

Legal submission on genocide to the Uyghur Tribunal

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I. Question Addressed

Does the People's Republic of China meet the intent requirement for genocide against the Uyghurs under the Convention on the Prevention and Punishment of the Crime of Genocide ("the Genocide Convention") and the Statute of the International Criminal Court ("the Rome Statute")?

II. Brief Conclusion

The documented genocidal acts can be linked to the requisite genocidal intent of the Genocide Convention and the Rome Statute both for population optimization and forced organ harvesting.

III. Analysis for population optimization

The Genocide Convention

The crime of genocide is a well-established peremptory norm enshrined in the *Genocide Convention*, which China signed and ratified in 1949 and 1983, respectively.¹ Under the *Genocide Convention*, State Parties have an obligation to prevent and punish genocide.²

¹ "Status of Treaties: Convention on the Prevention and Punishment of the Crime of Genocide," *United Nations Treaty Collection* <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&clang=en#33>.

² *The Convention on the Prevention and Punishment of the Crime of Genocide*, GA Res 260 (III), 9 December 1948, 78 UNTS 277 at Article I, [*Genocide Convention*].

Article II of the *Genocide Convention* defines the crime of genocide as “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group”³

Vienna Convention on the Law of Treaties

The Vienna Convention on the Law of Treaties (“VCLT”) to which China is a State party, sets out the parameters for international treaty interpretation. As per Article 31 of the VCLT, the *Genocide Convention* must be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁴

The high-level statements on “population optimization” can be linked to the genocidal act under Article II d) of the Genocide Convention

China seeks to “optimize” the Uyghur population in the Xinjiang Uyghur Autonomous Region (“XUAR”) to solve its “terrorism” problem.⁵ China would likely argue

³ *Ibid* at Article II.

⁴ *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, Article 31 [VCLT].

⁵ Adrian Zenz, “End the Dominance of the Uyghur Ethnic Group: An Analysis of Beijing’s Population Optimization Strategy in Southern Xinjiang” (3 June 2021) at 1, online (pdf): *Central Asian Survey* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3862512>

that its population optimization – or counterterrorism – measures in Xinjiang are non-genocidal in nature. However, Dr. Adrian Zenz in his research presents evidence on the tight link between China’s population optimization programs and birth control measures, which he estimates to have resulted in a difference in population growth of between 2.6 and 4.5 million persons by 2040.⁶ Thus, the high-level statements of intent on the “optimization” of the Uyghur population in Southern Xinjiang can be linked to the genocidal act of “measures intended to prevent births within the group” under Article II d) of the Genocide Convention.⁷

The Rome Statute

The Rome Statute, in Article 6, replicates the crime of genocide found in the Genocide Convention. China is not a state party to the Rome Statute. However, the International Criminal Court has jurisdiction where a situation is referred by the Security Council (where China has a veto) or the crime is committed in part in the territory of a state party to the statute of the Court.

Legal Requirements of Article II d) of the Genocide Convention and Article 6 d) of the Rome Statute

It is argued that China’s acts meet the legal requirements of Article II d) of the Genocide Convention and Article 6 d) of the Rome Statute, which identifies “imposing measures intended to prevent births within the group” as a genocidal act.⁸ The International Criminal Tribunal for Rwanda in *Prosecutor v Akayesu* held that “imposing measures intended to prevent births within the group” includes “the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages.”⁹

⁶ *Ibid.*

⁷ *Genocide Convention, supra* note 2 at Article II d).

⁸ *Ibid.*

⁹ ICTR, *Prosecutor v Akayesu*, ICTR-96-4-T, Judgement, 2 September 1998, para. 507-508.

The discussion below provides an overview China's use of these practices which constitute genocide.

Overview of "Population Optimization"

In April 2014, President Xi launched an offensive to target the "struggle against terrorism, infiltration, and separatism."¹⁰ He singled out South Xinjiang, where Uyghurs comprise 90% of the population, as the focal point of the offensive.¹¹ This launched a series of "population optimization" policies, which center around changing the ethnic population ratios in Xinjiang through the immigration of Han Chinese, out transfers of Uyghur and other ethnic minorities, and systematic birth prevention campaigns.¹² By relating "population structure" to "population security," China justified altering or reducing the proportion of Uyghurs to Han in Xinjiang in pursuit of national security and counterterrorism policy.¹³

According to Dr. Zenz, the most high-profile and authoritative voice on this issue is "Liu Yilei, deputy secretary-general of the party committee of Xinjiang's Production and Construction Corps (XPCC), and dean of Xinjiang University's Western China Economic Development and Reform Research Institute."¹⁴ According to Yilei:

"...the problem in southern Xinjiang is mainly the *unbalanced population structure*. Population proportion and population security are important foundations for long-term peace and stability. The proportion of the Han population in southern Xinjiang is too low,

¹⁰ Newlines Institute and Raoull Wallenberg Centre for Human Rights, "The Uyghur Genocide: An Examination of China's Breaches of the 1948 Genocide Convention" (March 2021) at 37, online (pdf): *Newlines Institute and Raoull Wallenberg Centre for Human Rights* <<https://newlinesinstitute.org/wp-content/uploads/Chinas-Breaches-of-the-GC3-2.pdf>>.

¹¹ *Ibid.*

¹² *Zenz, supra* note 5 at 7 and 8.

¹³ *Ibid* at 6.

¹⁴ *Ibid.*

less than 15%. The problem of demographic imbalance is southern Xinjiang's core issue."¹⁵

Like Yilei's statement, other statements of intent to optimize the population make less explicit reference to destruction, instead focussing on "[changing] the population structure and layout,"¹⁶ "implementing population adjustments,"¹⁷ and "optimizing [Xinjiang's] population resources."¹⁸ However, although the statements don't explicitly refer to genocidal acts, they explicitly endorse reducing Uyghur fertility levels and the "rapid growth of the minority population."¹⁹ These statements in turn justify policies such as the use of forced sterilizations and birth control measures on Uyghurs. The section below provides an overview of how these policies meet the legal definition of a genocidal act under Article II d) of the *Genocide Convention*.

Birth Control Measures Imposed on Uyghurs in Xinjiang

According to the Raoul Wallenberg Centre's detailed research on the Uyghur Genocide, "the dual strategy of imposing systematic birth prevention measures on Uyghur women and interning Uyghur men and women of childbearing age en masse constitute measures intended to prevent Uyghur births."²⁰

Forced Sterilizations

"Documents from 2019 reveal plans for a campaign of mass female sterilization in rural Uyghur regions, targeting 14 and 34 percent of all married women of childbearing age in two Uyghur counties that year."²¹ The aim of the campaign is likely to sterilize

¹⁵ *Ibid.*

¹⁶ *Ibid* at 5.

¹⁷ *Ibid.*

¹⁸ *Ibid* at 6.

¹⁹ *Ibid* at 8.

²⁰ Newlines Institute and Raoull Wallenberg Centre for Human Rights, *supra* note 10 at 33.

²¹ Adrian Zenz, "Sterilizations, IUDs, and Mandatory Birth Control: The CCP's Campaign to Suppress Uyghur Birthrates in Xinjiang" (21 June 2020) at 2, online (pdf): *Jamestown*,

rural minority women with three or more children, which is equivalent to at least 20% of all childbearing-age women.²² “Budget figures indicate that this project had sufficient funding for performing hundreds of thousands of tubal ligation sterilization procedures in 2019 and 2020.”²³ The XUAR’s Health Commission also budgeted 750.4 and 733.9 million RMB in 2019 and 2020 respectively to incentivize “voluntary” sterilizations and intrauterine device (IUD) placements.²⁴

Intrauterine Device Placements

“In 2018, 80 percent of all new IUD placements in China were fitted in XUAR, a region with merely 1.8 percent of China’s population, a *77.5 percent increase* from four years prior.”²⁵ IUDs were designed so that they could only be removed by State-approved surgeries, and unauthorized procedures were punishable by prison terms and fines.²⁶ “By 2019, XUAR planned to subject at least 80 percent of women of childbearing age in Southern XUAR to sterilizations or IUD placements.”²⁷

The Mass Internment of Uyghurs and Birth Prevention Measures in Detention

“According to the Karakax List, by far the two most cited reasons for detention or internment are (1) “birth policy violations” and (2) “unsafe post 80s, 90s, or 00s person”.”²⁸ The targeting of persons of childbearing age for internment suggests that the mass internment campaign is largely driven by birth prevention.²⁹ Furthermore, ex-

<<https://jamestown.org/wp-content/uploads/2020/06/Zenz-Internment-Sterilizations-and-IUDs-UPDATED-July-21-Rev2.pdf?x53474>>.

²² *Zenz, supra* note 5 at 2.

²³ *Ibid.*

²⁴ *Ibid* at 2, 12, 18-19.

²⁵ Newlines Institute and Raoull Wallenberg Centre for Human Rights, *supra* note 10 at 32.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*

detainees report being forcibly subjected to IUD placements or abortions if pregnant; a required procedure for all interned women.³⁰

Impact of Birth Prevention Measures

Between 2015 and 2018, natural population growth in Xinjiang declined drastically; the growth rates in the two largest Uyghur prefectures decreased by about 84%.³¹ One Uyghur region set an unprecedented birth rate target for 2020 of 1.05 per 1000 (compared to 19.66 per 1000 in 2018).³² The Government did not dispute the decrease in birth rates, instead attributing the drop to “better implementation of family planning policy.”³³ Further, analyzing the difference between the projected natural population growth rate with and without government measures exposes a difference of between 2.6 and 4.5 million lives.³⁴

Therefore, Chinese official’s statements of intent to optimize the population through sterilizations, IUD placements and the mass internment of Uyghurs meets the legal requirement of Article II d) of the *Genocide Convention*.

Proving the intent requirement for Article II d) of the Genocide Convention and Article 6 d) of the Rome Statute

Genocidal intent has two components. The first is the intent to commit the underlying genocidal act. For example, to meet the intent requirement for Article II d) of the Genocide Convention and Article 6 d) of the Rome Statute and “imposing measures intended to prevent births within the group,” the perpetrator must intend to prevent births within the group. The second component is the intent to “destroy, in whole or in

³⁰ *Ibid.*

³¹ *Zenz, supra* note 5 at 2.

³² *Ibid.*

³³ Newlines Institute and Raoull Wallenberg Centre for Human Rights, *supra* note 10 at 33.

³⁴ *Zenz, supra* note 5 at 17.

part, a national, ethnic, racial or religious group, as such.”³⁵ This is known as the special or specific intent or *dolus specialis*.³⁶

The imposition of forced birth control and sterilization measures on Uyghurs was done with the specific intent to destroy Uyghurs in whole or in part. The high-level statements of intent and the imposition of “campaigns of destruction” constitute an intent to “destroy” under the Genocide Convention and the Rome Statute.

Proving the Legal Requirements of Specific Genocidal Intent

Evidence and Burden of Proof

Genocidal intent can be established through circumstantial evidence. However, “any inferences drawn from circumstantial evidence must be the only inference that could reasonably follow from the acts in question.”³⁷ The existence of intent must be established by looking at all evidence as a whole.³⁸ The United Nations Human Rights Council in its Report on the Fact-Finding Mission in Myanmar set out the factors relevant to a determination of genocidal intent from a collection of genocide case law, which include:³⁹

- Evidence of communications showing an accused ordered attacks on the targeted group⁴⁰
- Evidence relating to those acting with or at the behest of the accused⁴¹

³⁵ *Genocide Convention*, *supra* note 2 at Article II.

³⁶ ICJ, *Bosnia Herzegovina v. Yugoslavia (Serbia and Montenegro)*, Judgment, 27 February 2007, para. 187 [*Bosnia*].

³⁷ *Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UNHRC, 39th Sess, Agenda Item 4, A/HRC/39/CRP.2 (2018) at 1415 [*Fact-Finding Mission on Myanmar*].

³⁸ ICTY, *Prosecutor v. Stakic*, IT-97-24-A, Judgment, 22 March 2006, para. 55.

³⁹ *Fact-Finding Mission on Myanmar*, *supra* note 39 at para 1415.

⁴⁰ ICTR, *Prosecutor v Kayishema and Ruzindana*, ICTR-95-1-A, Judgment, 1 June 2001, para. 148 [*Kayishema*].

⁴¹ ICTR, *Prosecutor v Niyitegeka*, ICTR-96-14-T, Judgment, 16 May 2003, paras. 413, 419.

- Contextual evidence in the form of plans, policies and preparation; the existence of a genocidal plan or policy⁴², government or official involvement in attacks⁴³
- Evidence of breadth and scale of attacks.⁴⁴

In *Prosecutor v. Radislav Krstic (Appeal Judgement)*,⁴⁵ the Appeals Chamber confirmed that “[t]he intent requirement of genocide under Article 4 of the Statute is [...] satisfied where evidence shows that the alleged perpetrator intended to destroy at least a substantial part of the group”. The Appeals Chamber held that the numeric size of the target part of the group, the number of individuals targeted in relation to the overall size of the entire group, and the targeted portion’s prominence within the group can be a useful consideration. If the targeted group is emblematic of the overall group or essential to its survival, that part may qualify as a substantial part of the group.

The Appeals Chamber concurred with the Trial Chamber that Srebrenica was of immense strategic importance to the Bosnian Serb leadership, was prominent in the eyes of the Bosnian Muslims and the international community, and that the fate of the Bosnian Muslims of Srebrenica was emblematic of that of all Bosnian Muslims.

The Defence claimed that the Trial Chamber had impermissibly measured the number of Bosnian Muslim men of military age that had been killed against the Bosnian Muslim population as a whole. The Appeals Chamber found that the Trial Chamber had properly “treated the killing of the men of military age as evidence from which to infer that Radislav Krstic and members of the VRS Main Staff had the requisite intent to destroy all the Bosnian Muslims of Srebrenica...”.⁴⁶

"Destroy"

In *Krstic*, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) unanimously held that the Srebrenica massacre, in which 7,000-8,000

⁴² ICTY, *Prosecutor v Jelusic*, IT-95-10-A, Judgment, 5 July 2001, para. 48.

⁴³ ICTY, *Prosecutor v Krstic*, IT-98-33-A, Judgment, 19 April 2004, para. 35 [*Krstic* Appeal].

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid* at para 19.

Bosniak Muslim men were killed, and between 25,000-30,000 women, children, and the elderly were forcibly transferred, constituted genocide.⁴⁷ In 2007, the ruling was upheld by the International Court of Justice.⁴⁸

The ICTY established beyond a reasonable doubt that killing 2-3 generations of men of military age, and forcibly transferring the women, children, and elderly would have a lasting and devastating impact on the survival of the Bosnian Muslim population of Srebrenica. The Trial Chamber also pointed out that their intent to destroy can be seen in the fact that the VRS Main Staff destroyed homes and the principal Mosque in Srebrenica. The Appeals Chamber confirmed the Trial Chamber's findings on this point.

Destruction means physical or biological destruction of a group. Some experts have argued that physical destruction is not necessary, as "genocide means any" of the enumerated acts under Article II of the Genocide Convention, including those not requiring physical destruction such as the forcible transfer of children (Article II (e)) or causing mental harm to members of the group (Article II (b)).⁴⁹ However, in *Krstic*, the Defence argued that the Trial Chamber impermissibly enlarged the term "destroy" in the prohibition of genocide to include the geographical displacement of a community. The Defence argued that an effort to displace a community from its traditional residence is insufficient to show that the alleged perpetrator intended to destroy a protected group and that the term genocide only applies to instances of physical or biological destruction of a group.

The main evidence the Trial Chamber relied upon was the killing of the Bosnian Muslim men of military age, since it impacted the survival of the community. The Appeals Chamber held that the Trial Chamber was entitled to conclude that evidence of the transfer supported its finding that some members of the VRS Main Staff intended to destroy the Bosnian Muslims in Srebrenica.

⁴⁷ *Ibid.*

⁴⁸ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 200, p.43.

⁴⁹ Newlines Institute and Raoul Wallenberg Centre for Human Rights, *supra* note 10 at 13.

As the Trial Chamber found in *Prosecutor v. Stakic*, “[t]he expulsion or part of a group does not in itself suffice for genocide.”⁵⁰ Despite this, a Trial Chamber may still rely on such an expulsion as evidence of the specific intent of genocide. The Appeals Chamber held that “[t]he genocidal intent may be inferred, among other facts, from evidence of ‘other culpable acts systematically directed against the same group’.”⁵¹

The Appeals Chamber referred to the *Prosecutor v. Jelusic* Appeals Judgement in which it held: “As to proof of specific intent, it may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts.”⁵²

The Appeals Chamber held that in the absence of direct evidence of genocidal intent, the intent may still be inferred from the factual circumstances of the case.⁵³ The Appeals Chamber also held that “[t]he inference that a particular atrocity was motivated by genocidal intent may be drawn, moreover, even where the individuals to whom the intent is attributable are not precisely identified. If the crime committed satisfies the other requirements of genocide, and if the evidence supports the inference that the crime was motivated by the intent to destroy, in whole or in part, a protected group, a finding that genocide has occurred may be entered.”⁵⁴

“The use of derogatory language towards members of the targeted group,” especially by government officials and direct perpetrators, is a relevant indicator of

⁵⁰ *Prosecutor v. Stakic* (2003), Case No. IT-97-24-T, (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II) at para. 519, including footnote 1097-1098 (citing K. Kreß, *Münchener Kommentar zum StGB*, Rn 57, section 6 VStGB (2003); William A. Schabas, *Genocide in International Law* (2000), p. 200; BGH v. 21.2.2001 – 3 StR 244/00, NJW 2001, 2732 (2733)).

⁵¹ *Krstic* Appeal, supra note 45 at para. 33.

⁵² *Jelusic*, supra note 44 at para 47.

⁵³ *Krstic* Appeal at para 34.

⁵⁴ *Ibid.*

genocidal intent.⁵⁵ Government officials have made explicit statements signaling an intent to destroy. Government officials “urged party members to “wipe [Uyghurs] out completely...Destroy them root and branch.””⁵⁶ Xinjiang’s Party Secretary, Chen Quanguo, urged thousands of police officers and soldiers to “round up everyone who should be rounded up” and to prepare for a “smashing, obliterating offensive.”⁵⁷ “Officials described Uyghurs with dehumanizing terms and repeatedly likened the mass internment of Uyghurs to “eradicating tumors.””⁵⁸ “An internal Party memo warned, “If religious extremist thought is not rooted out, violent terrorist acts will continually multiply like cancer cells.””⁵⁹

The campaigns of destruction put in place are “evidence of an organized plan of destruction.”⁶⁰ Apart from the forced sterilizations and IUD placements discussed above, the Chinese regime has put in place measures to destroy the Uyghur’s cultural identity through the destruction of sacred sites and instituted a mass internment campaign.⁶¹ Although masked as a campaign to “alleviate poverty” through education and training, this is a campaign to detain and persecute Uyghurs.⁶² This is done in internment camps with strict security conditions, where detainees’ sleep, eating and movement are controlled.⁶³ Uyghurs at detention camps are often subject to forced labour such as being threatened with further detention if they deny a work transfer and being forced to work at factories at less than minimum wage.⁶⁴

“In whole or in part...as such”

⁵⁵ *Kayishema*, *supra* note 42 at paras. 93, 527.

⁵⁶ Newlines Institute and Raoul Wallenberg Centre for Human Rights, *supra* note 10 at 37.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Fact-Finding Mission on Myanmar*, *supra* note 39 at para 1428.

⁶¹ Newlines Institute and Raoul Wallenberg Centre for Human Rights, *supra* note 10 at 39.

⁶² *Ibid.*

⁶³ *Ibid* at 40.

⁶⁴ Amy K. Lehr & Mariefaye Bechrakis, “Connecting the Dots in Xinjiang: Forced Labour, Forced Assimilation, and Western Supply Chains” (2019) at 10, online (pdf): *Center for Strategic & International Studies* <https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/Lehr_ConnectingDotsXinjiang_interior_v3_FULL_WEB.pdf>

It is argued that the consistent targeting of specific subsets of Uyghurs and the targeting of the Xinjiang region is indicative of an intent to destroy a substantial portion of the Uyghur population in part as such.

There are three matters relevant to the determination of “part” of the “group” for the purposes of Article II.⁶⁵ First, the perpetrator need not intend to destroy the entire group.⁶⁶ Partial destruction is sufficient if a substantial, or sufficiently large, part of the group has been targeted.⁶⁷ Interpreting the treaty in its context and in light of its object and purpose, per Article 31 of the VCLT – “to prevent genocide and safeguard the existence of human groups before their physical destruction occurs” - reveals that the terms “in whole or in part” encompass “an intent to destroy the group to the point that the group no longer exists as a group and can no longer reconstitute itself as such.”⁶⁸ Thus, intent to destroy the entire group is not necessary.

Second, “genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area.”⁶⁹ As mentioned above, the population optimization offensive was launched in Southern Xinjiang, where Uyghurs comprise 90% of the population.⁷⁰ Although “population optimization” isn’t synonymous with population destruction, “an intent to alter the demographic or ethnic composition of an area” shows an active preoccupation on the part of government authorities with the presence of the protected group in a specific geographic area.⁷¹ Considering that this policy was launched under the guise of counterterrorism, but has been linked with birth control prevention measures which have been shown to decrease birth rates significantly, this policy can therefore be indicative of a genocidal intent to destroy Uyghurs.

Third, “the number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group. In addition to the numeric

⁶⁵ ICTY, *Prosecutor v Krstic*, IT-98-33-T, Judgment, 2 August 2001, paras 585-590.

⁶⁶ *Fact-Finding Mission on Myanmar*, *supra* note 39 at para 1412.

⁶⁷ *Bosnia*, *supra* note 36 at para. 198.

⁶⁸ Newlines Institute and Raoul Wallenberg Centre for Human Rights, *supra* note 10 at 36.

⁶⁹ *Bosnia*, *supra* note 36 at para. 199.

⁷⁰ Newlines Institute and Raoul Wallenberg Centre for Human Rights, *supra* note 10 at 37.

⁷¹ *Fact-Finding Mission on Myanmar*, *supra* note 39 at para 1427.

size of the targeted portion, its prominence within the group can be a useful consideration."⁷² Thus, the "consistent targeting by the perpetrators" of specific subsets of Uyghurs is indicative of genocidal intent, as it makes it more difficult to argue that the attacks were spontaneous or sporadic.⁷³ This is seen in two ways. Uyghurs of childbearing age are consistently targeted by perpetrators for birth control measures. As discussed above, this is evidence of an intent to impose birth control measures to reduce births among Uyghurs, evidencing an intent to destroy a substantial part of the Uyghur population. Further, the targeting of Uyghur intellectuals for internment, "including Government officials, tech founders, prominent university professors, deans, medical researchers, doctors, journalists, editors, publishers, celebrated artists, poets, linguists, computer engineers, and the like," is "evidence of a deliberate Government policy of specifically targeting prominent Uyghur leaders."⁷⁴

Disproving China's Official Explanation for Population Optimization

The Chinese Government would likely argue that it implemented population optimization policies to combat terrorism in Xinjiang. This ulterior intent would mean that it lacked the requisite specific intent to commit genocide. The two counterarguments described below prove that China did possess the specific genocidal intent.

First, China's official reasons behind its policies cannot be used to deny their genocidal nature. To allow a State to escape its obligations under the *Genocide Convention* by invoking other reasons, regardless of how "spurious or specious" would render the *Genocide Convention* unenforceable.⁷⁵ Further, it would be contrary to the principle of good faith enshrined in Article 31 of the VCLT, "and cause offense vis-à-vis the reasonable expectations on the part of other States party for performance and reliability."⁷⁶

⁷² *Krstic Appeal*, *supra* note 45 at para 12.

⁷³ ICTY, *Prosecutor v Tolimir*, IT-05-88/2-A, Judgment, 8 April 2015, para. 263.

⁷⁴ Newlines Institute and Raoul Wallenberg Centre for Human Rights, *supra* note 10 at 40.

⁷⁵ Newlines Institute and Raoul Wallenberg Centre for Human Rights, *supra* note 10 at 36.

⁷⁶ *Ibid.*

Second, the means by which China carried out its population optimization, or counterterrorism policy in the XUAR is unlawful and disproportionate, which reveals an alternative intent. The Fact Finding Mission in Myanmar illustrated this principle. It considered the Government's explanation that Myanmar's "clearance operations were legitimately targeted at eliminating [the Rohingya] terrorist threat."⁷⁷ Myanmar claimed that "the operations were aimed at restoring security in Rakhine State, including by creating the conditions that would allow for even greater control and surveillance over the population. This would occur through the creation of a new physical environment, with newly built villages that are easier to control and in the vicinity of reinforced security posts."⁷⁸ However, the means by which the government carried out the clearance operations – "pursuing a campaign of absolute terror and brutality through gang raping women, killing babies and erasing entire villages, in the knowledge that such response is unlawful and disproportionate, reveals an alternative intent."⁷⁹ Similarly, although China claims that it was seeking to optimize the population for national security purposes, the genocidal means by which it was carried out, through birth control measures, reveals an alternative intent to commit genocide.

Intent and ethnic composition

Chinese government officials have made statements of intent to optimize the ethnic composition in Xinjiang to achieve national security objectives. However, these policies have been closely linked to the imposition of forced sterilizations, IUD placements and birth control measures. Thus, the high-level statements of intent to optimize the population can be linked to the genocidal act under Article II d) of the *Genocide Convention*.

The documented genocidal acts can be linked to the requisite specific genocidal intent by examining the high-level statements of intent and campaigns of destruction by the Chinese regime. To constitute genocide, the perpetrator must possess the specific

⁷⁷ *Fact-Finding Mission on Myanmar*, *supra* note 39 at para 1435.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

“intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such.”⁸⁰ The use of derogatory language towards members of the targeted group and the organized plan of destruction in the form of birth control measures, mass internment and forced labour policies meet the legal requirement for “destruction.” Further, the consistent targeting of specific subsets of Uyghurs and the targeting of the Xinjiang region is indicative of an intent to destroy a substantial portion of the Uyghur population in part as such. Lastly, China’s official reasons for carrying out population optimization policies cannot be used to infer a lack of genocidal intent, as the way they were carried out signal an ulterior intent to commit genocide.

IV. Analysis for forced organ harvesting

Specific intent was a barrier to establishing genocide at The Independent Tribunal into Forced Organ Harvesting from Prisoners of Conscience in China (“The Tribunal”) in 2020. The Tribunal found that while forced organ harvesting practices constituted the genocidal acts of killing of members of a group, causing serious bodily or mental harm to members of a group, and the deliberate inflicting on the group of conditions of life calculated to bring about the group’s physical destruction in whole or in part, there was not clear evidence of a specific intent to destroy the Falun Gong practitioners, or Uyghurs, in whole or in part.⁸¹ The existence of an ulterior explanation for forced organ harvesting – that of a profit motive – made it possible that the perpetrators lacked the specific intent to commit genocide. The China Tribunal, at paragraph 478, noted:

“It was possible to characterise what had occurred as the implementation of a policy to develop the market for organ transplants where Falun Gong practitioners and Uyghurs served unfortunately as a ready and rich resource to meet demand, such that the infliction of forced organ harvesting on these groups was not primarily motivated by the intention to exterminate these groups in whole or in

⁸⁰ *Genocide Convention*, *supra* note 2 at Article II.

⁸¹ “The Independent Tribunal into Forced Organ Harvesting from Prisoners of Conscience in China,” Judgement, 1 March 2020 at paras 471 and 473 [China Tribunal].

part. Whether or not, despite that, those responsible for forced organ harvesting of members of these groups had the requisite mental state or intent to constitute the crime of genocide is not clear."⁸²

This is a possible characterisation for what is happening to the Uyghurs generally. Other motives besides eradication of the group in whole or in part might be profit through selling off body parts or security or ethnic homogeneity or the stamping out of beliefs other than belief in the Chinese Communist Party. Does it really matter which motive is primary?

There were and are also plenty of high level statements about the eradication of Falun Gong. If high level statements about intent to optimize the ethnic composition in Xinjiang to achieve national security objectives show the requisite genocide intent against Uyghurs, why can not the high level statements about eradication of Falun Gong show the requisite genocide intent against Falun Gong? Conversely, if high level statements about eradication of Falun Gong do not show the requisite genocide intent against Falun Gong, how can it be that high level statements about intent to optimize the ethnic composition in Xinjiang to achieve national security objectives shows the requisite genocide intent against Uyghurs?

An opinion on the law of genocide under the Genocide Convention and the Rome Statute dated 23rd May 2019 of Datuk N. Sivananthan commissioned by The China Tribunal at paragraph 34 states:

"The final element that must be met before considering the prohibited acts and their definitions is knowledge of the attack. Case law suggests that awareness, wilful blindness or knowingly taking the risk should suffice in showing the existence of knowledge on the part of the accused. Motive is not necessary and knowledge may be inferred from circumstantial evidence."⁸³

This principle must be kept in mind when considering genocide. Motive is not necessary. An individual may not be motivated to commit genocide and still be complicit in genocide. A person may not have a genocidal motive in killing practitioners of Falun Gong or Uyghurs

⁸² *Ibid* at para 478.

⁸³ <https://chinatribunal.com/wp-content/uploads/2019/06/China-Tribunal-opinion-sgd.pdf>

for their organs. Yet, the person could still be complicit in the genocide of Falun Gong or Uyghurs through death by organ extraction.

Wilful blindness should suffice. A person can not say he/she did not know that the organs provided for transplantation were sourced from a living person killed through organ extraction and that the person killed was Falun Gong or Uyghur if the person involved in transplantation was wilfully blind to the source of the organs.

What wilful blindness means in a medical context was explored in the Nuremberg Medical Trial, the trial of the Nazi doctors. These doctors were not prosecuted for genocide, but they were prosecuted for crimes against humanity, which has a similar mental element.

The Charter of the Tribunal defined crimes against humanity to be

"Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated."

There had to be an intent to commit an inhumane act against a civilian population. The Nazi doctors pleaded ignorance, that they did not know that those on whom they were experimenting were members of a civilian population. The Tribunal rejected that defense and convicted several doctors who used it.

That defence was used by Karl Brandt, Karl Gephardt, Karl Genzken and Siegfried Handloser. The Tribunal in its judgment in convicting all of crimes against humanity said about Brandt "Had he made the slightest investigation he could have ascertained that ...", about Gephardt "had he made the slightest inquiry of them ...", about Genzken "Had he made the slightest inquiry he would have discovered that ..." and about Handloser "Had the slightest inquiry been made the facts would have revealed that".⁸⁴

The Rome Statue for the International Criminal Court provides in Article 30(2)(b) that the mental element for the crimes over which the Court has jurisdiction, including genocide,

⁸⁴ See <https://www.legal-tools.org/doc/c18557/pdf/>

encompasses

"In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events."

The legal opinion submitted to the Tribunal, in paragraph 22, states:

"The intent that is required for genocide is a special one and is unlike the normal intent exemplified in Article 30 of the Rome Statute, which is that the individual must mean to engage in the conduct or mean to cause the conduct or is aware that it will occur in the ordinary course of events. The special intent for genocide instead requires the intent to destroy in whole or in part the protected group."

This is an odd position in light of the fact that Article 30 of the Rome Statute just quoted imposes the same intent requirement for all the crimes over which the Court has jurisdiction and makes no exception for genocide. The opinion cites in support of this deviation from the plain words of the Court statute an academic article by Alexander Greenawalt.⁸⁵

The article states:

"However, even assuming all future genocide trials are before the ICC [International Criminal Court], the statutory framework only guides interpretation '[u]nless otherwise provided.' In this way, the statute provokes an interesting interpretive question. Although nothing in the statute [of the Court] explicitly provides for a distinct genocidal intent standard, one might argue that the origins and development of the prohibition against genocide provide an external source of interpretive authority that trumps the Rome Statute's *mens rea* provision."

The phrase "Unless otherwise provided" occurs in Article 30(1) of the Court statute.

The subarticle states:

"Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge."

⁸⁵ See <https://core.ac.uk/download/pdf/46713705.pdf>

The notion that the phrase "Unless otherwise provided" allows for an external source of interpretive authority to trump the Rome Statute can not be right. The phrase "Unless otherwise provided" must mean "unless otherwise provided in the Rome Statute or by the states parties to the Statute". It can not mean unless otherwise provided by someone else somewhere else. Such an interpretation would render the meaning of the statute uncertain since external interpretive sources vary.

The International Criminal Court has Elements of Crimes. In reference to intent for genocide the Elements state:

"Notwithstanding the normal requirement for a mental element provided for in Article 30, and recognizing that knowledge of the circumstances will usually be addressed in proving genocidal intent, the appropriate requirement, if any, for a mental element regarding this circumstance will need to be decided by the Court on a case-by-case basis."⁸⁶

The Elements of Crime could fit within the phrase "Unless otherwise provided" in Article 30(1) of the Rome Statute since the Elements of Crime were adopted by the states parties to the Rome Statute. The question then becomes what is the appropriate requirement for a mental element regarding knowledge of the circumstance in the case of killing of Falun Gong or Uyghurs for their organs.

The appropriate requirement for a mental element in the circumstances the Tribunal is considering is a variation on the reasoning of the judgment in the Nuremberg Medical Trials. The test should be this:

"If those involved in organ harvesting had made the slightest inquiry or internet search they would have discovered that ..."

This standard contrasts those involved in organ harvesting in China with Dr. James Shapiro of the University of Alberta Hospital, who did make inquiries and searches and refused to participate in a collaboration. The inquiries and searches he made anyone could have made.

⁸⁶

https://www.icc-cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/0/elements_ofcrimeseng.pdf

The Greenawalt article, after the excerpt just quoted, adds:

"If so, the central question remains the same as before: Does 'intent' have a special meaning within the context of genocide?"

The article answers this question this way:

"In cases where a perpetrator is otherwise liable for a genocidal act, the requirement of genocidal intent should be satisfied if the perpetrator acted in furtherance of a campaign targeting members of a protected group and knew that the goal or manifest effect of the campaign was the destruction of the group in whole or in part."⁸⁷

Knowledge, here, as elsewhere includes wilful blindness. That article answer is not that far different from the intent requirement set out in Article 30(2) of the Rome Statute.

Killing Falun Gong or Uyghurs for their organs is an act in furtherance of a campaign targeting practitioners of Falun Gong. Those complicit in killing of Falun Gong or Uyghurs for their organs would have to be wilfully blind not to know the goal or manifest effect of the campaign targeting practitioners of Falun Gong or Uyghurs was the destruction of the group in whole or in part.

The opinion of Datuk N. Sivananthan further states:

"26. An important point that must be noted by the China Tribunal is that an intention to forcefully harvest the organs for the sake of profit is not the same as an intention to forcefully harvest the organs to bring about the physical or biological destruction in part or in whole of a protected group. In deciding whether genocide has been committed, the China Tribunal must make this distinction carefully. One may seek to argue that even if the harvesting of the organs were done for the sake of profit, the perpetrators would have knowledge that their actions would bring about the destruction in part or in whole of the group. However, this argument is reliant on a knowledge-based approach that has yet to be supported by any court rather than a purpose-based approach that has been adopted by the ICTY, ICTR and ICC. As such, it is highly unlikely that the perpetrators' knowledge of the effect of their actions

⁸⁷ Page 2288

without any intention to cause such an effect would be sufficient to meet the requirement of intent under the Genocide Convention."

This reasoning is consequential. It depends on acceptance of the proposition that the Rome Statute does not mean what it says, that the intent for genocide is different from the intent for other crimes under the jurisdiction of the Court, even though the Statute says that the intent for all crimes under the jurisdiction of the Court is the same. It further depends on acceptance of the proposition that the phrase "Unless otherwise provided" in Article 30(1) is not limited to what is provided in the Court Statute or by the states parties to the Statute, but can refer to what is provided by outsiders to the Court.

As previously noted, Court statute Article 30(2)(b) provides that intent encompasses both intent to cause the consequences and knowledge that the consequences will occur. The author of the opinion, in effect, amends the Court statute to say that intent for genocide is limited to intent to cause the consequences and excises from the statute its plain words that intent includes knowledge that the consequences will occur. Yet, there is nothing in the Court jurisprudence to which the author refers which supports that reading of the Statute.

The reasoning of the author of the opinion also rejects the proposed alternative of Professor Greenawalt whose article the opinion cites in support of the reasoning. The proposed alternative of Professor Greenawalt is, as one can see, a knowledge-based approach.

The distinction between knowledge and purpose the author of the opinion seeks to make is not clear cut. People often have more than one intent in carrying forward any action. A person can intend both to make money out of the killing of innocents and intend to eradicate the group to which the innocents belong. Indeed, one intent reinforces the other, gives impetus to the other.

It is impossible to say that the only true genocidal killers are volunteers, those who get no benefit from the killings. If people are paid handsomely to eradicate a group, the intent to eradicate the group nonetheless exists.

Ours is the exact opposite of the author of this opinion. We consider it highly unlikely that the Court would deviate from the Court statute when determining genocidal intent. We

consider highly unlikely that the Court would interpret the phrase "Unless otherwise provided" to mean more than what is otherwise provided by the Court Statute or the states parties to the Statute.

Moreover, even if the Court were to do so, we expect the Court would endorse the proposed alternative of Professor Greenawalt. We expect the Court would adopt a knowledge based approach to intent in the form articulated by Professor Greenawalt.

Time of death

The opinion states in paragraph 21:

"An important distinction that has to be made by the China Tribunal then is whether the harvesting of the organs was done prior to the death of the victim or after the victim's death. If the action was done after the death of the victims then the action of forcefully harvesting the organs from the body would itself likely not constitute a prohibited act for the purposes of the Genocide Convention. If on the other hand, the forced harvesting of organs was done prior to the death of the victims and it resulted in serious physical or mental harm or caused the victim's death, it would qualify as a prohibited act and subject to the intention behind the harvesting of the organs, it may lead to a finding of genocide."

There has to be a distinction made between natural death before harvesting and induced death before harvesting. Induced brain death for the purpose of organ harvesting would still fall within the definition of genocide.

Opportunity to defend

The author in paragraph 52 of the opinion writes:

"An important gap or weakness that currently exists in the proposed determination process of the China Tribunal is the lack of involvement of the accused and hence the lack of opportunity for the individuals accused of these crimes to defend themselves. This is especially important in situations where issues of criminality are raised."

This statement of lack of opportunity is not quite right. The accused were given the opportunity to defend themselves, but declined to do so. Substantial material which contains their public comments was also provided for the Tribunal's consideration.

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