IN THE MATTER OF FORCED ORGAN HARVESTING FROM PRISONERS OF CONSCIENCE IN CHINA

ADVISORY OPINION OF EDWARD FITZGERALD QC

We are asked advise the International Tribunal into Forced Organ Harvesting from Prisoners of Conscience in China on a number of specific questions. These arise from the possibility that the Tribunal may find in its final report that prisoners of conscience who are:

(1) Falun Gong practitioners;

(2) Uighurs;

(3) Tibetan;

(4) "House Christians";

may have been subject to forced organ harvesting.

QUESTION 1

"*What is the present definition of genocide as applicable to the first two groups?"*

1. The authoritative definition of genocide is contained in the 1949 Genocide Convention.

2. Article II of the Convention states:

" In the present Convention, genocide means 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 measured intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group".

3. This definition is repeated in Article 6 of the Rome Statute of the International Criminal Court and has been adopted in the domestic legislation of many countries. See e.g. the UK International Criminal Court Act, 2001, Section 50.

QUESTION 2

" ***Assuming the test is as in the Genocide Convention and the Statute of the International Criminal Court, what additional definitions to guide the Tribunal can be given for:***

a. national,

b. ethnical (sic),

c. racial

d. religious (whether the Falun Gong are a religious group is particularly contentious although definitions of all 4 terms will be valuable to the Tribunal)."

4. The first conviction for genocide was by the International Criminal Tribunal for Rwanda (ICTR), ***Akeyesu*** (Trial Chamber, 2 September 1998; Appeal Chamber, 22 August 2000)

5. The ICTR was required to focus on the definition of "national, ethnic, racial and religious group", as it was concerned with killing of Tutsis by Hutus. The

Tutsis and the Hutus were both tribal groups which shared language, religion and culture, lived in the same area and had a high rate of mixed marriages.

6. The definition it propounded was that groups came within the definition if they were groups:

"*constituted in a permanent fashion, and membership of which is determined by birth, with the exclusion of the more "mobile" groups, which one joins through individual voluntary commitment such as political or economic groups. Therefore a common criterion in the four types of groups protected by the Genocide Convention is that membership in such grounds would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner" (at 511).*

7. This definition seems workable in relation to national, ethnic or racial groups, but not to religious groups (with which the ICTR in ***Akeyesu*** was not concerned). A person may be born into a religious group or may join it through conversion. In either case they may choose to leave that group.

8. It is well established that with regard to the specific individual victim of genocidal conduct, and the question of whether he or she belongs to the targeted group, it is sufficient that the perpetrator <u>believes</u> that the victim is a member of the group he or she seeks to destroy (see Cassese et al, International Criminal Law, 3rd edition, p. 121).

9. This means that where, as with the Nazi genocide of the Jews, the perpetrators perceived the victims as members of a racial group, and persecuted persons of Jewish descent whatever their religion, the genocide was of perceived members of a racial group, irrespective of whether or not it is factually accurate to consider Jews as a racial group.

10. The ***Akeyesu*** definition would however exclude a situation where members of a particular religion were being subjected to genocide but only so long as they remained adherents of that religion, in other words, where the persecution was specifically linked to their religion, but not linked to any national, ethnic or racial group or to any perception of such a group.

11. There is no mention of any distinction, comparable to that drawn in Akeyesu, between groups, membership of which is not challengeable by the group's members, and groups which one can join or leave, in the Commentary on Article 17 (genocide) of the Draft Code of Crimes against the Peace and Security of Mankind adopted in 1996 by the International Law Commission.

12. In ***Krstic*** , the International Criminal Tribunal for the Former Yugoslavia (ICTY) found that genocide was committed at Srebrenica when the Bosnian Serb army systematically murdered all male Bosnian Moslem inhabitants of the town of military age (Trial Chamber 2 August 2001; Appeal Chamber, 19 April 2004),.

13. Both the victims and many of the perpetrators at Srebenica were Bosnians. The victims were murdered not because of their national identity as Bosnians but because of their Moslem religious identity.

14. Moslems are adherents of one of the world's largest religion and include nationals by birth of most if not all of the world's countries. Any person may become a Moslem, and while under many interpretations of Islam ceasing to be a Moslem (apostasy) is not permitted, in practice it is not uncommon for persons to convert from Islam to other religions or otherwise cease to be Moslems. According to the ***Akeyesu*** definition, Moslems are a "mobile" group.

15. The ICTY in ***Krstic*** found that Bosnian Moslems were a national group, being recognized as a "nation" in the 1963 constitution of Yugoslavia. The finding of genocide was therefore against a "national group" within the meaning of the Convention rather than against a religious group, despite the religious identity of the victims having been the reason why they were killed.

16. The Tribunal in ***Krstic*** could be regarded as having side-stepped the issue of whether mass murders based purely on the religion of the victim, with no alternative basis for liability of membership a national, ethnic or racial group, could constitute genocide.

17. A Uighur is defined by the Oxford English dictionary as "a member of a Turkic people of north-west China". The Merriam Webster Dictionary defines a Uighur as "a member of a Turkic people powerful in Mongolia and eastern

Turkestan between the eight and the twelfth centuries". All other definitions agree in describing Uighurs as a people. Uighurs have their own language. They are one of the 56 national minority groups recognized by the People's Republic of China.

18. We consider that there can be no serious doubt that Uighurs are both a national group and an ethnic group within the meaning of the Genocide Convention.

19. The position of Falun Gong is different.

20. This issue of whether Falun Gong was a religion was considered at some length by the Hong Kong Court of First Instance in ***Chu Woan Chyi & Ors. v Director of Immigration.*** (2007) HKCFA 267; (2007) 3 HKC 168, at paras. 52-58, where Hartmann J. reviewed the jurisprudence on the definition of a religion and stated:

"52. At the outset it must be observed that practitioners of Falun Gong, while they describe it as a spiritual movement, do not classify it as a "religion". The Falun Gong movement is founded in large measure on Buddhist teachings but incorporates elements of Daoism. There is no requirement to believe in an identified deity. But Falun Gong practitioners do accept the supernatural; that is, a reality of the spirit that extends beyond the perception of our physical senses. By means of meditation and exercises they seek to place themselves in harmony with this transcendent reality. Falun Gong practitioners see their

movement is entirely benevolent. They adhere to a moral code, they say, which ensure a life of spiritual purpose.

53. In considering the concepts of "religious belief" and "religious activities" under the Basic Law[1], a technical, narrow or rigid approach must be avoided. The concepts are to be given a generous interpretation in order to ensure the full measure of the freedoms contained in those concepts. See **Ng Ka Ling & Others v Director of Immigration** (1999) 2 HKCFAR 4 at pp. 28 onwards.

54. In **Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth**. [1943] HCA 12;(1943) 67 CLR 116, Latham CJ observed that –

> "It would be difficult, if not impossible, to devise a definition of religion which would satisfy the adherents of all the many and various religions which exist, or have existed, in the world"

55. A religion, I think, needs to be something more than a set of shared ethical beliefs. But it does not, in my view, certainly not in the Asian context, demand a belief in the existence of god or any intelligent first cause. Among clearly recognized religions which do not each would what generally be considered a belief in the existence of God are Buddhism and Taoism.

56. For present purposes, it is sufficient, I think to adopt the guidelines of the High Court of Australia in **Church of the New Faith v Commissioner of Pay-Roll** [1983] HCA 40; (1982) 154 CLR 120, per Wilson and Deane JJ at p. 174:

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[1] The Basic Law of the Hong Kong Administrative Region of the People's Republic of China is Hong Kong's constitutional document, enacted as a law of the People's Republic of China pursuant to Article 31 of the Chinese Constitution. Article 32 of the Basic Law provides that Hong Kong residents shall have freedom of religious belief and freedom to preach and to conduct and participate in religious activities in public.

"One of the more important indicia of "a religion" is that the particular collection of ideas and/or practices involves belief in the supernatural, that is to say, belief that really extends beyond that which is capable of perception by the senses. If that be absent it is unlikely that one has "a religion". Another is that the ideas relate to man's nature and place in the universe and his relation to things supernatural. A third is that the ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having supernatural significance. A fourth is that, however loosely knit and varying in beliefs and practices adherents may be, they constitute an identifiable group or identifiable groups."

57. As I have said, Falun Gong adherents, who certainly form an identifiable group, do accept a reality of the spirit that extends beyond the perception of our physical senses. They acknowledge the supernatural; that is, a dimension of the spirit that is above and/or outside of nature. They seek to place themselves in harmony with this reality. Importantly, they bind themselves to a code of ethical and moral behaviour which is integral to their spiritual aspirations. As such I am satisfied that, under the Basic Law; that is as a constitutional protected freedom, the Falun Gong is to be recognized as a religious movement, its beliefs being religious beliefs.

58. The Falun Gong movement, as I have said, does not recognize itself as a religion. But, as important as that may be as an indicator, it is not decisive. The real question is whether, however it wishes to see itself in comparative terms, it is, by reason of its belief structure, entitled to be recognized as a religion under the Basic Law. As I have said, I am satisfied that it is."

21. The Canadian Federal Court (Dube J) in ***Hui Qing Yang v Ministry of Citizenship*** [2001] FCT 1052 concluded that Falun Gong was both a religion and a "particular social group" within the meaning of the Refugee Convention

in the context of an asylum application. The court enumerated the characteristics of a religion as "a sense of the holy or the sacred (often manifested in the form of gods or a personal god; a system of beliefs; a community of believers or participants; ritual (which may include standard forms of invocation, sacraments or rites of initiation) and a moral code." (para. 15).

22. The English Court of Appeal in ***L (China) v Secretary of State for Home Department*** [2004] EWCA Civ 1441, did not consider an appeal by a Falun Gong asylum applicant on the basis of membership of a religious group as the applicant in that case had not claimed to be a member of a religious group. However, it considered that a Falun Gong adherent in China could properly be regarded as liable to persecution on grounds of imputed political opinion. Unlike Hartman J in ***Chu Woan Chye***, the Court of Appeal did not seek to go behind the appellant's own non-identification of Falun Gong adherence as membership of a religion.

23. We consider that the balance of authority and the correct analysis is that Falun Gong is a religious group.

24. However, that is not the end of the matter. As the jurisprudence relating to genocide stands at present, based on the 'stable' and 'permanent' criteria identified in ***Akeyesu***, and taking account of the approach adopted by the ICTY in ***Krstic***, it cannot be said that genocide extends to attempts to destroy groups which are, and are perceived by the perpetrators to be, based purely on religion, and not nationality, ethnicity or race.

25. It is possible that the law may develop in future so as to extend the definition of genocide to groups which are and are perceived to be purely religious[2]. This could occur if a court has to consider a mass-murder situation similar to what occurred at Srebenica, in circumstances where the only identifier for the victims was religion and not nationality. However as yet this has not happened. We do not therefore think that the persecution of Falun Gong can at present correctly be described in law as genocide.

QUESTION 3: ***What is the present definition of crimes against humanity as applicable to these groups?***

26. The relationship between the definition of crimes against humanity in Article 7 of the Rome Statute and previous international customary law is summarised by Cassese (International Criminal Law, 3rd edition, p. 105) as follows:

> "A comparison between this provision and customary international law shows that by and large the former is based on the latter. However many differences may be discerned. In some respects Article 7 elaborates upon and clarifies; in other respects it is narrower than customary international law, in other it instead broadens customary rules."

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[2] It has been the practice of Trial Chambers in several cases where there has been a religious element, to define a group as either racial, national or ethnic - even when a claim of religious genocide seemed possible (i.e. in the cases of *The Prosecutor v Radislav Krstic, IT-98-33-T [2001]* and *The Prosecutor v Tolimir* Case No. IT-05-88-2-T [2012] which both dealt with the persecution of Bosnian Muslims). However, contemporary jurisprudence continues to develop in such a way as to emphasise the requirement for Trial Chambers to assess the particular political, social, historical and culture context in which the alleged genocide occurs, when determining whether victims constitute a protected group (*The Prosecutor v Radislav Krstic, IT-98-33-T [2001]; The Prosecutor v Bagilishema,* ICTR-95-1A-T [2001], *The Prosecutor v Kajelijeli* ICTR-9-44-A [2003]; Prosecutor v *Semanza* ICTR-97-20-T) [2003]. This may provide further scope for a finding of genocide based on religion.

27. Cassese identifies three areas where the Rome Statute definition is arguably narrower than international customary law. The first of these is that the Rome Statute refers to crimes against a civilian population while customary international law extends to military such as prisoners of war. The second is that under the Rome Statute the crime must be part of an attack on a civilian population.

28. "Attack" is defined in Article 7 (2) (a) as " a course of conduct involving the multiple commission of acts referred to in paragraph1 against any civilian population, pursuant to or in furtherance of a state or organizational policy to commit such attack."

29. "Attack" so defined does not cover toleration of a practice by the state. This is relevant to forced organ transplants, as the state would be exonerated from guilt if such transplants were a practice (e.g. by doctors and corrupt officials) which it tolerated but had not itself directed or initiated.

30. Moreover the need to identify an "attack" creates a further and more fundamental difficulty in the present context. Practices of forced organ transplants carried out on persons who are already prisoners at the time of the forced transplant, whether by executing the prisoner and then removing organs from the corpse, or by administering an anaesthetic to a living prisoner, do not naturally fall within the commonly understood concept of an "attack". This would seem to create a major obstacle to bringing such forced transplants within the Rome Statute (as opposed to the international customary law) definition of crimes against humanity.

31. The third area is also relevant in the present context. Under Article 7 (1) (h), persecution must be perpetrated "in connection with any act referred to in this paragraph or any crime within the jurisdiction of the court", and must be committed with discriminatory intent.

32. In contrast, under customary international law, persecution does not need to consist of conduct defined as a war crime or a crime against humanity or linked to any such crime. Persecution may consist of acts not punishable as war crimes or crimes against humanity as long as such acts (a) result in egregious violations of fundamental human rights; (b) are part of widespread or systematic practice; and (c) are committed with discriminatory intent (see Cassese, p. 107).

33. Forced organ transplants are clearly a violation of fundamental human rights and so crimes against humanity under international customary law.

34. It would therefore be preferable for any tribunal trying such violations to be able to rely on international customary law. The International Criminal Court will of course have to apply Article 7, as will those national jurisdictions which have adopted the Rome Statute definition such as the UK (Section 50 of the International Criminal Court Act 2001). However it might be open to an ad hoc tribunal, depending on its statute, to apply the customary international law definition where it was wider.

QUESTION 4

(a) ***What is the definition of "widespread" in Article 7 of the rome statute***.

(b) What is the definition of "systematic" in Article 7 of the rome statute

35. The only jurisprudence on these terms which we have been able to locate is the judgment of the ICTR in ***Augustin Ndindiliyimana***, 11 February 2014 which states:

"The term "widespread" refers to the large scale nature of the attack and the number of victims, whereas the term "systematic" refers to "the organised nature of the acts of violence and the improbability of their random occurrence". With respect to the mens rea, the perpetrator must have acted with knowledge of the broader context of the attack, and with knowledge that his acts (or omissions) formed part of the widespread or systematic attack against the civilian population."

QUESTION 4 (c) ***What if any assistance by definition or otherwise can be given for the subparagraphs identified in red in the instructions***

A) MURDER

36. If a person is killed for the purpose of forced transplantation of their organs that is self-evidently murder.

(B) EXTERMINATION

37. Extermination is “mass or large scale killing” (Cassese, p. 94). In ***Krstic*** the ICTY held that:

“for the crime of extermination to be established, in addition to the general requirements for a crime against humanity, there must be evidence that a particular population was targeted and that its members were killed or otherwise subjected to conditions of life calculated to bring about the destruction of a numerically significant part of the population.”

38. It seems unlikely that forced organ transplants, as such, constitute extermination. The purpose of the organ transplants is presumably to meet a demand for transplanted organs, rather than to exterminate the group from which the victims are taken. It may however be incidental to a wider plan to target a particular group or collectivity for extermination but in that case the crime would be the targeting for extermination rather than the forced transplants in isolation.

(E) IMPRISONMENT OR OTHER SEVERE DEPRIVATION OF PHYSICAL LIBERTY IN VIOLATION OF FUNDAMENTAL RULES OF INTERNATIONAL LAW

39. In Kordic and Cerkez (May 1998) the ICTY defined this offence as:

“arbitrary imprisonment, that is to say, the deprivation of liberty of the individual without due process of law, as part of a widespread or systematic attack directed against a civilian population”(paras. 302-303).

40. This rather narrow definition would seem to rule out the applicability of this crime to a situation where prisoners, already in prison for other reasons, are selected for forced organ transplants.

41. We understand that in China organs for transplants are frequently taken from prisoners, whether political or non-political, on execution, so that the inclusion of some prisoners who are Uighurs or Falun Gong practitioners would not naturally seem to fit the definition of a widespread or systematic attack against a particular civilian population.

42. This does not rule out the possibility that the arbitrary imprisonment before or after a forced transplant may of itself be a crime against humanity, if for example, it is part of the imprisonment of a large number of Falun Gong practitioners because they are practitioners of Falun Gong, which China seeks to eliminate.

(F) TORTURE

43. Torture is defined by Article 7 (2) (e) of the Rome Statute as "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused."

44. Forced organ transplants will not necessarily fall within this definition. Removal of a kidney under anaesthesia may not involve any pain or suffering either before or after the removal. However any such transplant carried out with deliberate disregard for pain or suffering thereby inflicted on the victim, before during or after the transplant, would appear to fall within the definition.

(H) PERSECUTION AGAINST ANY IDENTIFIABLE GROUP OR COLLECTIVITY ON POLITICAL, RACIAL, NATIONAL, ETHNIC, CULTURAL, RELIGIOUS, GENDER AS DEFINED IN PARAGRAPH 3, OR OTHER GROUNDS THAT ARE UNIVERSALLY RECOGNIZED AS IMPERMISSIBLE UNDER INTERNATIONAL LAW, IN CONNECTION WITH ANY ACT REFERRED TO IN THIS PARAGRAPH OR ANY CRIME WITHIN THE JURISDICITON OF THE COURT

45. Persecution "means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity" (Article 7(2)(g) of the Rome Statute).

46. In ***Kupreskic & Ors,*** 21 October 2001, the ICTY found the defendants guilty of persecution for "the "deliberate and systematic killing of Bosnian Muslim civilians" as well as their "organized detention and expulsion from Ahmici [the village where the crimes were committed]" (at 629).

47. It also found that the comprehensive destruction of Bosnian Muslim homes and property constituted "a gross or blatant denial of fundamental human rights" and being committed on discriminatory grounds, amounted to persecution (at 630).

48. By analogy with the approach in Kupreskic, where forced transplants have being carried out as part of a general campaign of persecution against Uighurs or against Falun Gong practitioners they might well amount to the crime of persecution.

(I) ENFORCED DISAPPEARANCE OF PERSONS

49. Enforced disappearances may be linked to forced organ transplants but are conceptually distinct. In particular cases it may be on the facts that a particular secret detention for the purpose of a forced organ transplant may be amount to a crime of enforced disappearance.

(J) THE CRIME OF APARTHEID

50. 'The crime of apartheid' is defined in Article 7 (2) (h) of the Rome Statute as: "inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime".

51. It is strongly arguable that Chinese rule in Sinkiang province involves an institutionalized regime of systematic oppression and domination by Han Chinese over Uighurs.

52. If it could be shown that only Uighurs and not Chinese were being subjected to forced transplants it might be possible to sustain a charge of apartheid.

However there may well be an insuperable difficulty of such acts are not inflicted only on Uighurs, or even only on Uighurs and other persecuted groups, but are also inflicted on the general prison population.

(K) OTHER INHUMANE ACTS OF A SIMILAR CHARACTER INTENTIONALLY CAUSING GREAT SUFFERING, OR SERIOUS INJURY TO BODY OR TO MENTAL OR PHYSICAL HEALTH

53. The scope of this crime was considered in some detail by the ICTY in ***Kupreskic***. The ICTY noted that Article 7(k) of the Rome Statute did not provide an indication of the legal standards which would enable the court to identify the prohibited inhumane acts. It held that, drawing upon the provisions of the Universal Declaration of Human Rights and the two United Nations Covenants on Human Rights, it was possible to identify a set of basic rights appertaining to human beings, the infringement of which may amount, depending on the accompanying circumstances, to a crime against humanity. It held that there was no doubt that serious forms of cruel and degrading treatment of persons belonging to a particular ethnic, religious, political or racial group, or serious widespread or systematic manifestations of cruel or humiliating or degrading treatment with a discriminatory or persecutory intent amount to crimes against humanity (para. 565).

54. It is highly likely that forced organ transplants inflicted on Uighurs or on Falun Gong practitioners as part of a campaign against Uighurs or against Falun Gong would meet the definition in Article 7(1) (k) as interpreted in ***Kupreskic***.

QUESTION 4 (d):

Is torture a "freestanding" international crime justiciable separately from crimes against humanity under the Genocide Convention or ICC Statute or otherwise?

55. Torture has long been a crime under international customary law justiciable separately from crimes against humanity (R v Bow Street Stipendiary Magistrate ex parte Pinochet [2000] 1 AC 61).

56. The United Nations Convention against Torture (UNCAT), which came into force on 26 June 1987, has 164 states parties (including the People's Republic of China), plus a substantial number of additional countries which have signed it but not yet ratified it. Article 5 of that Convention requires States Parties to assume universal jurisdiction for the crime of torture. In the UK this provision is enacted in Section 134 of the Criminal Justice Act 1988.

QUESTION 5

If crimes have been committed in what if any courts can China state bodies or state-supported bodies such as regional government bodies, local councils, military units, hospitals, etc, be "tried" or have their breach of international law determined?

57. China is not a party to the Rome Statute for the International Criminal Court. In theory possible crimes by or on the territory of a non-party state can be

referred to the International Criminal Court by the United Nations (as happened with Sudan in relation to Darfur in 2005), but as China is a permanent member of the UN Security Council with a veto it can be assumed that China will not be referred to the ICC under this provision.

58. Unlike Europe, Africa and the Americas, Asia has no regional/continental international court of justice comparable to the European, Inter-American or African Courts of Human Rights.

59. China signed the International Covenant on Civil and Political Rights (ICCPR) in 1998 but has not ratified. It is not therefore possible for the United Nations Human Rights Committee which monitors the operation of the ICCPR to consider the issue of organ harvesting in China.

60. The Committee against Torture, which monitors the operation of UNCAT, has jurisdiction to consider this issue, but it is not a court and does not provide a forum for a trial.

61. There is therefore at present no tribunal in which China or its institutions can be tried for crimes relating to organ transplants.

QUESTION 6:

Position with regard to individuals

62. The position with regard to individuals responsible for crimes relating to organ transplants is quite different from that relating to the People's Republic of China itself as a state, or to its institutions, or legal entities within China.

63. Should any such individual be found in the territory of a country which has enacted provisions for universal jurisdiction relating to crimes under the ICC statute or against torture (if the forced transplant constituted torture), that individual is liable to be arrested and tried in that country.

64. This international criminal jurisdiction is now well-established and has led to a number of significant convictions, one of the most notable being the conviction, in Senegal, in 2016, of the former president of Chad, Hissene Habre, for crimes against humanity, including murder, torture, forced disappearances and cruel and inhumane acts, committed while he was president of Chad.

65. In the UK, in R v Zardad in 2005, a former Afghan warlord who had been arrested in England was tried and convicted of torture in relation to his actions while in Afghanistan. He was sentenced to 20 years imprisonment. An appeal was dismissed ([2007] EWCA Crim 279).

66. Trials under universal jurisdiction in relation to crimes committed during the Liberian Civil Wars are currently pending in the UK and Belgium.

67. The best, and currently the only, prospect of justice for the victims of forced organ transplants in China or their relatives is therefore if one of the

perpetrators is found and prosecuted in a country which exercises universal jurisdiction for international crimes.

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Doughty Street Chambers

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