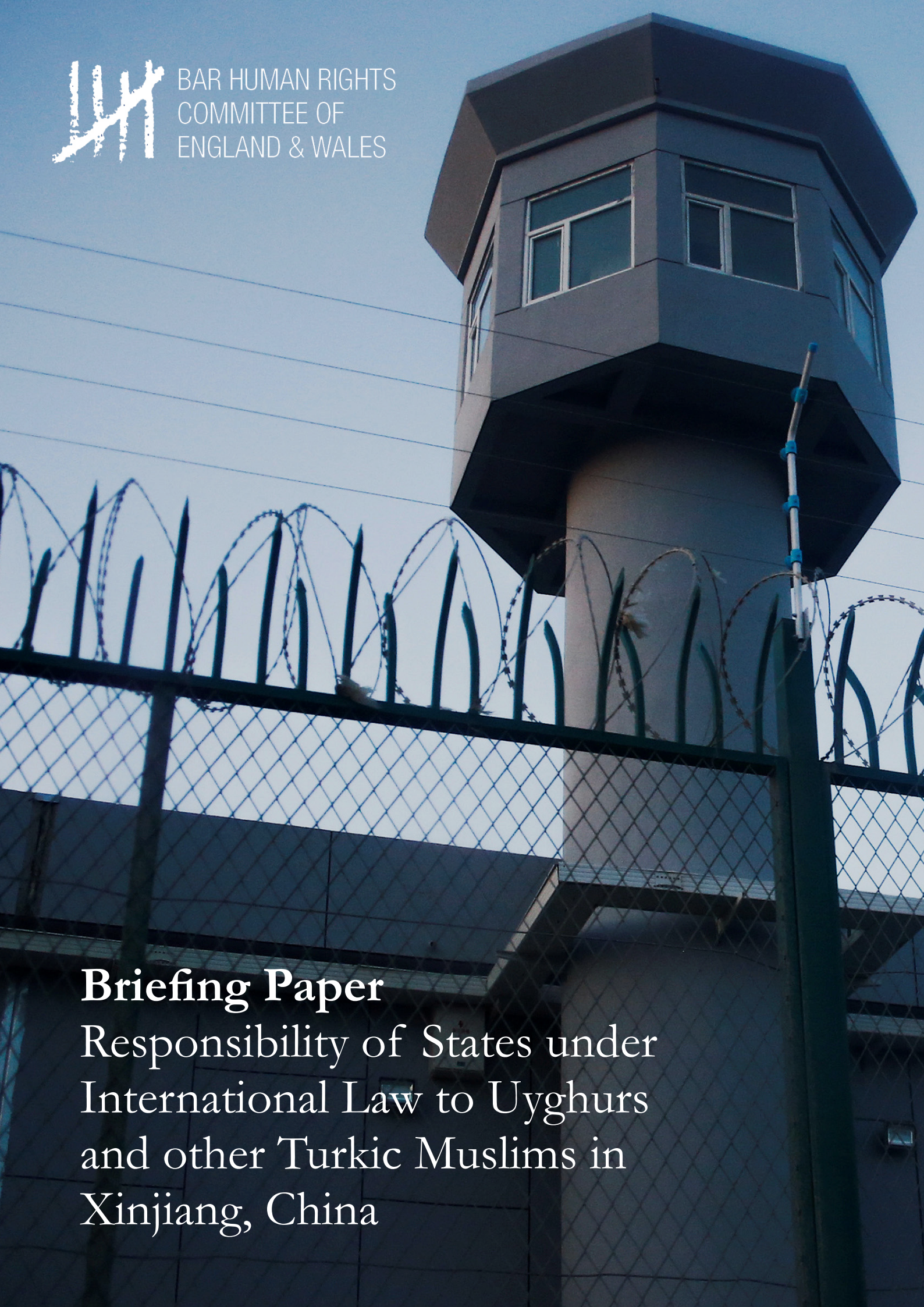




BAR HUMAN RIGHTS  
COMMITTEE OF  
ENGLAND & WALES



**Briefing Paper**  
Responsibility of States under  
International Law to Uyghurs  
and other Turkic Muslims in  
Xinjiang, China



**This is a high-level briefing paper only. It does not constitute legal advice. It does not address the specific circumstances of any individual case and cannot be relied upon for that purpose.**

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**Front Cover Photo: Thomas Peter (Reuters)**

A guard watchtower rises along a perimeter fence of what is officially known as a vocational skills education centre in Dabancheng in Xinjiang Uighur Autonomous Region, China September 4, 2018.

## Forward

With multiple reports continuing to emerge of alleged atrocities in Xinjiang, China, remaining silent is no longer an option for the international community.

The international legal order was created, in part, to ensure that the most vulnerable populations would be protected by it.

This impressive high-level Briefing Paper, produced and published by the Bar Human Rights Committee of England and Wales, under the leadership of its Chair, Schona Jolly QC, is a timely and important intervention on the grave allegations of systematic persecution of Uyghur and other Turkic Muslim people in Xinjiang.

It not only throws light onto a corner of the world which has been kept in darkness, but also seeks to engage the international community, through its parliamentarians and diplomats, by encouraging it to take meaningful steps in accordance with international human rights law and international criminal law.

The Paper is grounded in careful research and thoughtful legal scholarship, meriting wide consideration amongst those charged with maintaining the international legal order.

We strongly welcome the clarity and commitment to international human rights which this report engenders. It also provides timely practical next steps which governments, and in particular the British Government, should urgently consider.

The Paper is published in the aftermath of the announcement of the UK's new sanction regime of Magnitsky powers. These may be utilised to boost protection for persecuted groups. We are pleased that the Paper refers to this.

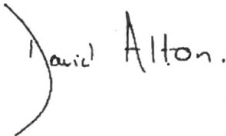
The Paper also considers, at a high-level, the potential availability of domestic or corporate accountability routes, which are an important tool in seeking accountability for human rights violations in the twenty first century.

This Paper makes clear that, whilst international legal accountability for alleged crimes of the most serious order in Xinjiang may be limited, alternative routes exist which the international community can use to place pressure on China to meet its own legal obligations towards all peoples within its border, as well as addressing the legal obligations of States other than China.

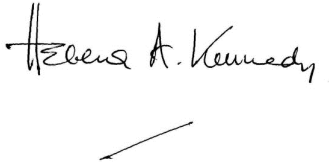
We commend this report to the UK government, to governments of EU member states and all other nations who have committed to prevent atrocities and to protect minorities from persecution.

It is an important step away from impunity towards accountability for allegations of some of the most serious human rights violations of our time.

July 2020

Handwritten signature of David Alton in black ink.

Lord David Alton of Liverpool

Handwritten signature of Helena Kennedy in black ink, with a long horizontal stroke below it.

Baroness Helena Kennedy  
QC of the Shaws

## Acknowledgements

This Briefing Paper has been produced by the Bar Human Rights Committee of England and Wales (“BHRC”). It was co-authored, and contributed to, by a leading group of human rights barristers and academics, who are BHRC members. The Paper was led, written and directed under the Chairship of Schona Jolly QC, who is also a contributing author, among others including Aarif Abraham and David McNeill. BHRC wishes to acknowledge the substantial contributions from other authors who wish to remain anonymous, owing to the possibility of reprisals for their connection with this work. We also acknowledge and thank additional individuals for their support with factual and open source research, and in particular Mira Hammad and students from the Amsterdam International Law Clinic under the supervision of Professor Kevin Jon Heller. Finally, BHRC acknowledges the invaluable and courageous work done by many individuals, including witnesses, survivors, victims, journalists and investigators in bringing to light the factual accounts necessary in order for the international community to take urgent, concrete and practical action.

## About the Bar Human Rights Committee

BHRC is the international human rights arm of the Bar of England and Wales. It is an independent body, distinct from the Bar Council of England and Wales, dedicated to promoting principles of justice and respect for fundamental human rights through the rule of law. Membership of the BHRC is comprised of barristers practicing at the Bar of England and Wales, legal academics and law students. BHRC’s Executive Committee members and general members offer their services pro bono, alongside their independent legal practices, teaching commitments and/or legal studies. BHRC employs two members of staff.

BHRC aims to:

- uphold the rule of law and internationally recognised human rights norms and standards;
- support and protect practicing lawyers, judges and human rights defenders who are threatened or oppressed in their work;
- further interest in and knowledge of human rights and the laws relating to human rights, both within and outside the legal profession;
- support and co-operate with other organisations and individuals working for the promotion and protection of human rights.

The remit of BHRC extends to all countries of the world, apart from its own jurisdiction of England and Wales. This reflects the Committee's need to maintain its role as an independent but legally qualified observer and critic.

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# Executive Summary

## Executive Summary

The severe ill-treatment, repression and abuse of Uyghurs and other Turkic Muslims by the Chinese State has been widely reported and these allegations have emanated from a number of diverse and credible sources. The allegations, if proven, would constitute very serious violations of international human rights and international criminal law; violations which are alleged to be continuing even now. The allegations must be taken seriously, and urgently, by the international community, and pursued using all appropriate means available, including by reference to international law and the international legal framework.

Alleged violations include the mass surveillance and arbitrary detention of over 1 million Uyghurs and other Turkic Muslims,<sup>1</sup> torture and inhuman treatment of detainees, the forced separation of children from their parents, the denial of the right to practice their religion or speak their language, forced sterilisation, forced labour, forced organ harvesting, enforced disappearances and killings in detention.

This Briefing Paper aims to provide a high-level overview of the international human rights and international criminal law framework applicable to the alleged ill-treatment, repression and abuse of Uyghur and other Turkic Muslim communities by the Chinese State. The Paper considers: the legal mechanisms that States may utilise in order to invoke China's responsibility for alleged violations of its international human rights obligations; the legal interest of States other than China in ensuring China's compliance with its international human rights obligations; and the recommended measures that States other than China should take to ensure China's compliance and prevent ongoing and future violations.

China is a state party to a number of international human rights and international criminal law treaties which:

- i. prohibit China (or others within its jurisdiction) from violating the rights of its citizens and/or commit crimes against them;
- ii. impose upon China, in some instances, a duty to prevent crimes or rights violations before they arise and, in particular, serious crimes such as torture, genocide, slavery and discrimination; and/or
- iii. require China to fulfil a duty to punish perpetrators of crimes or rights violations when they occur.

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<sup>1</sup> Statement of Purpose, Uyghur Human Rights Policy Act of 2020 (United States of America).



There is evidence emanating from a number of sources (including independent bodies) that have given rise to the allegations raising serious concerns that obligations and/or duties under a number of international treaties, ratified or accepted by China, have been violated. The treaties which may have been contravened include the:

- iv.** Convention on the Elimination of All Forms of Racial Discrimination (“**CERD**”);
- v.** Convention on the Prevention and Punishment of the Crime of Genocide (“**Genocide Convention**”);
- vi.** Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (“**UNCAT**”);
- vii.** Convention on the Elimination of All Forms of Discrimination against Women (“**CEDAW**”);
- viii.** Convention on the Rights of the Child (“**CRC**”); and
- ix.** Slavery Convention.

China is duty-bound under international law to respect, protect and fulfil in good faith all of its responsibilities. Under the aforementioned treaties, China must interpret, apply and fulfil its obligations in line with international jurisprudence and guidance. As a minimum, China must respect and ensure respect for the rights guaranteed under those treaties to all persons in its jurisdiction, without discrimination. Ensuring respect for the rights guaranteed entails not only refraining from any conduct that undermines the enjoyment of those rights, but also investigating all allegations of violations of those rights by State and non-state actors and providing effective remedies to individuals who suffer harm.

BHRC considers that there are no current or reliable avenues for the fair, independent and impartial resolution domestically within China. It is, therefore, reasonable for States and individuals to look to international legal mechanisms in order to enforce China’s obligations under international law by requiring China to: cease continuing violations of its international human rights obligations; prevent future violations; and provide a remedy for harm suffered.

There exist, however, certain limitations upon holding China legally accountable for alleged violations/crimes. These include the fact that China has placed reservations on the dispute resolution clauses, complaints clauses, and inter-State resolution mechanisms that would allow the treaties to which it is a State party to be enforced. This precludes individuals and States from seeking to enforce China’s obligations under most of these treaties in a formal court of law or an international, independent, impartial forum.

Such legal obstacles do not exist with respect to CERD. China has not made a reservation to Article 11 CERD according to which States Parties accept the competence of the Committee on the Elimination of Racial Discrimination to examine inter-State disputes regarding the application of the Convention. Much of the alleged treatment suffered by Uyghurs violates the rights guaranteed by CERD. The Committee on the Elimination of Racial Discrimination provides a means by which State Parties to CERD can, and should, seek to invoke China's international responsibility with respect to its treatment of Uyghurs.

Moreover, China and, in particular, the world at large is not absolved of responsibility. The alleged mistreatment of members of Uyghur and other Turkic Muslim communities, by China, raises serious concerns of systemic and persistent violation of human rights and *jus cogens* norms<sup>2</sup> and is a matter of grave concern to the international community as a whole (*erga omnes*).<sup>3</sup> It is the responsibility of all States to take all available measures to prevent any violations of international law from occurring, to seek to bring any on-going violations to an end, and to call upon China to immediately cease all and any alleged practices and policies - violating its obligations and responsibilities - towards Uyghurs and other Turkic Muslims.

All States, including China, have unequivocally accepted that slavery and racial discrimination, torture and genocide are prohibited: they have committed to not carry out those proscribed acts; they have committed to their prevention; and they have committed to punishment of perpetrators where they have found individuals to have committed those proscribed acts. There can be no derogation from those commitments. As such, all States have a right to invoke the responsibility of China for any failure to uphold its obligations under the aforementioned conventions and/or customary international law, and any resulting violations of *jus cogens* norms and *erga omnes* (*partes*) obligations.

States other than China may, and should, ensure China's compliance with its international obligations by: invoking its responsibility in any available international

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<sup>2</sup> A *Jus cogens* or peremptory norm is a norm accepted and recognised by the international community of States as a whole, from which no derogation is permitted. (Art 53, 64 VCLT 1969); According to the International Law Commission (ILC), 'Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination' (ILC, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries', November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1., pp. 112-113.)

<sup>3</sup> *Erga omnes* obligations are considered to be of such fundamental importance that "all states can be held to have a legal interest in their protection." According to the ICJ, obligations *erga omnes* "derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination": *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Merits) [1970] ICJ Reports 3, paras 33-34. See also *East Timor (Portugal v Australia)*, Judgment, [1995] ICJ Reports 90, para. 29; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996], ICJ Reports 264; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objections, Judgment, I.C.J. Reports 1996, p. 595, at pp. 615-616, paras. 31-32. Note that some obligations are *erga omnes partes* which means that "each State party has an interest in compliance with them in any given case". (*Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, ICJ Reports 2012 p.422, para. 69).

forums including at the United Nations and, in particular, international dispute mechanisms (such as the Committee for the Elimination of Racial Discrimination); using all diplomatic means and good offices of the State; and/or by implementing Magnitsky-type sanctions on individual perpetrators of grave human rights violations.

There may also be domestic avenues of recourse open to States. States should take steps under domestic law to ensure that international corporations that operate in, or whose supply chains are linked to, Xinjiang Uyghur Autonomous Region (“**Xinjiang**” or “**XUAR**”) implement measures and conduct necessary due diligence to ensure that their operations do not contribute in any way to the commission of alleged violations of human rights in XUAR by the Chinese authorities.

The detailed recommendations and steps that all States can immediately consider and make effective, in line with their international obligations, appear at the end of this Briefing Paper.

# Summary of Facts

# Summary of Facts

## Introduction

1. International organisations have faced difficulties investigating the human rights situation within the Xinjiang Uyghur Autonomous Region (“**Xinjiang**” or “**XUAR**”).<sup>4</sup> Human rights organisations have claimed that visits to the region by foreign diplomats and UN human rights experts are managed by the Chinese authorities to disguise human rights abuses.<sup>5</sup> Foreign journalists have also faced difficulties in reporting from XUAR.<sup>6</sup> For that reason, the primary sources underlying the reports upon which this summary is based are threefold: accounts from individuals with direct experience of the situation or their family members; covertly obtained audio-visual evidence through journalistic investigation; and official documents including the so-called ‘China cables’. We emphasise that BHRC has not made any factual findings based on its own independent investigations but it relies on open source reporting and investigations (which are referenced throughout the report) in order to explain the context in which the allegations arise.
2. The ‘China cables’ are a series of highly classified Chinese government documents which were obtained by the International Consortium of Investigative Journalists (“**ICIJ**”) in November 2019 via a chain of exiled Uyghurs. The Chinese government alleges that these documents are fake.<sup>7</sup> The ICIJ is confident that the documents are genuine and they have been verified by leading experts.<sup>8</sup>

## Detention facilities

3. Uyghurs, and other predominantly Turkic Muslim peoples, including of Kazakh origin, originating from the XUAR are held in detention facilities for long periods of time incommunicado; without charge or trial.<sup>9</sup> The number of people detained in these facilities is unknown. It is widely reported, however, to be upwards of 1 million and possibly in the region of 1.5 million, which would be equivalent to just under one in six adult members of the predominantly Muslim peoples of XUAR.<sup>10</sup>

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<sup>4</sup> China: “Where are they?” Time for answers about mass detentions in the Xinjiang Uyghur Autonomous region’, *Amnesty International*, p.5 2018.

<sup>5</sup> ‘UN: Unprecedented Joint Call for China to End Xinjiang Abuses’, *Human Rights Watch*, 10 July 2019.

<sup>6</sup> M. Forsythe, ‘China Says It Will Expel French Journalist’, *New York Times*, 19 January 2018; A. Ramzy & E. Wong, ‘China forces out BuzzFeed journalist’, *New York Times*, 24 August 2018; ‘Harassment of journalists in China: reporters covering Xinjiang prevented from conducting interviews’, *Foreign Correspondents Club of Hong Kong*, December 2017.

<sup>7</sup> G. Baker, “‘China cables’ reveal secrets of country’s Xinjiang detention camps after leak to foreign media’, *Reuters*, 25 November 2019.

<sup>8</sup> F. Shiel, ‘About the China cables investigation’, *International Consortium of Investigative Journalists*, 23 November 2019.

<sup>9</sup> ‘Concluding observations on the combined fourteenth to seventeenth periodic reports of China (including Hong Kong, China and Macao, China)’, Committee on the Elimination of Racial Discrimination, para. 40, 30 August 2018.

<sup>10</sup> P. DeHahn, ‘More than 1 million Muslims are detained in China – but how did we get that number?’, *Quartz*, 4 July 2018.



4. The camps were instituted in 2014 and expanded rapidly in 2017.<sup>11</sup> They are described by the Chinese authorities as voluntary vocational skills training centres; part of a strategy to offset religious extremism and separatism in XUAR.<sup>12</sup> Numerous independent sources, however, suggest that individuals living in the camps are arbitrarily deprived of their liberty and a leaked camp guidance manual directs that there should be ‘no escape’ from the facilities.<sup>13</sup>

### Conditions and treatment of detainees

5. First-hand accounts<sup>14</sup> and leaked documents<sup>15</sup> suggest that individuals held in these camps are targeted for detention on the basis of expressions of ethno-religious identity, such as frequent attendance at mosques, maintaining a ‘heavy religious environment’ at home, harbouring ‘strong religious beliefs’, returning from travel abroad to a Muslim-majority country or an imputed desire to travel for religious pilgrimage and growing a beard. As a result, detainees are almost exclusively or exclusively Muslim.
6. Physical harm experienced by those being held in the facilities include being given electric shocks, being forced to remain in stress positions for an extended period of time, being beaten, being deprived of food, being shackled and blindfolded and being forced to take unidentified drugs which have caused detainees to experience blackouts.<sup>16</sup>

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<sup>11</sup> A. Ramzy, C. Buckley, “‘Absolutely no mercy’: Leaked files expose how China organised mass detention of Muslims”, *The New York Times*, 16 November 2019.

<sup>12</sup> ‘Vocational education and training in Xinjiang’, *State Council Information Office of the People’s Republic of China*, August 2019.

<sup>13</sup> ‘Concluding observations on the combined fourteenth to seventeenth periodic reports of China (including Hong Kong, China and Macao, China)’, *Committee on the Elimination of Racial Discrimination*, para. 38, 30 August 2018; E. Graham-Harrison, J. Garside, “‘Allow no escapes’: leak exposes reality of China’s vast prison camp network”, *The Guardian*, 24 November 2019; H. Uyghur, ‘I risked my life getting my parents out of a Chinese Uyghur Muslim detention. I need your help to save more’, *The Independent*, 27 November 2019; P. Irwin, ‘China’s brutal treatment of the Uyghurs has been laid bare – the world must no longer look away’, *The Independent*, 25 November 2019; T. Regencia, ‘Escape from Xinjiang: Muslim Uyghurs speak of China persecution’, *Al-Jazeera English*, 10 September 2018; S. Hoshur, J. Lipes, ‘Nearly 10 percent of residents of a Xinjiang township detained by Chinese authorities’, *Radio Free Asia*, 14 December 2017; S. Hoshur, J. Lipes, ‘Nearly half of Uyghurs in Xinjiang’s Hotan targeted for re-education camps’, *Radio Free Asia*, 9 October 2017; S. Hoshur, J. Lipes, ‘Re-education camps in two Xinjiang counties hold thousands of Uyghurs’, *Radio Free Asia*, 29 September 2019.

<sup>14</sup> ‘Eradicating Ideological Viruses: China’s campaign of repression against Xinjiang’s Muslims’, *Human Rights Watch*, p.31 September 2019.

<sup>15</sup> Editorial Board, ‘How China corralled 1 million people into concentration camps’, *The Washington Post*, 29 February 2020; A. Ramzy, ‘How China tracked detainees and their families’, *New York Times*, 17 February 2020; I. Watson, B. Westcott, ‘Watched, judged, detained’, *CNN*, November 2019.

<sup>16</sup> ‘How to Brainwash a Million People’, *BBC Panorama Investigation*, interview given by former detainee, aired 25 November 2019; P. Stubbley, ‘Muslim women “sterilised” in China detention camps, say former detainees’, *The Independent*, 12 August 2019; Agence France-Presse, ‘Mike Pompeo urges China to immediately halt detention of Uyghurs in Xinjiang’, *The Guardian*, 28 March 2019; E. Meixler, “‘I begged them to kill me.’ Uyghur woman tells Congress of torture in Chinese internment camps”, *TIME Magazine*, 29 November 2018; D. Byler, ‘China’s high-tech war on its Muslim minority’, *The Guardian*, 11 April 2019; China: “‘Where are they?’ Time for Answers About Mass Detentions in the Xinjiang Uyghur Autonomous region”, *Amnesty International*, p.14 2018; ‘Eradicating Ideological Viruses: China’s campaign of repression against Xinjiang’s Muslims’, *Human Rights Watch*, p.33, September 2019; L. Kuo, ‘China footage reveals hundreds of blindfolded and shackled prisoners’, *The Guardian*, 23 September 2019; S. Yan, ‘I begged them to kill me, Uyghur woman describes torture to US politicians’, *The Telegraph*, 28 November 2018.

7. Gender-specific and sexual harm has been widely reported. Women in detention reported being implanted with contraceptive devices against their will and forced to undergo treatment which disrupted their menstrual cycle whilst in detention.<sup>17</sup> Women in detention also reported widespread rape and sexual humiliation, from being filmed in the shower to having their genitalia rubbed with chilli paste.<sup>18</sup>
8. There are reports of other forms of physical and/or psychological harm, including solitary confinement, being kept in a frigid room for 24 hours at a time, indefinite detention and humiliation including compulsory sessions of self-criticism and criticism of other detainees.<sup>19</sup> Up to 20 detainees at a time have reportedly been held in 16m<sup>2</sup> rooms with a shared toilet bucket emptied once a day.<sup>20</sup>
9. Deaths have reportedly occurred due to the conditions in the camps, including suicides by detainees following mistreatment.<sup>21</sup> Information as to the number and nature of deaths is sparse and Uyghur relatives living in the diaspora allege that this is due to a deliberate information vacuum created by the Chinese authorities to mask the deaths of missing relatives. They also allege that the Chinese authorities are underplaying deaths related to conditions in the camps allowing the spread of COVID-19.<sup>22</sup> The UN Human Rights Council has also heard evidence, emanating from the China Tribunal, of forced organ harvesting from a number of Uyghur detainees.<sup>23</sup>

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<sup>17</sup> E. Lynch, 'China's attacks on Uyghur women are crimes against humanity', *The Washington Post*, 21 October 2019; A. Ferris-Rotmanm A. Toleukhan, E. Rauhala, A. Fifield, 'China accused of genocide over forced abortions of Uyghur Muslim women as escapees reveal widespread sexual torture', *The Independent*, 6 October 2019; Z. Rahim, 'Prisoners in China's Xinjiang concentration camps subjected to gang rape and medical experiments, former detainee says', *The Independent*, 22 October 2019; China Tribunal Summary Judgment, paras. 94 – 99; 17 June 2019.

<sup>18</sup> A. Ferris-Rotmanm A. Toleukhan, E. Rauhala, A. Fifield, 'China accused of genocide over forced abortions of Uyghur Muslim women as escapees reveal widespread sexual torture', *The Independent*, 6 October 2019S. Hoshur, R. Vandenbrink, 'Uyghur woman forced to abort six-month pregnancy while ill', *Radio Free Asia*, 13 January 2014; P. Stublely, 'Muslim women 'sterilised' in China detention camps, say former detainees', *The Independent*, 12 August 2019.

<sup>19</sup> C. Buckley, 'China is detaining Muslims in vast numbers. The goal: transformation', *The New York Times*, 8 September 2018; M. Clarke, 'Patriotic songs and self-criticism: why China is 're-educating' Muslims in mass detention camps', *The Conversation*, 25 July 2018; N. Bequelin, 'Mezut Ozil's free speech on China must be preserved, even if Arsenal stay silent', *The Independent*, 17 December 2019; N. Cumming-Bruce, 'Rights groups seek UN inquiry into China's mass detention of Muslims', *The New York Times*, 4 February 2019; 'Eradicating Ideological Viruses: China's campaign of repression against Xinjiang's Muslims', *Human Rights Watch*, p.50-53, September 2019; V. Chaudhry, 'The impact of COVID-19 on Uyghur Muslims: an ignored crisis', *LSE Blogs*, 23 April 2020.

<sup>20</sup> E. Brazell, 'Coronavirus could be used to cover up Muslim concentration camp deaths, families fear', *The Metro*, 6 February 2020.

<sup>21</sup> 'China: "Where are they?" Time for Answers About Mass Detentions in the Xinjiang Uyghur Autonomous region', *Amnesty International*, p.14 2018; S. Denyer, 'Former inmates of China's Muslim 're-education' camps tell of brainwashing, torture', *Washington Post*, 16 May 2018; I. Watson, B. Westcott, 'Uyghur refugee tells of death and fear inside China's Xinjiang camps', *CNN*, 21 January 2019; 'Submission to the UN Universal Periodic Review People's Republic of China 31<sup>st</sup> Session of the Human Rights Council', *Uyghur Human Rights Project*, p. 2-3, November 2018.

S. Hoshur, J. Lipes, 'Two Uyghur students die in China's custody following voluntary return from Egypt', *Radio Free Asia*, 21 December 2017; H.R. 649 Uyghur Human Rights Policy Act of 2019, Findings s.4(10), *US Congress*, introduced 17 January 2019.

<sup>22</sup> A. Remzy, 'Xinjiang returns to work, but Coronavirus worries linger in China', *The New York Times*, 30 March 2020; I. Watson et. Al, 'Uyghur refugee tells of death and fear inside China's Xinjiang camps', *CNN*, 21 January 2019.

<sup>23</sup> W. Martin, 'China is harvesting thousands of human organs from its Uyghur Muslim minority, UN human rights body hears', *Business Insider*, 25 September 2019; A. Withnall, 'China is killing religious and ethnic minorities and harvesting their organs, UN Human Rights Council told', *The Independent*, 24 September 2019; China Tribunal Summary Judgment, paras. 87 – 91; 17 June 2019.

10. Activities within the camps are designed to specifically target and erase Uyghur and other Muslim minority culture and identity. These activities include being forced to learn Mandarin Chinese and banned from speaking their own languages, being forced to sing the praises of the Chinese Communist Party and memorise rules such as ‘*We can now no longer say Islamic greetings.*’ Detainees are only to be released once they can demonstrate that they have transformed their behaviour, beliefs and language.<sup>24</sup> Once detainees have demonstrated sufficiently to the camp authorities that their ‘mental state is healthy’ they are released, although sometimes into house arrest or into factory work (see forced labour section below).<sup>25</sup>
11. Children have been held in the detention camps, including a 17-year-old boy who died in detention.<sup>26</sup> The number of children being held in detention, including their age range, requires further investigation.

### Forced labour

12. ‘Graduating’ detainees (i.e. detainees who have ‘transformed’ their beliefs and, therefore, been released) have reportedly been sent directly to work in factories in other parts of China as part of a wider government-led labour transfer scheme.<sup>27</sup> This scheme is reported to involve Uyghur workers being placed in factories both within Xinjiang and transferred to factories in the rest of China. The Australian Strategic Policy Institute estimates that at least 80,000 Uyghurs were transferred out of Xinjiang and assigned to factories through a central government policy.<sup>28</sup>
13. The Chinese authorities assert that the work assignments are voluntary. Some reported aspects of the programme, however, bear notable hallmarks of coerced labour. The factories themselves are subject to high level security including fencing and security towers and are heavily guarded. Official documents suggest that some factories work closely with detention camps.<sup>29</sup> Factory workers reportedly: undergo organised Mandarin and ‘ideological’ training outside working hours; are forbidden from participating in religious observance; have limited freedom

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<sup>24</sup> ‘Eradicating Ideological Viruses: China’s campaign of repression against Xinjiang’s Muslims’, *Human Rights Watch*, p.38-40, September 2019; ‘How to Brainwash a Million People’, *BBC Panorama Investigation*, see interviews given by former camp instructor, interview given by former detainee and interview by Ben Emmerson QC, aired 25 November 2019; ‘Data leak reveals how China ‘brainwashes’ Uyghurs in prison camps’, *BBC News*, 24 November 2019.

<sup>25</sup> G.Bunn, ‘Detainees are trickling out of Xinjiang’s camps’, *Foreign Policy Magazine*, 18 January 2019; T. Grose, ‘Once their mental state is healthy, they will be able to live happily in society’: How China’s government conflates Uyghur identity with mental illness’, *ChinaFile*, 2 August 2019.

<sup>26</sup> S. Hoshur, J. Lipes, ‘Uyghur teenager dies in custody at political re-education camp’, *Radio Free Asia*, 14 March 2018.

<sup>27</sup> V. Xiuzhong Xu, D. Cave, J. Leibold, K. Munro, N. Ruser, ‘Uyghurs for sale: ‘re-education’, forced labour and surveillance beyond Xinjiang, policy brief report no. 26/2020’, *Australian Strategic Policy Institute*, p.18, 1 March 2020.

<sup>28</sup> *Ibid*, p.3.

<sup>29</sup> C. Buckley, A. Ramzy, ‘Inside China’s push to turn Muslim minorities into an army of workers’, *The New York Times*, 30 December 2019; E. Dou, C. Deng, ‘Western companies get tangled in China’s Muslim clampdown’, *The Wall Street Journal*, 16 May 2019.

of movement; and are assigned ‘minders.’<sup>30</sup> They are, reportedly, not allowed to return to Xinjiang.<sup>31</sup> Reports suggest that payment differs from factory to factory, with some being paid ‘very low wages’ and some transferred detainees not being paid at all for their work.<sup>32</sup>

14. United States Customs and Border Protection officers recently detained a shipment of hair products, including almost 13 tons of wigs made from human hair, on the basis of suspected links to the use of forced labour in XUAR.<sup>33</sup>

### **Commercial links to detention facilities and forced labour**

15. The detention facilities, forced labour and state surveillance in XUAR are reportedly supported by a variety of governmental and private sector organisations.
16. The cotton industry is particularly important to the region. The Xinjiang provincial government has a target of employing 1 million workers in its textile industry by 2023,<sup>34</sup> a target that observers believe cannot be achieved without coercion, given the low wages offered to textile workers.<sup>35</sup> China produces 22% of the world’s cotton, of which over 80% is grown in Xinjiang (although 99% of XUAR’s cotton is sold within China).<sup>36</sup> Other important products are tomatoes, hops, lavender, shoes and finished textiles.<sup>37</sup> By some estimates XUAR produces 20% of the world’s tomato paste.<sup>38</sup>
17. State owned entities are reported to administer detention centres as well as commercial businesses reliant on forced labour, and together with their subsidiaries are responsible for over a large proportion of XUAR’s cotton production.<sup>39</sup> Local companies operating in Xinjiang are commonly “paired” with companies from eastern China. The eastern companies provide both financial investment into XUAR and also help run “vocational training” programmes which directly involve those subject to forced labour.<sup>40</sup>

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<sup>30</sup> Xiuzhong Xu, D. Cave, J. Leibold, K. Munro, N. Ruser, ‘Uyghurs for sale: ‘re-education’, forced labour and surveillance beyond Xinjiang, policy brief report no. 26/2020’, *Australian Strategic Policy Institute*, p.3 March 2020.

<sup>31</sup> A. Fifield, ‘China compels Uyghurs to work in a shoe factory that supplies Nike’, *The Washington Post*, 29 February 2020.

<sup>32</sup> D. Kang, M. Mendoza, Y. Wang, ‘US sportswear traced to factory in China’s internment camps’, *The Associated Press*, 19 December 2018.

<sup>33</sup> B. Allen-Ebrahimian, J. Swan, ‘Scoop: U.S. seizes \$800,000 shipment of Xinjiang products made with human hair’, *Axios*, 1 July 2020. <https://www.axios.com/us-china-forced-labor-products-human-hair-69da26c5-2d01-4bad-a2b2-8c944f6d0a70.html>

<sup>34</sup> Government of XUAR’s ‘Xinjiang Textile and Apparel Industry Development Plan (2018-2023)’, 2 March 2018.

<sup>35</sup> A. Lehr and M. Bechrakis, ‘Connecting the Dots in Xinjiang: Forced Labor, Forced Assimilation, and Western Supply Chains’, published by the Centre for Strategic and International Studies Human Rights Initiative, October 2019.

<sup>36</sup> A. Lehr and M. Bechrakis, *Ibid*, with figures from ‘China: Cotton and Products Annual’, USDA Foreign Agricultural Service, 16 April 2019.

<sup>37</sup> ‘Xinjiang: Market Profile: Major economic indicators’ (HTKDC Research, 29 May 2020) <https://research.hktcdc.com/en/data-and-profiles/mcpc/provinces/xinjiang> accessed 17 July 2020.

<sup>38</sup> A. Tao, ‘Mass detentions, surveillance, and ethnic repression in China’s far west: the situation right now’, *SupChina*, 15 January 2020.

<sup>39</sup> A. Lehr and M. Bechrakis, *Ibid*.

<sup>40</sup> A. Lehr and M. Bechrakis, *Ibid*.

18. The state surveillance system depends on sophisticated digital infrastructure, including extensive electronic facial recognition cameras, compulsory mobile phone apps and other intrusive technology.<sup>41</sup> The surveillance system and detention are inherent parts of the same enforcement regime; surveillance provides the police with the triggers for arrest and detention and ensures that ex-detainees and those not yet detained are alive to the possibility of arrest.<sup>42</sup> As discussed below, its application is reportedly targeted at Turkic Muslims. Inevitably, this surveillance infrastructure makes use of goods and services from the worldwide technology sector.

### Measures targeting ethno-religious culture and practices

19. The Chinese authorities have instituted a sophisticated system of mass and heavy surveillance within XUAR, reportedly utilised as part of a structure of repression and control specifically targeted at Muslims.<sup>43</sup> Physical measures include a network of checkpoints at which Han Chinese, Uyghur officials with passes and foreign visitors are waved through a 'green channel', while the movements of Uyghurs and other Muslims are scrutinised and restricted.<sup>44</sup>

20. Turkic Muslims are forced to exclusively celebrate Chinese national cultural traditions, such as Chinese New Year, and are required to attend a variety of political indoctrination gatherings, including a daily or weekly flag-raising ceremony. Those who do not attend are sent to detention camps.<sup>45</sup> Unique Uyghur culture is facing eradication due to restrictions of Uyghur cultural practice, such as *muqam* (a musical tradition) and *meshrep* (traditional cultural gatherings), and due to the elimination of the Uyghur language as a medium of instruction in Xinjiang schools and universities.<sup>46</sup> There are also reports of the destruction of religious and cultural sites by Chinese authorities, including mosques and Uyghur burial grounds.<sup>47</sup>

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<sup>41</sup> M. Wang et. al, 'China's algorithms of repression', *Human Rights Watch*, May 2019.

<sup>42</sup> M. Wang et. al, *Ibid*.

<sup>43</sup> M. Wang et. al, *Ibid*; D. Byler, 'I researched Uyghur society in China for 8 years and watched how technology opened new opportunities—then became a trap', *The Conversation*, 18 September 2018; I. Cockerell, 'Inside China's massive surveillance operation', *WIRED*, 5 September 2019; Editorial, 'For Uyghur Muslims in China, life keeps getting harder', *Foreign Policy*, 26 October 2019.

<sup>44</sup> C. Buckley, P. Mozur, 'How China uses high-tech surveillance to subdue minorities', *The New York Times*, 22 May 2019.

<sup>45</sup> 'Eradicating Ideological Viruses: China's campaign of repression against Xinjiang's Muslims', *Human Rights Watch*, p.65 September 2019.

<sup>46</sup> C. Shepherd, 'Fear and oppression in Xinjiang: China's war on Uyghur culture', *The Financial Times*, 12 September 2019; J. Smith Finley, 'Now we don't talk anymore', *Chinafile*, 28 December, 2018; 'Twenty years after the Ghulja massacre, repression and discrimination still feature in Uyghurs' daily lives', *Uyghur Human Rights Project*, 2 January 2017; H.R. 649 Uyghur Human Rights Policy Act of 2019, Findings s.4(7(C)), *US Congress*, introduced 17 January 2019.

<sup>47</sup> P. Irwin, 'China's brutal treatment of the Uyghurs has been laid bare – the world must no longer look away', *The Independent*, 25 November 2019; M. Rivers, 'More than 100 Uyghur graveyards demolished by Chinese authorities, satellite images show', *CNN*, 3 January 2020; R. Harris, 'Bulldozing mosques: the latest tactic in China's war against Uyghur culture', *The Guardian*, 7 April 2019.



21. Islamic religious observance is heavily repressed. There are reports of the confiscation of non-state approved copies of the Quran and prayer mats; discouragement of fasting during Ramadan; restrictions on entry to mosques; and restrictions on women wearing the hijab. Muslim women choosing to wear a face veil have reportedly been denied marriage applications and subjected to forced evictions by Chinese authorities on that basis.<sup>48</sup> Religious repression was heightened by the passing of the 2017 *'De-extremification Regulation'* which prohibited 'extremist' behaviours such as having an 'abnormal' beard and refusing to watch public TV programmes.<sup>49</sup>
22. The Chinese authorities have used disturbing rhetoric to describe the purpose of government policies that disproportionately affect Muslim residents of the XUAR. This includes references in speeches and documents by Chinese officials to *'eradicating tumours; dealing swiftly with those 'infected with an ideological virus... before the illness arises,' and that "you can't uproot all the weeds hidden among the crops in the field one by one. You need to spray chemicals to kill them all.'*<sup>50</sup>

### Sexual and reproductive violence against women

23. In addition to the treatment of women in detention (described above), Uyghur women have been subjected to sexual and reproductive violence in the community. There have been reports of Uyghur women being forced to undergo abortions,<sup>51</sup> to use *'birth control methods with long-term effectiveness'*, meaning intrauterine devices (IUD) or sterilisation,<sup>52</sup> and to undergo bi-monthly pregnancy tests.<sup>53</sup> Birth control 'violations' have been punished with fines totalling 3-8 times the average annual disposable income and extrajudicial internment described as *'vocational skills and training'*.<sup>54</sup>

<sup>48</sup> R. Turdish, 'Two Xinjiang villages bar women from covering faces', *Radio Free Asia*, 31 May 2015; G. Keyoumu, J.Lipes, 'Veiled Muslim Uyghur woman evicted from rented home', *Radio Free Asia*, 27 August 2013; S. Tynen, 'I was in China doing research when I saw my Uyghur friends disappear', *The Conversation*, 9 March 2020.

<sup>49</sup> 'Eradicating Ideological Viruses: China's campaign of repression against Xinjiang's Muslims', *Human Rights Watch*, p.71-74 September 2019; T. Regencia, 'Escape from Xinjiang: Muslim Uyghurs speak of Chinese persecution', *Al-Jazeera English*, 10 September 2018; 'China: human rights violations in the name of "national security"', *Amnesty International submission for the UN Universal Periodic Review – 31st session of the UPR working group*, p.11-12, November 2018; A. Su, 'Silent prayer: The Chinese state's siege on Uyghur ways of worship', *The Pulitzer Center*, 4 January 2017.

<sup>50</sup> C. Buckley, 'China is detaining Muslims in vast numbers. The goal: transformation', *The New York Times*, 8 September 2018; A. Forth, 'The ominous metaphors of China's Uyghur concentration camps', *The Conversation*, 19 January 2020.

<sup>51</sup> Y. Fan, L. Mudie, 'Forced abortion victim in China rails at judges in 'fraud' trial', *Radio Free Asia*, 24 October 2013; S. Hoshur, 'Four Uyghur women forced to abort their babies in Xinjiang', *Radio Free Asia*, 30 December 2013; A. Ferris-Rotman et.al, 'China accused of genocide over forced abortions of Uyghur Muslim women as escapees reveal widespread sexual torture', *The Independent*, 6 October 2019.

<sup>52</sup> A. Zenz, 'Sterilizations, Forced Abortions, and Mandatory Birth Control', *The Jamestown Foundation*, June 2020, p.11.

<sup>53</sup> *Ibid*, p.12.

<sup>54</sup> *Ibid*, pp. 10-12.

24. Chinese Han men (Communist party officials) are sent to stay with women whose male relatives have been detained and instructed to sleep in their beds as part of the ‘*Pair Up and Become Family*’ programme, which aims to ‘*promote ethnic unity*’. Uyghur women are then pressured into forced marriages with the party officials.<sup>55</sup>

### **Forced removal of children**

25. In 2013, the Committee on the Rights of the Child expressed its deep concern at frequently reported practice of torture and ill treatment of Uyghur children for exercising their right to freedom of expression and religion.<sup>56</sup>
26. It has been reported that nearly half a million children have been separated from their families and placed in so-called ‘boarding schools’, with government documents outlining plans for expansion of such schools. The documents also suggest that the schools are designed to assimilate and indoctrinate children at an early age, away from the influence of their families. Accounts from parents allege that children are enrolled in these schools without their consent, often following the arbitrary detention of a parent.<sup>57</sup>

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<sup>55</sup> A. Ma, ‘China is reportedly sending men to sleep in the same beds as Uyghur Muslim women while their husbands are in prison camps’, *Business Insider*, 4 November 2019; R. Peper, “‘This is mass rape’: Uyghur activist condemns program said to pay Chinese men to sleep with Uyghur women to promote “ethnic unity””, *The Insider*, 24 December 2019.

<sup>56</sup> Committee on the Rights of the Child, ‘Concluding Observations on the combined third and fourth periodic reports of China’, CRC/C/CHN/CO/3-4, para. 43.

<sup>57</sup> A. Qin, ‘In China’s Crackdown on Muslims, Children Have Not Been Spared’, *The New York Times*, 28 December 2019, Updated 17 February 2020; T. Imin Uyghurian, ‘China has destroyed Uyghur families, including mine. Guterres must act’, *The Guardian*, 25 September 2019.

# Duties on China under International Law

## Duties on China under International Law

27. China is a State Party to the following core human rights and international criminal law treaties which are, among others, relevant to the documented violations and/or crimes to-date against Uyghurs and other Turkic Muslims:
- a. International Convention on the Elimination of All Forms of Racial Discrimination (“**CERD**”);<sup>58</sup>
  - b. Convention on the Prevention and Punishment of the Crime of Genocide (“**Genocide Convention**”);<sup>59</sup>
  - c. United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (“**UNCAT**”);<sup>60</sup>
  - d. Convention on the Elimination of All Forms of Discrimination against Women (“**CEDAW**”);<sup>61</sup>
  - e. United Nations Convention on the Rights of the Child (“**CRC**”);<sup>62</sup>
  - f. Slavery Convention 1926 (“**Slavery Convention**”).<sup>63</sup>
28. China has signed the International Covenant on Civil and Political Rights (“**ICCPR**”).<sup>64</sup> As a signatory to the ICCPR, China is under an obligation to refrain from committing acts that defeat the object and purpose of the Covenant.<sup>65</sup>

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<sup>58</sup> Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (CERD).

<sup>59</sup> Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 276.

<sup>60</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 85 UNTS 1465.

<sup>61</sup> Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW). China is not a State Party to the Optional Protocol to CEDAW. The CEDAW Committee, among other things, is thereby precluded from accepting individual complaints related to China or initiating an inquiry procedure into serious and systematic abuses of women’s human rights.

<sup>62</sup> Convention on the Rights of the Child (adopted 2 November 1989, entered into force 2 September 1990) 1557 UNTS 3 (CRC). Ratified by China on 2 March 1992.

<sup>63</sup> Slavery Convention, 1926 (adopted 25 September 1926, entered into force 9 March 1927) 60 UNTS 254. Ratified by China on 22 April 1937. China has not signed or ratified the Protocol amending the Slavery Convention 1926, adopted on 7 December 1953 that provides for the jurisdiction of the International Court of Justice over inter-State disputes relating to interpretation and application of the Convention (the Protocol was signed by the Republic of China in 1955, but its signature declared void by the People’s Republic of China upon its founding on 1 October 1949).

<sup>64</sup> China signed the International Covenant on Civil and Political Rights (ICCPR) on 5 October 1998.

<sup>65</sup> Article 18, Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

29. Moreover, China is bound by *jus cogens* norms of customary international law that include the prohibition of genocide, racial discrimination, slavery, and torture.<sup>66</sup> These obligations are *erga omnes* in nature i.e. they are owed to the international community as a whole. China's compliance with these obligations is, therefore, the concern of all States.<sup>67</sup>
30. Persecution of any identifiable group on *inter alia* ethnic, religious or cultural grounds, enslavement, torture, or murder (among other crimes), when committed as part of a widespread or systematic attack<sup>68</sup> against a civilian population, could constitute crimes against humanity.
31. Under the six treaties noted above, China is required to take numerous steps in respect of the documented violations and/or crimes against Uyghurs and other Turkic Muslims.

### Genocide Convention

32. Genocide is the commission of certain prohibited acts with an intent to destroy, in whole or part, a national, ethnical, racial or religious group ("**protected group**"), as such. (Art II) Prohibited acts under the Convention constitute: (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; or (e) forcibly transferring children of the protected group to another group. (Art II) Uyghurs and other Turkic Muslims would need to constitute 'protected groups' within the meaning of the Convention. The intent here is a special intent to destroy, in whole or in part, the protected group ("**specific intent**").
33. Specific intent, which may be inferred from a variety of conduct including statements as well as the scale of the atrocity, has been described in the following way: "*For any of the acts charged to constitute genocide, 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.*"<sup>69</sup>

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<sup>66</sup> *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, Judgment, ICJ Reports 1970 p.3 at para. 34.

<sup>67</sup> *Ibid*, para. 33.

<sup>68</sup> 'Attacks' against the civilian population are not limited to military attacks. International Criminal Court, *The Elements of Crimes*, 'Crimes against Humanity', Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 10-12 May 2010, p5 [Hereafter '*The Elements of Crimes*']; Draft Articles on the Prevention and Punishment of Crimes against Humanity, Article 2(2), A/74/10 p.12.

<sup>69</sup> Rutaganda, ICTR-96-3-T, para. 60.



34. There are accounts, emanating from a number of bodies and organisations, which raise grave concerns that prohibited acts of genocide are being committed in Xinjiang against Uyghurs and/or other Turkic Muslims. Those acts include: killings in detention; other extra-judicial killings; serious bodily or mental harm including sexual violence, and/or other conditions of life calculated to destroy inflicted upon detainees; measures such as forced sterilisation, enforced abortions, enforced birth control and enforced separation of the sexes that may constitute restrictions on birth within the group; and separation of children from the protected group and transfer to non-members. The allegations raise particular concerns about the gendered nature of the prohibited acts with such acts constituting serious bodily and mental harm specifically directed against women and girls.<sup>70</sup> If proven, all the aforementioned acts, given their frequency and pattern, would violate numerous provisions of the Genocide Convention. It follows that there would need to be proof of the requisite specific intent (i.e. the intent to destroy, in whole or part, the protected group) by high, mid-level and/or low-level perpetrators of prohibited acts. Nevertheless, duties, including interim duties, upon the Chinese State under the Genocide Convention are clear and as follows.
35. China is prohibited from committing any act of genocide, which means it must refrain from: (a) the commission of prohibited acts by its own organs, agents and/or officials; and/or (b) the commission of prohibited acts by others acting on their behalf or at their behest (Art III).
36. China must not be complicit in prohibited acts committed by others (i.e. non-state actors) within its State (Art III(e), IV).
37. China must do everything it can to prevent genocide and to punish persons where the crime has occurred. (Art I, IV) The latter would necessarily entail efforts at investigating whether genocide has occurred and/or is occurring.
38. China must enact necessary legislation to give effect to its obligations under the Genocide Convention (Art V).

## UNCAT

39. UNCAT defines 'torture' as '*any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person... for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*' (Art 1).

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<sup>70</sup> See further: 'Beyond Killing: Gender etc' , *Global Justice Center*, December 2018.

40. Accounts of prolonged solitary confinement, beatings and the deprivation of food of detainees, among other treatment, raise serious concerns about the use of torture and/or other inhuman treatment against Uyghur and other Muslim detainees.
41. Torture, committed as part of a widespread or systematic attack against a civilian population, is a crime against humanity under customary international law.
42. Pursuant to UNCAT, China is under an obligation to exercise due diligence to prevent, investigate and, in accordance with the relevant rules of criminal evidence and procedure, to prosecute all acts of torture and other cruel, inhuman or degrading treatment<sup>71</sup> committed by public officials or persons acting in an official capacity (Arts 2, 4, 7, 13 and 16).
43. China is under an obligation to ensure that its officials and other persons involved in the custody and detention of persons are educated in the prohibition of torture, and to ensure that arrangements for the custody and treatment of persons in detention are regularly reviewed in order to prevent torture and ill treatment (Arts 10, 11, and 12).
44. China must also review its domestic laws, rules and practices to make them consistent and give effect to provisions of CAT, including the prohibition of torture (Arts 2, 4, 16).

## **CEDAW**

45. China is prohibited from all forms of discrimination against women and must abstain from performing, sponsoring or condoning any practice, policy or measure that violates CEDAW.<sup>72</sup>
46. The accounts of certain practices targeting women of Uyghur and other Turkic Muslim heritage raise serious concerns of gendered discrimination and violation of numerous provisions of CEDAW. Some of the accounts suggest there is the potential for findings of violations under multiple conventions including UNCAT, Genocide Convention, CERD, and the Slavery Convention, among others. Violations of CEDAW may include the following: sexual violence targeting women; measures intended to restrict births; placing restrictions on marriage which is the only means of religiously observant women/men having familial relations; prohibiting women from observing their religion through requiring removal of traditional dress and compulsory 're-education' programs for 'de-veiling'; forcing Uyghur women

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<sup>71</sup> *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, ICJ Reports 2012 p.422, para. 90.

<sup>72</sup> CEDAW Committee, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the *Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/2010/47/GC.2, 19 Oct 2010.

and other Turkic Muslim women to stay with Han Chinese male officials in their homes; and unequal treatment in obtaining employment as well as wider, general discrimination within workplace settings.

47. China must take steps to prevent, prohibit and punish any possible violation of the Convention by third parties, including in the home and in the community, and to provide reparation to the victims of such violations.<sup>73</sup>
48. China must refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions act in conformity with this obligation (Art 2).
49. China must take all appropriate measures without delay, including adopting legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women (Art 2).
50. China must prevent and eliminate discrimination that is perpetrated by any (public or private) individual, organization or enterprise (Art 2).
51. China has an obligation to take all appropriate measures, including adopting legislation, to ensure the full development and advancement of women in all fields, in particular in the political, social, economic, and cultural fields, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of 'substantive' equality with men (Art 3).

## CERD

52. China is obliged to condemn racial discrimination (Art 2(1)), to ensure that national and local public authorities do not practice racial discrimination against persons or groups of persons (Art 2(1)(a)), and to take effective measures to review national and local policies (Art 2(1)(c)).
53. There are accounts, emanating from a number of bodies including the Committee on Eliminating Racial Discrimination<sup>74</sup>, that Uyghurs and other Turkic Muslims are discriminated against. These accounts raise serious concerns which, if proven, could constitute violations of CERD. There is *prima facie* evidence of discriminatory treatment of Uyghurs and other Turkic Muslims in the following ways: frequent profiling, monitoring and targeting by law enforcement agencies; discrimination in workplace settings; specific identification and targeting of Uyghur leaders, officials and prominent persons by law enforcement, penal and judicial bodies; forcible separation of children from their parents and extended family and

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<sup>73</sup> Ibid.

<sup>74</sup> See CERD, Concluding observations on the combined fourteenth to seventeenth periodic reports of China (including Hong Kong, China and Macao, China), August 2018.

forced assimilation into non-Uyghur group practices; removal of Chinese identity documents including passports; destruction of ethno-cultural and religious symbols and places of worship; measures prohibiting free practice and observance of religion and belief and forcible assimilation of Uyghur or other Turkic Muslims into practices going against their beliefs; and forcible displacement and re-population of traditional Uyghur and other Chinese regions with Han Chinese.

54. China must prevent, prohibit and eradicate all practices of racial segregation and apartheid in territories under its jurisdiction (Art 3).
55. China is required to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, racial hatred and discrimination in any form. (Art 4) This duty requires:
  - a. Criminalising dissemination of ideas or violence based on racial superiority or hatred, incitement to racial discrimination or incitement to such acts, and the provision of any assistance to racist activities, including the financing thereof;
  - b. Criminalising and declaring illegal and prohibiting organizations, as well as organized and all other propaganda activities, which promote and incite racial discrimination;
  - c. Prohibiting public authorities or public institutions, national or local, to promote or incite racial discrimination (Art 4(a)-(c)).
56. China is required to guarantee the right to equal treatment before tribunals and other judicial organs (Art 5(a)) and the protection of people against bodily harm and violence (Art 5(b)).
57. China must also assure to everyone within its jurisdiction effective protection and judicial and institutional remedies against any acts of racial discrimination (Art 6).

## CRC

58. Reports of the forced separation of Uyghur children from their parents, often as a result of the latter's arbitrary detention, the forced placement of these children in boarding schools, and the prohibition on the speaking of the Uyghur language and practice of Islam, raise a serious concern that China is violating a number of rights of the child guaranteed by the CRC. The CRC emphasises the importance of acting in the best interests of the child, and on that basis discrimination on any of the grounds articulated in Art. 2 of the Convention '*offends the human dignity of the child*'.<sup>75</sup>

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<sup>75</sup> Committee on the Rights of the Child, General Comment no.1 (2001): Article 29(1): The Aims of Education, CRC/GC/001/1, para. 10 (with respect to the impact of discrimination on the right to education).

59. Pursuant to the CRC, China must ensure that the rights of all children are protected without discrimination to freedom of expression, religion, language, and culture and that in all circumstances the best interests of the child are the primary consideration. (Arts. 2, 3, 6, 12, 13, 14, and 30)
60. No child should be subjected to unlawful or arbitrary interference with their family life (Art. 16), and all children must be protected from all forms of physical and mental violence. (Arts. 19 and 37)

### **Slavery Convention**

61. ‘Slavery’, as defined in the Slavery Convention, ‘is the status or condition of a person over whom any or all powers attaching to the right of ownership are exercised’. (Art 1) The act of ‘enslavement’ as a crime against humanity is defined in similar terms.<sup>76</sup> ‘Enslavement’, committed as part of a widespread or systematic attack against a civilian population, is a crime against humanity under customary international law.
62. Indicia of contemporary forms of slavery and ‘enslavement’ include ‘control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force, coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour’.<sup>77</sup>
63. Pursuant to the Slavery Convention and customary international law, China is under an obligation to bring about the complete abolition of slavery in all its forms (Art. 2), to prevent compulsory or forced labour from developing into conditions analogous to slavery (Art. 5), and to protect its populations from enslavement as a crime against humanity.<sup>78</sup>

### **Limitations on requiring China to apply and fulfil its duties**

64. China does not accept, where available, individual complaints procedures which would allow Chinese nationals to directly bring their cases before the Committees associated with the six treaties considered in this Paper.
65. China does not accept, where available, any inquiry procedures into serious and systematic abuses of human rights under these treaties. This reservation precludes an independent investigation under the treaties into the plight of Uyghurs and other Turkic Muslims.

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<sup>76</sup> International Criminal Court, *The Elements of Crimes*, Article 7(1)(c), p. 6. According to *The Elements of Crimes*, two additional criteria are required: the conduct must be committed as part of a widespread or systematic attack against a civilian population, and the perpetrator must know or have intended the conduct to be part of a widespread or systematic attack against a civilian population.

<sup>77</sup> For instance, ICTY, *Prosecutor v Kunarac*, IT-96-23 & IT-96-23/1-A, Judgment, Appeals Chamber, 12 June 2002, para. 119.

<sup>78</sup> 2005 World Summit Outcome, A/RES/60/1, para. 138.

66. China has also expressly made reservations to deny the conferral of jurisdiction on the International Court of Justice (“**ICJ**”) in the event of a ‘dispute’ as to the application, interpretation, and fulfilment of the provisions of the treaties.<sup>79</sup> (Genocide Convention (Art IX); CERD (Art. 22); CEDAW (Art. 29); UNCAT (Art. 30, para. 1); and Slavery Convention, as amended by the 1953 Protocol (Art. 8).<sup>80</sup>
67. Moreover, China has not accepted, where provided, the competence of treaty-based mechanisms to receive inter-State communications concerning its compliance with its obligations under the treaty.<sup>81</sup>
68. Considered collectively, these restrictions/reservations mean that in respect of its obligations under Genocide Convention, CEDAW, and UNCAT, other State Parties may not seek to enforce China’s obligations, as an alleged breaching State, before the ICJ or the specific treaty-based mechanisms.
69. China, however, has not made any reservation to Article 11 CERD and, accordingly, has accepted the competence of the Committee on the Elimination of Racial Discrimination to examine and adjudicate inter-State disputes concerning alleged failures to give effect to the Convention. State Parties to CERD may, therefore, request the Committee examine alleged breaches of the Convention by China.
70. The non-availability of an inter-State legal dispute mechanism under the Genocide Convention, CEDAW, CRC, and UNCAT does not:
  - a. preclude, in any way, China’s international responsibility for violations of its international obligations pursuant to these treaties.<sup>82</sup> The obligations and responsibilities arising under the treaties remain binding.
  - b. prevent States from asserting China’s responsibility for rights-violating conduct;
  - c. restrict States from seeking to hold China to account for violations of its obligations through other international human rights mechanisms such as the United Nations Human Rights Council (**HRC**),

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<sup>79</sup> The CRC does not provide for referral of a dispute to the ICJ.

<sup>80</sup> Protocol amending the Slavery Convention 1926, adopted on 7 December 1953 that provides for the jurisdiction of the International Court of Justice over inter-State disputes relating to interpretation and application of the Convention (the Protocol was signed by the Republic of China in 1955, but its signature declared void by the People’s Republic of China upon its founding on 1 October 1949).

<sup>81</sup> For example, China has not accepted the competence of the Committee on the Rights of the Child to receive inter-State communications, in accordance with Optional Protocol to the Convention on the Rights of the Child on a communications procedure (19 December 2011, entered into force 14 April 2014), and has not made a declaration recognising the competence of the Committee against Torture, in accordance with Article 21 UNCAT.

<sup>82</sup> For instance, Commentary to Article 16, ILC Draft Articles on State Responsibility, p.67 with respect to the right of a State to assert another State’s complicity in an internationally wrongful act, even though no international court may have jurisdiction to decide the matter in the absence latter State as a party to proceedings (the ‘*Monetary Gold* principle’).

- d.** hinder monitoring of China's compliance with its obligations by the Committees established by four of the treaties (i.e. save for the Genocide Convention and the Slavery Convention).
- 71. The non-availability of inter-State legal dispute mechanisms under the treaties noted above does not preclude international organisations from requesting an Advisory Opinion from the ICJ on matters that concern those international organisations. Matters of concern may include obligations of States under treaties, matters which require clarification or development of international law, and measures to strengthen peaceful relations between States. The procedure is available to five United Nations organs,<sup>83</sup> fifteen specialised agencies<sup>84</sup> and one related organisation.<sup>85</sup> Advisory Opinions issued by the ICJ are non-binding but carry great legal weight and moral authority.
- 72. The treaty-based mechanisms – the Committee on the Elimination of Racial Discrimination, Committee against Torture, Committee on the Rights of the Child, and Committee on the Elimination of Discrimination against Women – provide guidance, develop jurisprudence, monitor each state party's compliance with the provisions of the treaties, and conduct reviews of state parties' progress in implementing the treaty. Civil society members can provide input to the Committee at various points by submitting reports, making oral statements, and organizing side events and briefings for Committee members. While the outcome of all of these processes are non-binding, they can have significant symbolic impact, which feeds into the HRC's Universal Periodic Review of State compliance with international human rights norms.

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<sup>83</sup> The General Assembly, Security Council, Economic and Social Council, Trusteeship Council, and Interim Committee of the General Assembly.

<sup>84</sup> These 15 specialised agencies include the International Labour Organisation, United Nations Education, Scientific and Cultural Organisation (UNESCO), World Health Organisation, and the International Monetary Fund.

<sup>85</sup> The International Atomic Energy Agency.



# Duties on States other than China

## Duties on States other than China

73. States other than China have a legal interest – perhaps even a moral or ethical imperative – to ensure that *jus cogens* or ‘peremptory norms’ of general international law are upheld and/or that obligations owed to the international community as a whole (usually arising from peremptory norms) are enforced.<sup>86</sup> By the very nature of the rights involved and for these rights to have any meaning at all – not least for victims and survivors of rights’ violations – humanity must act in concert, through their State representatives, to ensure rights accepted by China are interpreted, applied and fulfilled in good faith.
74. First, serious breaches by China of its obligations arising under peremptory norms attract additional consequences for China and all other States.
- a. Art 41 of the Articles on State Responsibility provides that all States should cooperate in bringing to an end, through lawful means,<sup>87</sup> any serious breaches of obligations arising under a peremptory norm of international law. Such serious breaches are not considered lawful and no State may recognise, render aid or assist in maintaining such a situation. Cooperation to bring to an end a violation may take a number of forms, depending on the particular situation, and applies to all States, whether or not they are directly affected by the serious breach.<sup>88</sup>
75. Second, all States can and should invoke the responsibility of China for any breaches of obligations it owes to the international community as a whole.
- a. Art 48 of the Articles on State Responsibility provides that any State may invoke the responsibility of another State for the breach of an obligation owed to the international community as a whole (*erga omnes*).<sup>89</sup> In invoking the responsibility of the wrongdoing State, in this

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<sup>86</sup> *Erga omnes* obligations are considered to be of such fundamental importance that “all states can be held to have a legal interest in their protection.” According to the ICJ, obligations *erga omnes* “derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination”: *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Merits) [1970] ICJ Reports 3, paras 33-34. See also *East Timor (Portugal v Australia)*, Judgment, [1995] ICJ Reports 90, para. 29; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996], ICJ Reports 264; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objections, Judgment, I.C.J. Reports 1996, p. 595, at pp. 615–616, paras. 31–32. Note that some obligations are *erga omnes partes* which means that “each State party has an interest in compliance with them in any given case”. (*Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, ICJ Reports 2012 p.422, para. 69).

<sup>87</sup> ‘Lawful means’ limits measures that States should take to those that comply with international law.

<sup>88</sup> Commentary to Article 41, ILC, ‘Draft Articles on State Responsibility, with commentaries’, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1., para. 2.

<sup>89</sup> Article 48(1)(b) and commentary paras. 8-10, ILC, ‘Draft Articles on State Responsibility, with commentaries’, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1., pp.126-127.

case China, a State may call upon China to cease the commission of the rights-violating acts,<sup>90</sup> to guarantee non-repetition of those acts, and to provide reparation to the victims of its rights-violating acts.<sup>91</sup>

- b.** States may take lawful measures to ensure cessation of a breach of an obligation *erga omnes*.<sup>92</sup>
- c.** States may also take measures, such as Magnitsky-type sanctions, directed against individual perpetrators of grave human rights violations.<sup>93</sup>

### Obligations on States other than China in practice

76. The idea that prohibitions of racial discrimination, genocide, torture, and slavery are *jus cogens* in character, and the obligations to prevent violations of those prohibitions arising thereof, and as set out in CERD, the Genocide Convention, UNCAT, the Slavery Convention (read together with relevant customary international law), are *erga omnes* (owed to the world at large) is non-controversial.<sup>94</sup> The international community as a whole has unequivocally accepted that slavery and racial discrimination, torture and genocide are prohibited: they have committed to not carry out those proscribed acts; they have committed to their prevention; and they have committed to punishing perpetrators where they have found to committed those proscribed acts. There can be no derogation from those commitments.

77. In relation to the aforementioned treaties, third States have specific duties arising from Chinese breaches of peremptory norms and obligations owed to the world-at-large. Those duties are set out, in brief, below.

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<sup>90</sup> Ibid, Article 30, p.88.

<sup>91</sup> Ibid, Article 48(2)(b), p.126.

<sup>92</sup> Ibid, Article 54. For example, economic and other boycotts imposed by States, upon the recommendation of the Security Council, on apartheid South Africa (Security Council resolution 569 (1985)); and sanctions imposed on the Federal Republic of Yugoslavia by European States (1998). However, it is recognised that State practice regarding the imposition of counter-measures on a State on the basis of the latter's violation of an obligation *erga omnes* is limited. At present there appears to be no *right* to impose counter-measures in the collective interest (see Commentary to Article 54, ILC, 'Draft Articles on State Responsibility', pp137-139).

<sup>93</sup> E.g. Sergei Magnitsky Rule of Law Accountability Act 2012 and Global Magnitsky Human Rights Accountability Act 2016 (USA); The Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law) 2017 (Canada); Proceeds of Crime Act 2002 (as amended by the Criminal Finances Act 2017) and Sanctions and Money-Laundering Act 2018 (as amended) (UK).

<sup>94</sup> *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment*, I.C.J. Reports 1970, p. 32, para. 33.; International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries', November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1.

## CERD

78. The prohibition of racial discrimination is *jus cogens* in character. The *erga omnes* and *erga omnes partes* character of the rights and obligations that are owed under customary international law and CERD means that there is a requirement on all States to protect the rights and obligations under CERD.<sup>95</sup>
79. States other than China have, a right and arguably a duty,<sup>96</sup> inter alia: to invoke responsibility of a State alleged to have violated CERD; to not consider any violations as legal, with all the consequences that entails for both States; to ask for cessation of possible violations; and to request just satisfaction for victims of any violations, including commitments for non-repetition, and arguably payment of reparations to victims (though reparations are not established as custom).<sup>97</sup> States should also refrain from rendering aid or assistance in maintaining the situation created by a breach of CERD.
80. CERD has an inter-State communications mechanism allowing a State to formally communicate its grievances to another State that has allegedly violated the Convention.<sup>98</sup> Arts. 11-13 lay out the procedure. If a State Party would be willing to submit such a communication to the Committee against China, and if the jurisdiction and admissibility of such a case were to be accepted, this could be a viable option to hold it accountable. The procedure under Arts. 11 – 13 is compulsory. Accordingly, upon accession to CERD every State party is automatically bound by that inter-State communication procedure. It may also not be excluded by way of a reservation, as confirmed by Art. 20(2).

## Genocide Convention

81. The prohibition of genocide is *jus cogens* in character. The *erga omnes* and *erga omnes partes* character of the rights and obligations (in particular the duty to prevent and punish under Art 1) owed under customary international law and the Genocide Convention means that there is a duty on all States to protect the rights and obligations thereof. That is particularly the case for States that have a particular ability to affect the commission of prohibited acts because they are closer in time and space (or because, arguably, their power or influence may make an impact).

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<sup>95</sup> *Barcelona Traction*, paras. 33-34.

<sup>96</sup> Article 16, CERD specifically includes a non-exclusivity clause and Art 22 Article 22 CERD also specifically states that states parties can institute ICJ proceedings where the treaty-specific means of dispute settlement have failed (and where reservations, of course, do not prove prohibitive). Duty here is derived arguably from Art 48 of the Draft Articles together with State Practice read in conjunction with relevant ICJ jurisprudence (See, for instance, *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment*, I.C.J. Reports 1970, p. 32, para. 33).

<sup>97</sup> Stephan Wittich, 'Reparation in Instances of Grave Violations of Human Rights' in I. Randelzhofer and C. Tomuschat (eds), *State Responsibility and the Individual* (Martin Nijhoff Publishers 1999). See also generally on third state responsibility: A. Bird, 'Third State Responsibility for Human Rights Violations' (2010) 21 *European Journal of International Law* 883.

<sup>98</sup> "[...] any State party may trigger the collective enforcement machinery created by the respective treaty, independently from the existence of correlative obligations between the concerned parties" (CERD/C/100/5, para. 3.33).

82. In practice, this means States Parties to the Genocide Convention have a duty, independent of China's own duty, to prevent genocide and/or punish perpetrators of the crime. (Art I). The ICJ has concluded that the obligation to prevent genocide contained in Article I of the Genocide Convention has an extraterritorial scope.<sup>99</sup> As such, States that have the '*capacity to effectively influence*' other States have a duty to employ all means reasonably available to them to prevent genocide, including in relation to acts committed outside their own borders. That duty is one of conduct rather than result.
83. The obligation to prevent genocide is engaged from the moment the State learns, or should know, of the existence of a serious risk that genocide will be committed.<sup>100</sup> Thus, it is incumbent upon all States to consider, in light of the information available to them, whether genocide is being committed or whether there is a serious risk that genocide may be committed, and if so, to take all available diplomatic, legal and other lawful measures to prevent genocide.
84. The duty on States Parties to punish acts of genocide would require serious consideration by Foreign Ministries of State Parties to the Genocide Convention. States should, as a minimum: (a) investigate allegations of crimes suffered by victims who are within their jurisdiction; (b) carry out appropriate due diligence on prohibited acts being committed against Uyghurs and assess whether genocide is being committed by individual perpetrators; (c) ensure legal persons and nations of their State are not, in any way, complicit in possible acts of genocide in China; (d) put into place all necessary measures to provide that agents, organs and officials of the State do not directly or indirectly contribute to possible acts of genocide in China; and/or (e) apprehend possible perpetrators when within their jurisdiction.

## UNCAT

85. The crime of torture, as defined by Art.1 UNCAT, is a universal jurisdiction crime. As such, all State Parties to UNCAT are under an obligation to criminalise all acts of torture and to investigate and prosecute all acts of torture committed by public officials or persons acting in an official capacity, including officials of foreign States, where the alleged offender is in the territory of the State (Arts. 2, 4, and 5).
86. The prohibition of torture is part of customary international law and is a *jus cogens* in character.<sup>101</sup> All States Parties to UNCAT share a common interest in ensuring compliance with the prohibition, and the obligation to prevent and punish acts

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<sup>99</sup> *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v Serbia)*, Judgment, ICJ Reports 2007, p.43.

<sup>100</sup> *Ibid.* at p.222 para. 431.

<sup>101</sup> *Questions related to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, ICJ Reports 2012 p.422, para. 99.

of torture, in accordance with UNCAT, wherever they may be committed.<sup>102</sup> That common interest in compliance with States' obligations under UNCAT implies the right of each State Party to invoke the responsibility of another State Party '*with a view to ascertaining the alleged failure to comply with its obligations erga omnes partes, ... and to bring that failure to an end.*'<sup>103</sup>

## CEDAW

87. Whilst violations of rights under CEDAW are serious and arguably as fundamental as other basic rights considered as peremptory norms and obligations *erga omnes*, neither the treaty itself nor customary international law has recognised them as such.
88. States other than China, therefore, do not ordinarily have specific obligations to prevent violations of the Convention and/or punish possible perpetrators of such violations. Certain types of violations may have been accepted as breaches of customary international law, in which case States would have specific duties to address such violations where they have jurisdiction.<sup>104</sup>
89. However, the rights and duties under CEDAW interplay with other obligations considered *jus cogens* norms and/or obligations *erga omnes*. In these circumstances, the gendered nature of the breach is or should be a relevant factor to be considered when assessing the multi-dimensional nature of the violations in international law.<sup>105</sup>

## CRC

90. As with CEDAW, the rights guaranteed to children by State Parties to CRC intersect with peremptory norms and obligations *erga omnes*, such as the prohibition of torture (Art. 37), and prohibition of racial discrimination (Art. 2). As explained above, all States are under an obligation to prevent the violation of *erga omnes* obligations. The commission of acts that violate those obligations against children arguably *may* be considered an aggravating factor, reflecting the special protected status of children in international humanitarian and human rights law, as it would be in certain domestic jurisdictions, for instance, where a crime was committed against a minor.

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<sup>102</sup> Ibid, para. 68.

<sup>103</sup> Ibid, para. 69.

<sup>104</sup> See further: Shavers AW, "Using Customary International Law to Improve Women's Lives" in Brian D Lopard (ed), *Reexamining Customary International Law* (Cambridge University Press 2017).

<sup>105</sup> See Global Justice Centre Report, 2019: Beyond Killing: Gender, Genocide, and Obligations Under International Law for an analysis of why a gendered perspective is or should be required when considering the multi-dimensional nature of serious violations in international law. See also R. Grey and others, 'Gender-Based Persecution as a Crime Against Humanity: The Road Ahead' (2019) 17 *Journal of International Criminal Justice* 957.

## Crimes against Humanity

- Acts such as murder, enslavement, persecution, extermination, and torture, *inter alia*, when committed as part of a widespread or systematic attack on a civilian population, constitute crimes against humanity.<sup>106</sup> The prohibition of crimes against humanity is considered to be a peremptory norm.<sup>107</sup> The UN General Assembly has
91. affirmed States' responsibility to '*use appropriate diplomatic, humanitarian and other peaceful means... to protect populations from... crimes against humanity*.'<sup>108</sup>
- China is not a party to the Rome Statute of the International Criminal Court ("**Rome Statute**").<sup>109</sup> That does not, however, detract from China's responsibility under customary international law to protect all persons in its jurisdiction from crimes against humanity, as well as to investigate and prosecute perpetrators of such
92. crimes, including public officials and persons acting on behalf of the State.<sup>110</sup>
- Moreover, the effective investigation and prosecution of crimes against humanity is not dependent upon a State's ratification of the Rome Statute. As the Preamble to the Rome Statute recognises, effective prosecution of the most serious crimes of international concern '*must be ensured by taking measures at the national*
93. *level and by enhancing international cooperation*'.<sup>111</sup> As an obligation *erga omnes*, all States are under a customary international law obligation to investigate and prosecute crimes against humanity, wherever committed.<sup>112</sup> Accordingly, a number of States, in particular but not exclusively State Parties to the Rome Statute, have implemented legislation enabling their domestic criminal courts to exercise universal or extraterritorial jurisdiction over crimes against humanity, regardless of the perpetrator's nationality and/or where the alleged crimes were committed.<sup>113</sup>

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<sup>106</sup> Customary international law, as codified by Arts. 2 and 3, ILC, draft Articles on Crimes against Humanity provisionally adopted by the ILC at its 67<sup>th</sup> Session (2015), A/70/10, p.50 and commentary pp.58-72 and Art. 7, Rome Statute of the International Criminal Court (17 July 1998, entered into force 1 July 2002), 2187 UNTS 3.

<sup>107</sup> Preamble, ILC, Draft Articles on Crimes against Humanity adopted by the Commission on First Reading, Report on the work of the sixty-ninth session (2017), A/72/10, p. 10.

<sup>108</sup> Art. 4, ILC, draft Articles on Crimes against Humanity provisionally adopted by the ILC at its 67<sup>th</sup> Session (2015), A/70/10, p.52 and commentary pp.73-83; 2005 World Summit Outcome, A/RES/60/1, para. 139.

<sup>109</sup> Rome Statute of the International Criminal Court, 17 July 1998 (entry into force 1 July 2002), 2187 UNTS 3 ('Rome Statute').

<sup>110</sup> 2005 World Summit Outcome, A/RES/60/1, para. 139.

<sup>111</sup> Preamble, Rome Statute.

<sup>112</sup> As recognised by UN General Assembly resolution 3074 (XXVIII), 3 December 1973; para. 3 and 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly resolution 60/147, 21 March 2006, Annex, paras. 4-5.

<sup>113</sup> 'First Report on crimes against humanity by Sean D. Murphy, Special Rapporteur', 17 February 2015, A/CN.4/680, paras. 53-56; 'Second Report on crimes against humanity by Sean D. Murphy, Special Rapporteur', 21 January 2016, A/CN.4/690, paras. 17-19.



94. There are also serious and credible allegations reported which relate to China's alleged pursuit/forced repatriation of Uyghur and other Turkic/Muslim minorities from Xinjiang who have sought asylum in neighbouring countries.<sup>114</sup> On 7 July 2020, a coalition of Uyghur exiles urged the International Criminal Court to investigate China for crimes against humanity and genocide.<sup>115</sup> The claims<sup>116</sup> focus on alleged events by Chinese officials in neighbouring Cambodia and Tajikistan, which are both signatories of the Rome statute. It is understood that it seeks to rely on a decision by the ICC in 2018 that it could exercise jurisdiction to investigate the deportation of hundreds of thousands of Rohingya Muslims from their homes in Myanmar as a crime against humanity. This is the first time that an attempt has been made to hold China accountable before an international court for its actions in respect of Uyghur and other Muslim minorities and will bear close scrutiny since allegations exist in respect of similar treatment of Uyghur and Muslim minorities across the region, and even further afield.

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<sup>114</sup> 'Kazakhstan: Improper Prosecution of Asylum Seekers from China', *Human Rights Watch*, 9 January 2020; J. Batke, 'China is Forcing Uighurs Abroad to Return Home. Why Aren't More Countries Refusing to Help?', *China Files*, 14 August 2017; T. Mitchell, Y. Yang, 'Mike Pompeo urges countries not to repatriate Uighurs to China', *Financial Times*, 23 September 2019; Q. Long, 'Ethnic Kazakh Faces Immediate Repatriation to China After Fleeing Country', *Radio Free Asia*, 8 February 2019; L. Hornby, C. Shepherd, 'China confirms Uighur repatriation fears', *Financial Times*, 5 August 2015.

<sup>115</sup> M. Simons, 'Uighur Exiles Push for Court Case Accusing China of Genocide', *New York Times*, 6 July 2020.

<sup>116</sup> The claims have been filed by two Uyghur groups called the East Turkistan Government in Exile and the East Turkistan National Awakening Movement. The groups advocate independence for Xinjiang, a region to which they refer as East Turkestan,

# International Accountability under the Law of England and Wales

# International Accountability under the Law of England and Wales

## Introduction

95. This section considers the possible availability of English and Welsh courts as a jurisdiction in which to hold relevant persons accountable for alleged human rights violations in XUAR. In very general terms, the availability of this jurisdiction will depend on whether sufficient links exist between (i) international corporations and alleged human rights violations taking place in XUAR, and (ii) between those corporations and England and Wales. Our understanding is that in practice China restricts the operation of foreign companies in its territory, particularly in sensitive areas such as Xinjiang. The Chinese companies that are alleged to be involved in human rights violations in XUAR are headquartered or listed in mainland China. The critical question for establishing the jurisdiction of a foreign court, therefore, will usually be whether a foreign parent company exerts sufficient control over a particular aspect of their Chinese subsidiary or supplier's business.
96. What is set out below is a necessarily high-level analysis of the broad jurisdictional framework. It should not be construed as legal advice on the merits of any possible claims identified. Any potential causes of action would of course depend on the underlying human rights violations in XUAR being substantiated by carefully collected and reliable evidence.

## Corporate accountability for foreign subsidiary companies: jurisdiction and direct liability of parent company

97. The primary hurdle to any claim against foreign companies in England are (i) jurisdiction and, (ii) establishing the liability of the parent or lead company for the actions or omissions of its subsidiary or supplier. Before the English courts can entertain a claim against a foreign company, the claimant must obtain permission from the court to serve proceedings out of the jurisdiction.
98. These issues have been recently considered by the Supreme Court, in a case where claimants (Zambian citizens) made allegations of various human rights abuses against a Zambian company and its UK parent. In its judgment in *Lungowe and others v Vedanta Resources plc and another* [2019] UKSC 20; [2019] 2 WLR 1051, the Supreme Court considered (1) a parent company's liability for the activities of its foreign subsidiaries, and (2) the scope of the English court's jurisdiction to hear such claims. The claim was in negligence and breach of statutory duty: the claimants alleged that discharges from a copper mine which was owned and operated by the Zambian subsidiary had caused them personal injury, damage to property and environmental damage. The claim against the Zambian subsidiary was on

the basis that it was the operator of the mine. The claim against the UK parent company was on the basis that it exercised a ‘*very high level of control and direction ... at all material times over the mining operations of [the Zambian subsidiary]*’ and had therefore assumed a direct duty of care to the claimants.

99. In its judgment, the Supreme Court summarised the relevant legal framework governing claims against UK parent companies and their foreign subsidiaries arising from human rights abuses by those foreign subsidiaries as follows:

**a. Jurisdiction over the UK parent company**

- i.** Jurisdiction against the UK company arises from article 4(1) of the Recast Brussels Regulation, which provides that persons domiciled in a Member State shall (regardless of their nationality) be sued in that state. Accordingly, any claimant (regardless of nationality or domicile) may sue an English domiciled defendant in England (para. 16).
- ii.** This jurisdiction is not available, however, where the sole purpose of issuing a claim against the UK parent company is to enable proceedings to be brought in England against the foreign subsidiary (para. 35).

**b. Jurisdiction over the foreign subsidiary**

- i.** Where the court has jurisdiction over the UK parent company, a claimant may also (pursuant to para. 3.1 of PD6B of the Civil Procedure Rules) apply for permission to serve the claim on a foreign defendant (e.g. a subsidiary or supplier of the UK parent company) out of the jurisdiction. In making such an application, the claimant must demonstrate: (1) that the claim against the UK parent company involves a real issue to be tried; (2) if so, that it is reasonable for the court to try that issue; (3) that the foreign subsidiary is a necessary or proper party to the claim against the UK parent company; (4) that either England is the proper place in which to bring the combined claims or there is a real risk that the claimants will not obtain substantial justice in the foreign jurisdiction, even if the foreign jurisdiction would otherwise have been the proper place to bring the claim (para. 20).
- ii.** In determining whether there is a real issue to be tried between the claimant and UK parent company, the court will ask whether the claim has a reasonable (as opposed to fanciful) prospect of success (para. 42). See ‘direct liability

of the parent company' below for application of the test in Vedanta.

- iii. In determining whether England is the proper place to bring the claim, the court will (summarily) consider connecting factors between the claim (as a whole) and the competing jurisdictions in which it may be tried (paras. 66, 74). These may include matters of practical convenience (such as the availability of witnesses, language, access to courts) as well as issues of applicable law (para. 66).
- iv. In determining whether the parties could obtain substantial justice in the relevant foreign jurisdiction, the court will require 'cogent evidence' which it will consider with anxious scrutiny, in recognition of the fact that a decision that a foreign jurisdiction would not provide substantive justice risks offending international comity (paras. 11, 88). This analysis is separate to that of determining the proper place (para. 88).

**c. Direct liability of the parent company**

- i. The 'critical question' when considering the liability of a UK parent company for acts of its foreign subsidiary is whether the parent company 'sufficiently intervened in [the relevant acts] to have incurred, itself (rather than by vicarious liability), a common law duty of care to the claimants' or liability under relevant foreign domestic law (para. 44). In relation to the duty of care specifically, the Supreme Court noted that (1) the liability of parent companies in relation to the activities of their subsidiaries is not, of itself, a distinct category of negligence; and (2) that establishment of the requisite duty of care will depend on the facts.
- ii. The parent company's ownership of shares in a subsidiary is not of itself sufficient to establish the necessary level of supervision or degree of control for purposes of the duty of care assessment: '[e]verything depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary. All that the existence of a parent subsidiary relationship demonstrates is that the parent had such opportunity' (para. 49). It follows, and

this is important for the present context, that there may be sufficient connection where there is no shareholding relationship but nonetheless the requisite connection (i.e. between a supplier and another company). Accordingly, claimants in supply chain settings may be able to argue that a lead purchasing company exercises sufficient control over a particular aspect of the supplier's business so as to found liability/jurisdiction.<sup>117</sup>

100. Accordingly, determination of jurisdiction will turn almost entirely on the facts of the case. As explained above, relevant considerations are likely to include: (i) the nature of the claim against each defendant, (ii) the relationship between the parent company and its subsidiary company (or possibly supplier and lead company), (iii) how the claim relates to both the foreign jurisdiction and England, and (iv) the nature of the relevant foreign justice system and whether substantive justice could be obtained there.
101. As *Vedanta* demonstrates, once jurisdiction is established, claims may be brought in the English courts against a foreign company in relation to a variety of causes of action. The applicable law will generally be that of the state in which the subsidiary is domiciled. Many claims relating to foreign human rights abuses are founded in tort and brought in negligence (as in *Vedanta*). However, the applicable domestic legislation may also give rise to claims for breach of statutory duty, bills of rights or constitutional principles.
102. In common law countries (and particularly those in which English judgments are of persuasive authority), the foreign domestic tort law may be assumed to be the same as English law. However, claims relating to civil law jurisdictions (such as mainland China) and breaches of foreign statutory duties will turn on expert evidence of foreign domestic law. Accordingly, before a claim could be formulated against a Chinese subsidiary of/supplier to a UK parent company, the claimant would need to obtain advice on Chinese law.
103. It is noteworthy that England is not the only common law jurisdiction that is opening up to claimants in corporate accountability cases. The Supreme Court of Canada in *Nevsun Resources Ltd v Araya* 2020 SCC 5 held that a novel claim for violations of customary international law including forced labour, torture, slavery and crimes against humanity could proceed to trial before the Canadian courts.

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<sup>117</sup> Anil Yilmaz Vastardis, *Vedanta v. Lungowe* Symposium: Potential Implications of the UKSC's Decision for Supply Chain Relationships, *Opinio Juris* 23.04.19. Claims against lead purchasing companies have been brought in Germany (*Jabir et al v KiK Textilien und Non-Food GmbH*, Case No 7 O 95/15) Canada (*Das v George Weston Limited*, 2017 ONSC 4129) and the United States (*Doe I v Wal-Mart Stores, Inc*, 572 F.3d 677, 683-84 (9th Cir 2009)).

The claims relate to Nevsun's alleged complicity in the use of forced labour at a mine site in Eritrea. This decision stands in contrast to the recent decisions of the US Supreme Court in *Kiobel v Royal Dutch Petroleum Co* 569 US 108 (2013) and *Jesner v Arab Bank* 138 S Ct 1386 (2018), which have had the effect of restricting the ability of claimants to bring claims for violations of customary international law under the Alien Tort Statute. Corporate liability under the ATS may be foreclosed altogether in *Doe v Nestle et al No. 17-55435 (9th Cir. October 23, 2018, amended July 5, 2019)*, which was granted certiorari by the Supreme Court on 2 July 2020.

104. There have been a number of other recent developments in the United States. The Uyghur Human Rights Policy Act 2020<sup>118</sup> provides for targeted sanctions and visa restrictions on persons identified responsible for specific human rights violations (Sec. 6), and requires companies to conduct due diligence to ensure that their commercial activities are not contributing to human rights violations in Xinjiang and that their supply chains are not compromised by forced labour (Sec.4(7)). It requires reports to Congress on: (1) human rights abuses in Xinjiang; (2) efforts to protect U.S. citizens and residents, including ethnic Uyghurs and Chinese nationals studying or working in the United States, from harassment and intimidation by the Chinese government; and (3) the Chinese government's acquisition and development of technology to facilitate internment and mass surveillance in Xinjiang.
105. Further, on 1 July 2020, the Department of State, together with the US Department of Commerce and US Department of Homeland Security, issued a business advisory to caution businesses about the risks of supply chain links to entities that engage in human rights abuses, including forced labour, in the XUAR.<sup>119</sup> It specifically pointed to the following three types of supply chain exposure for entities engaged in human rights abuse:
  - a. Assisting in developing surveillance tools for the P.R.C. government in Xinjiang;
  - b. Relying on labour or goods sourced in Xinjiang, or from factories elsewhere in China implicated in the forced labour of individuals from Xinjiang in their supply chains, given the prevalence of forced labour and other labour abuses in the region; and
  - c. Aiding in the construction of internment facilities used to detain Uyghurs and members of other Muslim minority groups, and/or in the

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<sup>118</sup> <https://www.congress.gov/bill/116th-congress/senate-bill/3744>; <https://www.congress.gov/116/plaws/publ145/PLAW-116publ145.pdf>.

<sup>119</sup> <https://www.state.gov/xinjiang-supply-chain-business-advisory/>.



construction of manufacturing facilities that are in close proximity to camps operated by businesses accepting subsidies from the P.R.C. government to subject minority groups to forced labour.

106. There are also relevant legislative developments occurring in Europe. The French law on the Corporate Duty of Vigilance enacted in 2017 requires French companies of a certain size to establish and to implement an annual ‘vigilance plan’. The plan must set out the steps that the company is taking to detect risks and prevent serious violations with respect to human rights and fundamental freedoms, health and safety and the environment. The law expressly links the specific duty of vigilance to the general tort provisions in art. 1240 and 1241 French civil code. Victims who have been harmed by a company captured by the legislation can claim damages for negligence through an ordinary civil lawsuit, using the company’s noncompliance with the duty of vigilance as evidence of its wrongdoing. The German government is considering enacting a mandatory human rights due diligence law and the European Union, under the German presidency, will begin consultations on a Europe-wide due diligence law later this year.

### **Review of international companies linked to Xinjiang**

107. We have preliminarily reviewed evidence of international companies that have or may have links with alleged human rights violations in Xinjiang, on the basis of information available on an open-source basis.<sup>120</sup> We emphasise that we have not conducted ourselves any investigations in respect of these companies and are unable to confirm, verify or otherwise report on the nature, degree or veracity of these sources or any related allegations. With that important disclaimer, we note that the international companies can be divided into three main categories as follows:
108. **International companies with significant ownership stakes in companies allegedly involved in human rights violations.** These include international investment funds and international technology companies which own significant shareholdings in Chinese registered companies. These Chinese companies, some of which are partly state-owned, themselves supply hardware technology to detention facilities or to local governments which carry out intrusive surveillance in XUAR, as well as software which may be used in the state surveillance system, for example software assisting with the mass collection and analysis of mobile phone location data.

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<sup>120</sup> We have been greatly assisted by a compilation of prominent examples of 57 international corporations potentially linked to human rights violations XUAR compiled from open source information.

109. **Suppliers of goods and services** to organisations alleged to be complicit in human rights abuses in Xinjiang and/or implicated or linked through supply chains. It is likely that hardware and software produced by international companies (an obvious example being computer chips) have been utilised in technology used by the police and other government authorities in XUAR. Other companies have reportedly supplied “technical solutions” to Chinese registered companies which supply surveillance technology in XUAR. Other companies have entered into partnership agreements to pursue projects in AI and policing software with Chinese universities (including a Chinese military university) and Chinese registered companies, including at least one which has been blacklisted by the US Department of Commerce on suspicion of being involved in the persecution of Muslims in XUAR.
110. **Purchasers of raw or finished materials** produced in Xinjiang, where violations of human rights, in particular with respect to slavery and forced labour, may be implicated or linked through supply chains. One international sportswear company ceased sourcing products from XUAR after allegations that its suppliers in XUAR made use of forced labour in detention camps. Other international clothing companies continue to purchase textiles from Chinese companies which operate cotton spinning mills in XUAR, and tomato paste produced by companies based in XUAR continues to be exported to a number of large international companies.
111. So far as companies using products from XUAR in their supply chains are concerned, opportunities for claims arising from rights violations are limited in England. To bring a direct liability claim, as noted above, requires the lead company to have sufficient control over the particular aspect of the supplier’s business. The Modern Slavery Act 2015 s.54 requires companies doing business in the UK and with an annual turnover of over £36m to publish an annual slavery and human trafficking statement. The obligation to publish such statements gives an important opportunity for raising public awareness and applying pressure on companies to disassociate themselves from such supply chains, but in itself does not provide any legal cause of action. *Vedanta* may assist claimants, however. The Supreme Court held that the most compelling indicator of a high level of intervention between parent and subsidiary was found in the public disclosures made by Vedanta in its sustainability reports. When lead companies set standards for their suppliers and supervise labour or environmental performance, they typically disclose these efforts in their sustainability, human rights, or modern slavery reporting. Thus, the disclosures in an annual slavery and human trafficking statements may evidence an assumption of responsibility on the part of the lead company that could be the basis of a direct liability claim.

112. It is also unlikely that any legal causes of action will arise simply from the supply of goods (such as computer chips) in chains which end up with products used in human rights violations in XUAR, although reputational, commercial and moral pressure may be placed on companies where such allegations can be demonstrated. The position may be different where international companies have provided bespoke services (such as designing software systems) where they knew or ought to have known the uses to which those services would be put. Everything will depend on the particular facts of each case; on the information currently available, it is not possible to provide specific or further analysis. However, the large number of technology companies based in the USA may make it valuable for opinions to be sought from US legal experts.
113. The most promising cases for litigation are likely to be those analogous to the case of *Vedanta*. The difficulty will be in identifying international companies which have a high degree of direction and control over Chinese subsidiaries. Our research has not identified any international companies with such control over Chinese subsidiaries involved in human rights violations in XUAR. Given the Chinese government's restrictive policies on foreign companies operating in China, it may be unlikely that such corporate relationships would in fact be permitted for companies operating in a politically sensitive area such as XUAR.
114. There may, however, be potential for applications for pre-action disclosure or requests for information in support of future claims. If international companies can be identified with connections to Xinjiang which may potentially form a basis for a claim, any such pre-action applications may be beneficial on a public awareness level as well as acting as a deterrent against any such links in future.
115. The most likely jurisdiction to have suitable defendant companies may be the USA, again because of the large number of global technology companies based there. Although the Alien Tort Statute is a less promising route for claimants suing in the United States, the option remains of bringing a conventional tort claim in a federal or state court. Recent political statements in the United States are strongly condemnatory of the situation in XUAR.<sup>121</sup> Indeed, on 9 July 2020, sanctions were applied to three senior officials of the Chinese Communist Party in Xinjiang for gross violations of human rights.<sup>122</sup> Other jurisdictions with potential defendants include France and Germany, and – because of its proximity to mainland China – Hong Kong. We would recommend that further research is carried out with the aid of qualified legal experts in those jurisdictions.

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<sup>121</sup> Department of Homeland Security, Trump Administration Strongly Warns US Businesses Against Contributing to China's Human Rights Abuses, 1 July 2020 <https://www.dhs.gov/news/2020/07/01/trump-administration-strongly-warns-us-businesses-against-contributing-china-s-human>.

<sup>122</sup> Statement of Secretary Pompeo, 9 July 2020 <https://www.state.gov/the-united-states-imposes-sanctions-and-visa-restrictions-in-response-to-the-ongoing-human-rights-violations-and-abuses-in-xinjiang/>.

## Criminal prosecutions and proceeds of crime proceedings in England and Wales

116. There are a number of potential criminal or quasi-criminal actions which could be taken by public authorities or private individuals in countries outside China. Again, such actions would be case-specific and this is intended to give an overview rather than offer legal advice on the merits of particular actions.
117. First, courts in the UK have jurisdiction to try persons of any nationality for certain offences committed anywhere in the world, including – most relevantly for these purposes – torture by public officials or persons acting in an official capacity, as defined in s.134 of the Criminal Justice Act 1988.<sup>123</sup> Officials of the Chinese central government and the XUAR government will clearly fall into this category. Private contractors or agents acting in an official capacity are also likely to do so,<sup>124</sup> although there may be borderline cases because of the complex relationship between the state and private sectors in China generally. Section 134(5)(b)(iii) accords a defence if the actions were carried out under lawful authority, justification or excuse according to Chinese law. The prerequisites for a public prosecution would of course be that such a person could be identified whilst he or she was in the UK, and the UK authorities would have to decide to investigate and prosecute him or her.
118. If such a person were identified within the UK but the authorities were not willing to investigate (for example, no police force would adopt the case) then a private prosecution could be initiated for a s.134 torture offence. The consent of the Attorney General would be required to prosecute any such offence,<sup>125</sup> and if granted, it is likely that the Crown Prosecution Service (“CPS”) would then take over any such prosecution because of the political sensitivities involved. Often when the CPS takes over a private prosecution, it does so in order to discontinue it, which would be a risk that any private prosecutor would have to take into account. However, either a decision by the Attorney General to withhold consent to such a private prosecution or a CPS decision to bring it to an end could be challenged by an application for judicial review.
119. Courts in the UK also have the power to try persons responsible for crimes within the jurisdiction of the International Criminal Court pursuant to the International Criminal Court Act 2001 (“**ICC Act**”). Section 51 of the ICC Act provides that it is an offence against the law of England and Wales for a person to commit ‘genocide, a crime against humanity or a war crime’, if committed outside the UK by *inter alia* ‘a United Kingdom resident’. Section 67A provides a definition of those who are to

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<sup>123</sup> See by way of example *R v Zardad*, *Central Criminal Court*, [2004] 4 WLUK 633.

<sup>124</sup> *R v Reeves-Taylor* [2019] UKSC 51.

<sup>125</sup> CPS: Consents to Prosecute, <https://www.cps.gov.uk/legal-guidance/consents-prosecute>.

be treated as being ‘resident’ for the purpose of the Act. As with torture under the Criminal Justice Act 1988, s.53 of the ICC Act requires the consent of the Attorney General for proceedings under the Act.

120. Crimes such as ‘murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment/severe deprivation of liberty, torture, rape/sexual slavery, persecution, enforced disappearance, and apartheid’ amount to ‘crimes against humanity’ if committed as part of a ‘widespread or systematic attack against a civilian population’. Importantly, s.65 of the ICC Act provides that commanders and superiors may be prosecuted for failing to prevent or punish the crimes of their subordinates.
121. A second area of criminal liability could be money laundering offences. Under the Proceeds of Crime Act 2002, “criminal property” is defined as property obtained as a result of or in connection with criminal conduct, which can be conduct which constitutes an offence in any part of the UK or would constitute such an offence if it occurred in the UK.<sup>126</sup> If a person in the UK then deals with the property in certain ways,<sup>127</sup> knowing or suspecting that it derives from criminal conduct, that person commits an offence. Therefore, if an individual can be proved to have financially benefited from activities in XUAR which would constitute offences in the UK (e.g. torture, false imprisonment, etc) then potentially that person may be guilty of money laundering offences if he or she chooses to invest or spend that benefit in the UK. Again, a private prosecution (potentially supported by restraint orders over the property) would be possible if no government authority was willing to investigate. No consent from the Attorney General or Director of Public Prosecutions is needed for a prosecution for money laundering offences.
122. If assets obtained through overseas unlawful activity<sup>128</sup> or gross human rights abuses or violations<sup>129</sup> can be identified in the UK, Part 5 of the Proceeds of Crime Act 2002 also gives powers to government bodies such as the National Crime Agency to recover those assets in civil proceedings.<sup>130</sup> The National Crime Agency in particular has been willing in recent years to take such proceedings in cases

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<sup>126</sup> Proceeds of Crime Act 2002 s. 340.

<sup>127</sup> Including concealing, disguising, converting, transferring, removing, acquiring, using or possessing it, or entering into an arrangement with respect to it: Proceeds of Crime Act 2002 ss. 327-329.

<sup>128</sup> Proceeds of Crime Act 2002 s. 241. The activity must have been unlawful both in the country where it occurred and would have been so unlawful if it had occurred in the UK.

<sup>129</sup> Proceeds of Crime Act 2002 s. 241A, commonly known as the ‘Magnitsky’ clause. A gross human rights abuse or violation is defined in relation to three conditions set out in the section, and is aimed at acts of torture or cruel, inhuman or degrading treatment or punishment carried out on or behalf of public officials against persons such as human rights activists.

<sup>130</sup> The most common powers are Civil Recovery proceedings under s. 243, summary Account Forfeiture Orders for money held in bank accounts under s. 303Z1, and Unexplained Wealth Orders under s. 362A.

arising from government corruption and human rights abuses and violations in Africa and former Soviet nations; there is no reason in principle why the same approach could not be taken if the beneficiaries of human rights violations in XUAR remained in China or elsewhere, but their financial benefits could be traced into assets invested in the UK.

123. Moreover, the Global Human Rights Sanctions Regulations 2020,<sup>131</sup> laid under the Sanctions and Anti-Money Laundering Act 2018,<sup>132</sup> can be used to impose sanctions for serious violations or abuses of (i) the right to life, (ii) torture, cruel, inhuman or degrading treatment or punishment, and (iii) slavery and holding in servitude or a requirement to perform forced or compulsory labour.
124. On 6 July 2020 the UK designated 49 individuals<sup>133</sup> and organisations involved in some of the most notorious rights violations under the new sanctions regime. The regime provides the UK powers to stop those involved in serious human rights abuses from entering the UK, channelling money through banks or profiting from the UK economy. The measures are aimed at individuals and organisations rather than nations. None of the individuals listed are currently from Xinjiang, or more broadly from China.

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<sup>131</sup> <http://www.legislation.gov.uk/uksi/2020/680/made>.

<sup>132</sup> <http://www.legislation.gov.uk/ukpga/2018/13/contents>.

<sup>133</sup> <https://www.gov.uk/government/news/uk-announces-first-sanctions-under-new-global-human-rights-regime>.

# Recommendations to States other than China



## Recommendations to States other than China

125. The treatment of members of Uyghur and other Turkic Muslim communities by China raises substantial and alarming concerns about the systematic violation of human rights and *jus cogens* norms. It should be a matter of grave concern to the international community as a whole. It is the responsibility of all States to take all available measures to prevent any violations of international law from occurring, to seek to bring any ongoing violations to an end, and to call upon China to immediately cease any and all alleged practices and policies - violating its obligations and responsibilities - towards Uyghurs and other Turkic Muslims.
126. The Bar Human Rights Committee recommends that States use all available means to:
- a.** Call upon China to:
    - i.** cease and desist all and any violations of its obligations and responsibilities under the relevant treaties;
    - ii.** make effective in domestic law the provisions of the relevant treaties in order to honour obligations to respect, protect and fulfil the obligations and responsibilities thereof;
    - iii.** investigate – and permit, support, and strengthen independent and impartial investigation by others - all allegations of genocide, murder, extermination, torture and other forms of ill-treatment, and enslavement and prosecute alleged offenders; and
    - iv.** provide ‘just satisfaction’ to survivors/victims in the form of individual and/or general measures which may, inter alia, include: remedial actions, reparations, and commitments for non-repetition.
  - b.** Give effect to their responsibilities under the relevant treaties to create, maintain and utilise international bodies to carry out investigations and due diligence in respect of China’s alleged violations of its obligations and responsibilities concerning its Uyghur and other Turkic Muslim populations;
    - i.** States should specifically consider supporting and assisting independent, impartial and international mechanisms (whether state or non-state) to carry out investigations to determine comprehensively any violation by China of its *jus cogens* obligations and responsibilities. Such a mechanism

may be founded, with the support of States, as an ad hoc process independent of international bodies where those bodies do not have a mandate.

- c.** To use all available offices and legal means to prevent any violations being committed against Uyghur and Turkic Muslim populations;
- d.** To use all available offices and legal means to investigate, apprehend and punish alleged perpetrators of any violations being committed against Uyghur and Turkic Muslim populations;
- e.** Utilise mechanisms before international organisations to request that an Advisory Opinion be sought from the ICJ on allegations highlighted in this Briefing Paper that would constitute, if proven, serious violations of international law, in particular obligations of an *erga omnes* character;
- f.** Support the call of the UN independent experts of 26 June 2020 for decisive measures to protect fundamental freedoms in China by:
  - i.** urging the Government of China to invite mandate-holders, including those with a mandate to monitor civil and political rights, to conduct independent missions and to permit those visits to take place in an environment of confidentiality, respect for human rights defenders, and full avoidance of reprisals against those with whom mandate-holders may meet,
  - ii.** calling upon the UN Human Rights Council (“HRC”) to act with a sense of urgency to take all appropriate measures to monitor Chinese human rights practices,
  - iii.** establishing an impartial and independent United Nations mechanism - such as a United Nations Special Rapporteur, a Panel of Experts appointed by the HRC, or a Secretary General Special Envoy - to closely monitor, analyse and report annually on the human rights situation in China, particularly, in view of the urgency of the situations in the XUAR;
- g.** Create and apply Magnitsky-style sanctions on individuals, whether state or non-state actors, where there are reasonable grounds to suspect the person is involved in serious human rights violations in XUAR; and
- h.** Invoke China’s international responsibility for alleged violations of CERD, engaging the inter-State dispute mechanism.

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