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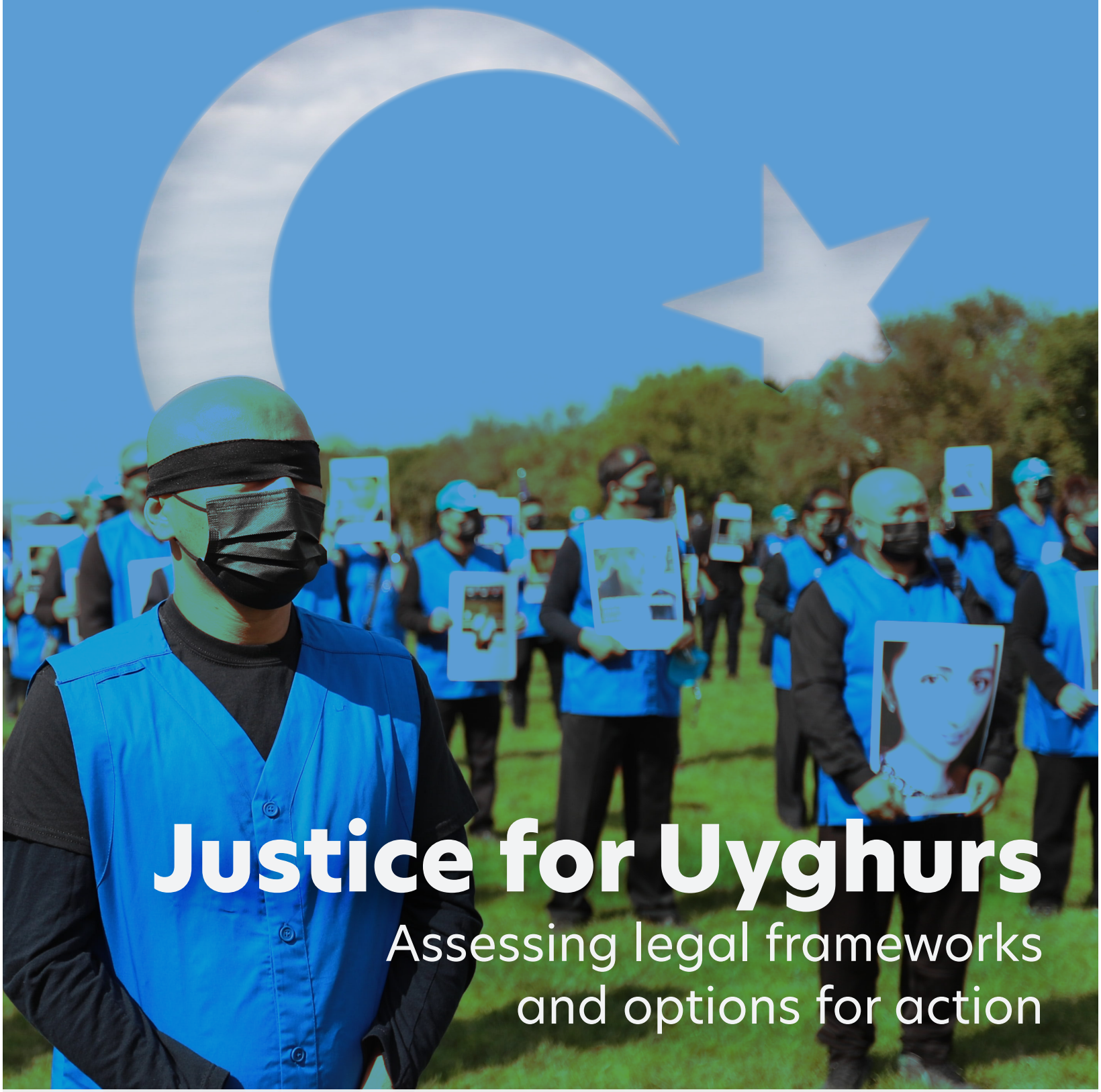

Justice for Uyghurs

Assessing legal frameworks and options for action

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MLI TRUE NORTH IN CANADIAN PUBLIC POLICY

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Executive Summary

The Chinese Communist Party (CCP) is committing numerous crimes and abuses against the Uyghurs in Xinjiang (East Turkestan). There is pervasive surveillance; massive numbers of arbitrary detentions; widespread physical and sexual torture; medical crimes; killings; forced labour; and transnational repression. The Uyghur Tribunal and others have found the crimes committed against the Uyghurs amount to genocide pursuant to the 1948 UN Genocide Convention.

These crimes are in breach of China's legal obligations. But the obligations under international law do not pertain solely to China. Every other state that is a party to the UN Genocide Convention has undertaken to prevent and to punish genocide, which means they have not only a moral obligation to take action to combat the Uyghur genocide, but also a legal one.

This paper summarizes the crimes against the Uyghur people and then outlines the viable options available to help address those crimes.

1. Encourage the Office of the Prosecutor at the International Criminal Court (ICC) to open a preliminary examination into the situation. The ICC has specific jurisdictional constraints. However, certain crimes (namely, the crimes against humanity of deportation and persecution) fall within the jurisdiction of the Court.

2. Refer the matter to the International Court of Justice (ICJ). Multiple human rights treaties, including the UN Genocide Convention and the Convention Against Torture, contain provisions that provide that disputes shall be submitted to the ICJ. Any state that has ratified those treaties could bring a dispute against the Chinese government for its violations of the Genocide Convention and/or the Convention Against Torture, and argue that the Chinese reservations under those provisions are invalid. An advisory opinion could also be sought.

3. Engage the various UN human rights mechanisms. Generally, violations of internationally recognized human rights can be brought to the various UN human rights bodies, including human rights treaty bodies, special procedures, and the Human Rights Council. Because China has not ratified any of the relevant optional protocols, none of the human rights treaty bodies are empowered to receive individual complaints about China. However, complaints of human rights breaches may be lodged with the special procedures.

4. Impose targeted sanctions using domestic law. Countries with Magnitsky or Magnitsky-style legislation may impose targeted sanctions on CCP officials responsible for atrocities committed against Uyghurs. In 2021, Canada, the US, the UK, and the European Union (EU) imposed sanctions on four individuals and one entity responsible for atrocities committed against the Uyghurs. Since then, the US has imposed sanctions on dozens of others. Further individuals and entities should be sanctioned.

5. Engage in civil lawsuits in domestic courts. Civil lawsuits against the Chinese government could potentially be filed in domestic courts for injury or damage that occurs domestically due to transnational repression. Further, civil lawsuits may be pursued against companies that use Uyghur forced labour abroad.

6. Criminally prosecute perpetrators using universal jurisdiction laws. The principle of universal jurisdiction can enable perpetrators of atrocity crimes to be prosecuted in domestic criminal courts, virtually anywhere, even if there is no link between the domestic system and the crimes committed. In Canada, this principle is enshrined in the Crimes Against Humanity and War Crimes Act. Other countries have similar legislation. Individuals responsible for atrocity crimes against Uyghurs should be prosecuted if they are physically present in any jurisdiction that allows for such prosecution.

7. Use of ombudsman or other neutral arbiter. In April 2022, a coalition of 28 Canadian non-profit organizations submitted a complaint to the Canadian Ombudsperson for Responsible Enterprise (CORE), asking it to investigate 14 Canadian companies' use of Uyghur forced labour. This use of an ombudsman or other neutral arbiter should be considered in other jurisdictions where such offices exist, following consultations with local lawyers.

8. Pass novel legislation and/or a policy regarding forced labour. The United States recently passed legislation that presumes that goods from Xinjiang (East Turkestan) are made using forced labour, and stops them from entering the country. Other countries, including Canada, could pass similar legislation or institute a similar policy.

9. Pass novel legislation and/or a policy regarding forced organ harvesting. In Canada, the proposed Bill S-223 is a general bill (not Uyghur- or China-specific) that addresses forced organ harvesting. Previous versions of the bill have received unanimous, bipartisan support. Bill S-223 should be prioritized and passed into law. Other countries may pass similar legislation.

10. Pass novel legislation and/or a policy regarding Uyghur refugee resettlement. The CCP is engaged in efforts to have Uyghurs located outside of China detained and deported back to Chinese custody. The principle of non-refoulement obligates countries to ensure they are not indirectly deporting Uyghurs back to China by returning them to these unsafe third countries. Democratic states, including Canada, should go further and take in Uyghur refugees.

Democratic states – and individual people – should not sit by knowing that atrocities are taking place against the Uyghurs in Xinjiang (East Turkestan). There are several options available for holding the Chinese Communist Party to account. This paper has listed many of them and calls for them to be pursued.

Sommaire

Le parti communiste chinois (PCC) multiplie les infractions graves et les exactions à l'encontre des Ouïgours au Xinjiang (Turkestan oriental) : surveillance invasive, détentions arbitraires massives, tortures physiques et sexuelles généralisées, délits de nature médicale, meurtres, travail forcé et répression transnationale. Le Tribunal ouïgour et d'autres instances ont conclu que les crimes commis contre les Ouïgours constituent un génocide au sens de la Convention des Nations Unies pour la prévention et la répression du crime de génocide (1948).

Ces crimes contreviennent aux obligations légales de la Chine. Or, les obligations imposées par le droit international ne visent pas uniquement la Chine. Tous les pays parties à la Convention des Nations Unies sur le génocide se sont engagés à prévenir et à punir ce crime, ce qui signifie qu'ils ont non seulement l'obligation morale, mais aussi l'obligation vjuridique de lutter activement contre le génocide des Ouïgours.

Ce document a pour objet de passer en revue les crimes commis contre les Ouïgours et de présenter les options viables pour lutter contre ces crimes.

1. Inviter le Bureau du Procureur de la Cour pénale internationale (CPI) à ouvrir un examen préliminaire de la situation. La CPI fait face à des contraintes juridictionnelles. Cependant, certains crimes contre l'humanité (à savoir les crimes de déportation et de persécution) relèvent de sa compétence.

2. Renvoyer l'affaire devant la Cour internationale de Justice (CIJ). De nombreux instruments relatifs aux droits de la personne prévoient la soumission des différends à la CIJ, notamment les conventions des Nations Unies sur le génocide et la torture. Tous les États ratificateurs peuvent engager une procédure contre le gouvernement chinois pour ses violations de la Convention sur le génocide, de la Convention contre la torture ou des deux, et faire valoir que les réserves chinoises à l'égard de leurs dispositions sont non valides. Une demande d'avis consultatif peut également être présentée.

3. Enclencher les différents mécanismes relatifs aux droits de la personne des Nations Unies. En règle générale, les violations des normes internationalement reconnues en matière de droits de la personne peuvent faire l'objet de recours auprès de différentes instances des Nations Unies : organes conventionnels, procédures spéciales et Conseil des droits de l'homme. Comme la Chine n'a pas ratifié les protocoles facultatifs s'y rapportant, aucun organe conventionnel n'est habilité à recevoir de communications individuelles visant la Chine. Toutefois, les dépôts de plaintes

pour violations des droits de la personne peuvent être traités dans le cadre des « procédures spéciales ».

4. Imposer des sanctions ciblées en recourant à la législation nationale. Les pays qui ont édicté une loi Magnitsky ou de type Magnitsky peuvent imposer des sanctions ciblées contre les représentants du PCC responsables des atrocités commises contre les Ouïgours. En 2021, le Canada, les États-Unis, le Royaume-Uni et l'Union européenne ont imposé des sanctions à quatre personnes et une entité, qui étaient responsables d'atrocités commises contre les Ouïgours. Depuis lors, les États-Unis ont imposé des sanctions à des dizaines d'autres. Diverses personnes et entités devraient encore être sanctionnées.

5. Engager des poursuites civiles devant les tribunaux nationaux. Des poursuites civiles peuvent être engagées contre le gouvernement chinois devant les tribunaux nationaux pour les blessures ou dommages subis en raison de la répression transnationale en Chine. En outre, des poursuites civiles peuvent être engagées contre les entreprises qui font appel au travail forcé des Ouïgours outre-mer.

6. Traduire en justice les auteurs d'actes criminels en recourant aux lois de compétence universelle. Le principe de la compétence universelle permet de mettre en accusation les auteurs de crimes d'atrocité devant les cours criminelles nationales, pratiquement n'importe où, même s'il n'existe aucun lien entre le système national et les crimes commis. Au Canada, ce principe est inscrit dans la Loi sur les crimes contre l'humanité et les crimes de guerre. D'autres pays ont adopté une loi similaire. Les coupables de crimes d'atrocité contre les Ouïgours doivent faire l'objet d'une mise en accusation lorsqu'ils sont physiquement présents dans un pays ou sur un territoire pouvant y faire droit.

7. Recourir à l'ombudsman ou à un autre arbitre neutre. En avril 2022, une coalition formée de 28 organisations canadiennes sans but lucratif a déposé une plainte auprès de l'ombudsman canadien pour la responsabilité sociale des entreprises pour qu'une enquête soit menée sur l'appel au travail forcé d'Ouïgours dans 14 entreprises canadiennes. Ce recours à un ombudsman ou à un arbitre neutre devrait être envisagé dans les pays et territoires où de telles fonctions existent, après consultation avec des avocats locaux.

8. Adopter une nouvelle loi, une politique ou les deux concernant le travail forcé. Les États-Unis ont récemment adopté une loi qui suppose que les biens en provenance du Xinjiang (Turkestan oriental) sont fabriqués en recourant au travail forcé, et empêchent l'importation de ces biens. D'autres pays, dont le Canada, pourraient adopter une loi ou une politique similaire.

9. Adopter une nouvelle loi, une politique ou les deux concernant le prélèvement forcé d'organes. Au Canada, le projet de loi S-223, qui est d'intérêt public, traite du prélèvement forcé d'organes (non particulier aux Ouïgours ou à la Chine). Les versions précédentes de ce projet de loi ont reçu un soutien unanime et bipartisan. Le projet de loi S-223 devrait être priorisé et adopté. D'autres pays pourraient faire de même.

10. Adopter une nouvelle loi, une politique ou les deux concernant la réinstallation des réfugiés ouïgours. Le PCC s'efforce d'obtenir que les Ouïgours se trouvant à l'extérieur de la Chine soient placés en détention et expulsés vers la Chine. Le principe de non-refoulement oblige les pays à s'assurer qu'ils n'expulsent pas indirectement les Ouïgours vers la Chine en les renvoyant dans les pays tiers peu sûrs. Les États démocratiques, y compris le Canada, devraient aller plus loin et accueillir des réfugiés ouïgours.

Les États démocratiques – et les personnes – ne doivent pas rester les bras croisés devant les atrocités commises contre les Ouïgours au Xinjiang. Plusieurs options permettent de demander des comptes au PCC. Dans le présent document, on en énumère plusieurs et on demande qu'elles soient mises en œuvre.

Introduction

It is well-established that the crimes being committed by the Chinese Communist Party (CCP) against the Uyghurs in Xinjiang (East Turkestan) constitute genocide, pursuant to the 1948 UN Genocide Convention. There is compelling evidence that numerous international crimes and human rights abuses are being committed against the Uyghurs, including surveillance, arbitrary detentions, physical torture, sexual violence, medical crimes, killings, forced labour, transnational repression, and genocide. Beyond the Genocide Convention, these actions are in breach of multiple human rights treaties to which China is a state party, including the Convention Against Torture and the International Covenant on Civil and Political Rights, and these actions are in violation of the fundamental norms that make up customary international law.

Much of the above has been investigated, in great depth, by credible and independent organizations and bodies. The next natural step is to outline the legal and policy options for action. This is what this report aims to accomplish. Now that we are aware of what is happening to the Uyghurs, what can be done about it?

This report examines and outlines options for action both internationally and domestically. Options canvassed include (1) encouraging the Office of the Prosecutor of the International Criminal Court (ICC) to open a preliminary examination; (2) referring the matter to the International Court of Justice (ICJ), either via relevant human rights treaties or an advisory opinion; (3) engaging the various UN human rights mechanisms; (4) imposing targeted sanctions; (5) engaging in civil lawsuits; (6) criminally prosecuting perpetrators using universal jurisdiction laws; (7) use of ombudsman or other neutral arbiter; and (8) passing novel legislation. This report examines all options. All viable options outlined should be pursued.

Part I: Factual background and crimes committed

The Uyghurs are an ethnic group from Asia's interior. They are predominantly Muslim and live in East Turkestan, a region the CCP calls "Xinjiang Autonomous Region." The CCP has ruled the region since 1949. There are significant diaspora communities of Uyghurs across the globe, including in Uzbekistan, Kyrgyzstan, and Kazakhstan. Smaller communities of Uyghurs also live in Afghanistan, Australia, Belgium, Canada, Germany, Norway, Russia, Saudi Arabia, Sweden, the Netherlands, Turkey, and the United States (Amnesty International 2020a).

It is well-established that the CCP is committing atrocity crimes – including genocide – and human rights abuses against the Uyghurs. The crimes and abuses documented include surveillance, arbitrary detentions, physical torture, sexual violence, medical crimes, killings, forced labour, transnational repression, and genocide. Much of the above has been investigated, in great depth, by credible and independent organizations and bodies.

In October 2020, the Canadian Parliamentary Subcommittee on International Human Rights concluded that a genocide is occurring against the Uyghurs (Canada, House of Commons 2020). This conclusion was based on a series of urgent meetings from 2018 to 2020, in which the Subcommittee heard over 12 hours of testimony and reviewed bodies of evidence from academics, civil society, and survivors. The Subcommittee found that there is pervasive state surveillance in Xinjiang (East Turkestan), mass detention and inhumane treatment of Uyghurs, forced labour, population control, and control through repression (Canada, House of Commons 2020).

In March 2021, the Newlines Institute for Strategy and Policy together with the Raoul Wallenberg Centre for Human Rights (RWCHR) came to the same conclusion on the matter of genocide following an in-depth analysis of the evidence in concert with the legal requirements of the 1948 UN Genocide Convention. The report concluded that the evidence supports a finding of genocide against the Uyghurs in breach of each of the five acts prohibited by Article II of the Genocide Convention (Newlines Institute and RWCHR 2021).

Other reports have focused on certain subsets of atrocities. For instance, Adrian Zenz released a report with the Jamestown Foundation in June 2020 in which he comprehensively analysed the CCP's efforts to suppress Uyghur birthrates through forced sterilization and mandatory birth control (Zenz 2020). The Australian Strategic Policy Institute (ASPI) released a report in February 2020 detailing the widespread use of Uyghur forced labour and the complicity of dozens of corporations whose supply chains are implicated including Apple, Nike, and Zara (Xu et al. 2020). Organizations such as Cana-

dians in Support of Refugees in Dire Need and the International Coalition to End Transplant Abuse in China have made great strides in raising awareness and collecting evidence on the prevalence of forced organ harvesting. A BBC investigation published in February 2021 detailed horrific accounts of the systematic sexual abuse occurring in Uyghur detention centres (Hill, Campanale, and Gunter 2021).

Most recently, the Uyghur Tribunal, chaired by Sir Geoffrey Nice QC, found beyond a reasonable doubt that the Chinese government has committed genocide against Uyghurs (Uyghur Tribunal 2021). Specifically, in paragraph 190 of the judgment, the panel wrote:

> the Tribunal is satisfied beyond a reasonable doubt that the PRC [People's Republic of China], by the imposition of measures to prevent births intended to destroy a significant part of the Uyghurs in Xinjiang as such, has committed genocide.

As a result of the depth of existing research, analysis of evidence will be limited in this report so as to not needlessly duplicate work that has already been conducted. Instead, the majority of this paper will focus on next steps – in other words, action items. Now that we know what is happening to the Uyghurs, what can be done about it?

Before delving into options for action, this section will summarize some of the major findings for completeness and to frame the discussion that follows. The following summary is broken down by type of crime or abuse and will cover the following: surveillance, arbitrary detentions, physical torture, sexual violence, medical crimes, killings, forced labour, transnational repression, and genocide.

Surveillance

According to the evidence reviewed and summarized by the Canadian Parliamentary Subcommittee on International Human Rights, the Newlines Institute for Strategy and Policy, RWCHR, and others, there is pervasive surveillance throughout Xinjiang (East Turkestan), to the point where various analysts, journalists, and witnesses have characterized the region as a police state.[1]

Every corner of Xinjiang (East Turkestan) is under surveillance (Canada, House of Commons 2020). The pervasive surveillance measures have been described as a "virtual cage," a means to control the population that complements the mass detention centres.[2] Cell phone activity is monitored, and various technologies are used to track every movement, including using CCTV, artificial intelligence, facial recognition software, and biometric data (Canada, House of Commons 2020). This mass surveillance has been ongoing

for years. As early as 2014, the CCP installed thousands of high-definition cameras throughout Xinjiang (East Turkestan) – in villages, mosques, and critical intersections – connected to high-tech centralized command locations (Newlines Institute and RWCHR 2021). Surveillance has increased in the years since. Between 2016 and 2018, cities spent up to US$46 million building high-tech surveillance systems; one county installed facial recognition technology in every single mosque in its catchment area – almost 1000 of them (Newlines Institute and RWCHR 2021). By 2018, the US State Department described the region as having "unprecedented levels of surveillance" (quoted in Chan 2018).

The Uyghur Tribunal recently found that the pervasiveness of state surveillance essentially transformed Xinjiang (East Turkestan) into a vast, open-air prison (Uyghur Tribunal 2021, para 170). Especially given the pervasiveness of state surveillance, this appears to be a clear breach of Uyghurs' right to privacy, which is protected in international law. Article 12 of the *Universal Declaration of Human Rights* provides that "no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation." Article 17 of the International Covenant on Civil and Political Rights (ICCPR) similarly provides that "no one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation." The ICCPR has been ratified by 167 states. China has not ratified the ICCPR, but the right to privacy likely constitutes customary international law, which means it is binding on all states (United Nations, General Assembly 2014).

> *State surveillance in Xinjiang (East Turkestan) is so pervasive that it might constitute a crime against humanity*

Further, the state surveillance in Xinjiang (East Turkestan) is so pervasive that it might constitute a crime against humanity. Article 7(1)(e) of the Rome Statute provides that "imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law" is a crime against humanity, "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack" (International Criminal Court 2011, article 7). State surveillance per se does not constitute this crime against humanity, but the pervasiveness of the state surveillance in Xinjiang (East Turkestan) arguably rises to the level of constituting a severe deprivation of physical liberty in contravention of Article 7(1)(e) of the Rome Statute. As noted above, the Uyghur Tribunal recently found

that "the pervasive surveillance systems installed throughout the region [renders] it an open-air prison" (Uyghur Tribunal 2021, para 170).

The surveillance then feeds into the CCP's other crimes, including mass arbitrary detentions, as state surveillance is employed and used to select Uyghurs for detention (described in further detail below) (Newlines Institute and RWCHR 2021). On its face, this use of surveillance to effectively create an open-air prison, which then aids in detentions, creates a severe deprivation of physical liberty, in contravention of Article 7(1)(e). In the alternative, the pervasive state surveillance can and has been considered to potentially constitute a crime against humanity under Article 7(1)(k), which prohibits "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health" (International Criminal Court 2011). The Uyghur Tribunal judgment stated explicitly that the evidence it received on pervasive surveillance systems "could [be included] within this category [of other inhumane acts]" (Uyghur Tribunal 2021, para 170). The Tribunal then found that it was "satisfied beyond all reasonable doubt that the crime against humanity of other inhumane acts is proved" (Uyghur Tribunal 2021, para 170).

Arbitrary detentions

Uyghurs and other Turkic Muslims are routinely rounded up and detained in camps. The CCP has euphemistically called these camps "re-education camps," or characterized them as training centres to alleviate poverty and/or eradicate terrorism and extremism. The camps may be more accurately described as concentration camps.

Uyghurs and other Turkic Muslims are detained in these camps indefinitely and arbitrarily. Vague, catch-all categories are employed to justify the detentions, including "born after 1980s," or being young, being generally untrustworthy, "having complex social ties," or "generally acting suspiciously" (Newlines Institute and RWCHR 2021). Once detained, detainees have no indication when or if they will be released, making their detentions indefinite (Canada, House of Commons 2020). One Uyghur Canadian, Huseyin Celil, has been detained by the CCP since 2006 (Canada, House of Commons 2020). There is no indication when, if ever, the CCP intends to release him; his wife and children do not even know if Celil is still alive (Press 2021).

The mass arbitrary detentions likely constitute atrocity crimes. As noted, Article 7(1)(e) of the Rome Statute of the ICC enumerates that "imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law" is a crime against humanity, "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack" (International Criminal Court 2011). These requirements appear to be met. Uyghurs are imprisoned in these camps in

violation of fundamental rules of international law, as they are imprisoned indefinitely and arbitrarily. Further, the mass arbitrary detentions are a segment of the CCP's overall campaign of repression and genocide against the Uyghurs. The Uyghurs are a civilian population, and the mass arbitrary detentions constitutes a widespread and systematic attack against them.

The prohibition against arbitrary detentions is also a feature of customary international law (International Committee of the Red Cross Undated). This means that the prohibition is binding on all states, including China. It is also enshrined in Article 9 of the *Universal Declaration of Human Rights*, which provides that "no one shall be subjected to arbitrary arrest, detention or exile"; in Article 9 of the ICCPR, which provides that "no one shall be subjected to arbitrary arrest or detention"; and in the International Convention on the Protection of All Persons from Enforced Disappearance.

Within the camps, detainees are subject to numerous other abuses, including physical torture, sexual violence, forced sterilization, forced organ harvesting, other killings, and forced labour. There is evidence that some detainees face such ill treatment in the camps that they die as a result (Uyghur Tribunal 2021, para 22). These mass, arbitrary detentions are used to terrorize the Uyghur community, not to eradicate terrorism.

The scale of the detentions is massive. It is impossible to state with certainty how many Uyghurs are arbitrarily detained, but estimates range from several hundreds of thousands to nearly 2 million, which would make this the largest mass detention of a minority community since the Holocaust (Teich 2021; Canada, House of Commons 2020). Radio Free Asia reported that in five camps in the region around Kashgar alone, 120,000 Uyghurs were detained; this was a figure deemed credible by Human Rights Watch (Phillips 2018). By March 2018, this estimate jumped to at least 880,000 Uyghurs (World Uyghur Congress 2017). The estimates have continued to rise. Adrian Zenz estimated in March 2019 that 1.5 million Uyghurs were detained, deriving the figure from satellite images, witness accounts, and public spending on detention facilities (Nebehay 2019). The US State Department estimated that this figure may have risen to more than 2 million (United States, Senate Foreign Relations Committee 2018). The World Uyghur Congress's own estimate is up to 3 million Uyghurs (Nebehay 2018).

Physical torture

Uyghur detainees within the camps are systematically tortured (Newlines Institute and RWCHR 2021; Uyghur Tribunal 2021, para 19). Methods of torture documented include: beating with sticks; confining in containers, up to the neck, in cold water; detaining in small cages wherein standing or lying is made impossible; detaining in "tiger chairs" where one's feet and hands are locked in position for hours, or even days, without any breaks; and pulling off

fingernails (Uyghur Tribunal 2021, para 19). Detainees are also subjected to beatings and whippings, including by metal and electric prods and bare cords (Newlines Institute and RWCHR 2021). Detainees are also placed in shackles, and sometimes immobilized that way for months on end (Uyghur Tribunal 2021, para 19).

As described by the Newlines Institute for Strategy and Policy and RWCHR, in their report T*he Uyghur Genocide: An Examination of China's Breaches of the 1948 Genocide Convention*:

> Eyewitnesses have testified to seeing blood covering the floors and walls, and watching detainees emerge from the interrogation rooms, some without fingernails. Other eyewitnesses have reported being forced to ingest blackout-causing drugs, confined to nail-covered or electrified chairs, subjected to complete strip searches, or hung on walls and beaten with electrified truncheons. (Newlines Institute and RWCHR 2021)

According to eyewitnesses, detainees could be tortured for reasons such as failing to comply with the strict rules and orders of the camps, turning off the bright cell lights that remain permanently turned on, speaking or whispering with each other, smiling, crying, yawning closing their eyes, eating too slowly, or taking too long in the bathroom (Newlines Institute and RWCHR 2021). The camps contain designated interrogation rooms, with no cameras, where brutal methods of torture are consistently used on detainees. The torture can last 24 hours and cause detainees to lose consciousness (Newlines Institute and RWCHR 2021).

Torture is prohibited under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). China is a state party to CAT, which means it is bound by its provisions and is prohibited from engaging in torture. Torture is also prohibited in the Rome Statute of the ICC. China is not a state party to the Rome Statute, but in any case, the prohibition against torture forms part of customary international law, which means it is binding on all states. In fact, the prohibition against torture is a *jus cogens*, or peremptory norm, which means it is binding even on states that are persistent objectors to the norm – this prohibition against torture is an international law norm from which no derogation is permitted.

The Uyghur Tribunal found that there is "a reasonable basis to believe that the [crime] against humanity of … torture" is being committed (Uyghur Tribunal 2021, para 58).

Sexual violence

Sexual torture is pervasive in the camps. As described to BBC News by survivors, there is "an organised system of mass rape, sexual abuse and torture," and "their goal is to destroy everyone" (Hill, Campanale, and Gunter 2021). The Uyghur Tribunal found that detained women and men "have been raped and subjected to extreme sexual violence," and that there is "a reasonable basis to believe that the [crimes] against humanity of … sexual violence" is being committed (Uyghur Tribunal 2021, paras 19 and 58).

The Uyghur Tribunal heard that one woman was "gang raped by policemen in front of an audience of a hundred people all forced to watch," and that female detainees "have had their vaginas and rectums penetrated by electric shock rods and iron bars" and were "raped by men paying to be allowed into the detention centre for the purpose" (Uyghur Tribunal 2021, paras 19 and 58).

Newlines Institute for Strategy and Policy and RWCHR also described accounts of gang rapes by security officials, including some who witnessed police taking young girls into a room to "take turns with them," with some never returning. They also describe accounts of the use of electrified sticks, biting, and a designated table for "doing things" (Newlines Institute and RWCHR 2021). Other witnesses describe that female detainees would be forced to "routinely undress, squat in the nude, and smear ground chili pepper paste on their genitals in the shower while filmed," as well as that they would be forced to "strip naked on a weekly basis as guards hosed them down with 'scalding' and corrosive disinfectant" (Newlines Institute and RWCHR 2021).

This sexual torture is similarly prohibited by the CAT, the Rome Statute, and customary international law, as above.

Medical crimes

The CCP is also committing medical crimes on Uyghurs, including forced sterilization of Uyghur women. The Uyghur Tribunal found that there is "a reasonable basis to believe that the [crime] against humanity of forced sterilization" is being committed, and that it forms part of a "systematic programme of birth control measures" designed to prevent births within the group (Uyghur Tribunal 2021, paras 58 and 149). It thus also grounds their finding of genocide, as will be discussed below.

There is a great deal of evidence demonstrating that the CCP is engaged in a systematic and deliberate program of preventing births within the Uyghur population (Uyghur Tribunal 2021, paras 58 and 149; Newlines Institute and RWCHR 2021). Population control measures include forced sterilization of Uyghur women and forced intrauterine device (IUD) placements (Newlines Institute and RWCHR 2021).

Chinese government documents from 2019 outline a specific plan for a campaign of mass Uyghur female sterilization, and funding for these programs has increased over time (Newlines Institute and RWCHR 2021; Zenz 2020). Examinations of Uyghur women in Turkey revealed that approximately one in four had been sterilized, despite many of them not being aware that they had undergone this procedure (Newlines Institute and RWCHR 2021). Between 2017 and 2018, the percentage of female infertility increased by 124 percent; and state funding in 2019 and 2020 increased such that they had capacity to sterilize hundreds of thousands of women (Newlines Institute and RWCHR 2021; Zenz 2020).

Chinese government documents from 2019 outline a specific plan for a campaign of mass Uyghur female sterilization.

Forced sterilization is used in concert with forced IUD placements. As Dr. Adrian Zenz found, the CCP planned on subjecting a minimum of 80 percent of women of childbearing age in southern Xinjiang (East Turkestan) to sterilization or IUD placements by 2019 (Newlines Institute and RWCHR 2021; Canada, House of Commons 2020). In 2018, 80 percent of all new IUD placements in China occurred in Xinjiang (East Turkestan), despite the region accounting for only 1.8 percent of China's overall population (Newlines Institute and RWCHR 2021; Canada, House of Commons 2020). Xinjiang (East Turkestan) family planning departments reportedly called Uyghur women in for mandatory IUD insertion procedures, and unauthorized removal procedures were punished with fines and terms of imprisonment (Newlines Institute and RWCHR 2021; Zenz 2020). Forced IUD insertion also occurs in detention centres as reportedly a mandatory procedure (Newlines Institute and RWCHR 2021). Witnesses testify also that female detainees are given injections and medications which stop their menstrual cycles (Newlines Institute and Rao RWCHR 2021; Canada, House of Commons 2020).

The impact of these population control measures is marked. From 2015 to 2018, population growth rates in the two largest Uyghur prefectures declined by 84 percent (Newlines Institute and RWCHR 2021; Zenz 2020; Canada, House of Commons 2020). The Xinjiang government has acknowledged the drop in birth rates and expressly attributed it to these governmental family planning policies (Newlines Institute and RWCHR 2021).

Forced sterilization is a crime against humanity as outlined in the Rome Statute. It has also been identified as a violation of the right to be free from torture and other cruel, inhuman, or degrading treatment, as well as a violation of the right to physical integrity, personal liberty and security, respect for honour and dignity, respect for private and family life, freedom of expression, and freedom to raise a family (Reinsberg 2020). Forced sterilization, when coupled with an intent in whole or in part to destroy a population, may also constitute genocide. This intent is demonstrated in this case, as has been found by the Uyghur Tribunal and others, and will be discussed in detail below.

There is evidence of other medical crimes committed against Uyghurs, including forced organ harvesting. Investigative journalist Ethan Gutmann estimates that 25,000 Uyghurs per year may be victims of forced organ harvesting (Gutmann 2020). Forced organ harvesting is not new, and it is not new in China. The China Tribunal found, as part of its March 2020 judgment, that "in China forced organ harvesting from prisoners of conscience has been practised for a substantial period of time, involving a very substantial number of victims" (ChinaTribunal 2020). International human rights lawyer David Matas has identified 10 "tell-tale signs" that Uyghurs may be subject to forced organ harvesting by the CCP, including "the blood testing and organ examination followed by colour coding of some of those tested," "the disappearances of the colour coded," "the organ transplant lanes at Xinjiang [East Turkestan] airports," and "the construction of crematoria near Uyghur detention camps" (Matas 2022).

Killings

As documented by the Newlines Institute for Strategy and Policy and RWCHR, large numbers of Uyghur detainees have died or have been killed while under police custody or while detained in the camps, and there is at least one confirmed report of mass deaths within a camp (Newlines Institute and RWCHR 2021; Hoshur and Lipes 2019).

Prominent Uyghurs have been sentenced to death (Newlines Institute and RWCHR 2021; and Hoja and Lipes 2018). Many Uyghurs have died from the torture and cruel treatment inflicted on them in the camps (Newlines Institute and RWCHR 2021; Uyghur Tribunal 2021, para 22).

The killings of Uyghurs, by any means, clearly violates the human right to life, which is enshrined in Article 3 of the *Universal Declaration of Human Rights*, and in Article 6 of the International Covenant on Civil and Political Rights.

Murder and extermination are also crimes against humanity, as defined by the Rome Statute. Experts have disagreed as to whether the killings of Uyghurs are organized and mass enough to constitute the crime against humanity of murder or extermination, with the Uyghur Tribunal noting that there is in-

sufficient proof of intent at this time (Uyghur Tribunal 2021, para 170). The Uyghur Tribunal further found that there is not enough evidence that the killings are organized or mass enough to ground a finding of genocide on that basis, although they still found that the CCP is committing genocide based on evidence of population control measures (Uyghur Tribunal 2021, paras 177-190). This will be discussed in detail below.

Forced labour

There is significant evidence of Uyghur forced labour. The government is forcibly transferring Uyghur men and women to cotton fields and factories and compelling them to work under horrible conditions (Xu et al. 2020).

Human rights groups have documented this use of Uyghur forced labour across several Chinese provinces. For instance, ASPI found that over 80,000 Uyghurs were transferred out of Xinjiang (East Turkestan) to work in factories across China between 2017 and 2019 (Xu et al. 2020). According to the ASPI, 27 factories across nine Chinese provinces use Uyghur forced labour, and the supply chains of dozens of massive multinational corporations are implicated, including Nike, Zara, and Apple (Xu et al. 2020). ASPI named 82 global brands, and since its report was released, additional companies have been exposed and come under fire for using Uyghur forced labour as well.[3]

Even if global companies disengage from the Chinese factories named in the ASPI report, they may still be complicit in Uyghur forced labour as long as they continue to operate or source supplies from Xinjiang (East Turkestan), because of the systematic use of Uyghur forced labour in the cotton fields. China produces 22 percent of the world's cotton, and 84 percent of that comes from Xinjiang (East Turkestan). The implication is that, if a brand or corporation uses any factory that uses Chinese cotton, Uyghur forced labour may still be implicated at those earlier stages of the company's supply chain.

Other industries also use Uyghur forced labour. According to the Coalition to End Forced Labour in the Uyghur Region, over 17 global industries are implicated in Uyghur forced labour, including the tomato industry, solar, mining, and tech (see End Uyghur Forced Labour 2022).

Between November 2021 and March 2022, 28 Canadian organizations – including Canadians in Support of Refugees in Dire Need, Uyghur Rights Advocacy Project (URAP), Canadian Security Research Group (CSRG), and RWCHR – wrote letters to 14 Canadian companies that are implicated in the use of Uyghur forced labour.[4] Only Inditex (the parent company of Zara) sent a response.

Use of forced or compulsory labour is prohibited in international law, including in customary international law. It is prohibited by the terms of the Forced

Labour Convention of 1930, the Protocol of 2014 to the Forced Labour Convention, and the Abolition of Forced Labour Convention of 1957. It is also prohibited by the Slavery Convention, which entered into force on March 9, 1927. The Forced Labour Convention has 179 states that are parties to it; the Protocol of 2014 to the Forced Labour Convention has 56 states parties; and the Abolition of Forced Labour Convention has 176 states parties. The Slavery Convention has 99 states parties. China is not a state party to any of these conventions, but this volume of states parties suggests that the prohibition of forced labour constitutes customary international law, making it binding on all states, including China. Further, the prohibition against slavery is a *jus cogens* norm.[5]

Further, the states parties to these conventions, which includes Canada and other democracies, have international treaty law obligations thereunder obligating them to take action to suppress or eliminate forced labour, including in their importations. This likely obligates Canada and other states parties to prevent products made using Uyghur forced labour from entering their domestic markets, possibly through the imposition of a presumptive ban. This will be discussed in greater detail in Part III.

Transantional repression

Transnational repression of Uyghurs outside of China is pervasive and on the rise. This phenomenon has been studied and reported upon by numerous human rights organizations.

In an August 2019 report, UHRP documented that the CCP "is implementing a systematic, ambitious, multi-year, well-resourced, relentless and cruel policy to inflict pain and suffering on Uyghurs abroad," and that this includes the intimidation and silencing of Uyghurs now residing in the United States (Uyghur Human Rights Project 2019). Amnesty International interviewed dozens of Uyghurs across 22 countries and found a similar pattern of harassment and repression (Amnesty International 2020b).

In a joint report released in June 2021, the UHRP and the Oxus Society for Central Asian Affairs found that the CCP "has engaged in an unprecedented scale of transnational repression" since 1997, now reaching 28 countries across the globe (Jardine, Lemon, and Hall 2021). The report catalogues the CCP's efforts to have Uyghurs outside of China detained and deported back to Chinese custody. The report found that between 1997 and March 2021, there were 1546 cases of detention and deportation of Uyghurs across 28 countries (Jardine, Lemon, and Hall 2021). The report also found that the CCP's transnational repression of Uyghurs is "consistently on the rise," with a demonstrated correlation between repression abroad and repression at home (Jardine, Lemon, and Hall 2021).

Transnational repression encompasses more than the CCP's efforts to have Uyghurs abroad deported back to China; it also includes intimidation and harassment of Uyghurs living outside of China. A subsequent report by the UHRP and the Oxus Society for Central Asian Affairs found that Uyghurs outside of China have experienced "relentless harassment, intimidation, and coercion," and that the CCP has been engaging in this form of transnational repression since 2002 (Hall and Jardine 2021). The report found that 95.8 percent of Uyghurs surveyed in liberal democracies reported feeling threatened, and 73.5 percent reported having experienced digital threats, risks, or other forms of harassment online (Hall and Jardine 2021).

The Canadian-based URAP found similar patterns. URAP researchers spoke with Uyghurs across Canada and found that "not a single of these community members has escaped the long arm of the Chinese state's campaign of transnational repression, intimidation, harassment and even direct threats" (Uyghur Rights Advocacy Project 2022).

The report noted that while Uyghurs residing in authoritarian states are threatened with detention and deportation, Uyghurs residing in liberal democracies do not face this same threat. Instead, the CCP "targets, or threatens to further target, relatives still residing in China either with imprisonment, or various forms of harassment and intimidation, as a way to coerce and pressure exiled Uyghurs to either return 'home' to China, or at minimum, put an end to their anti-CCP activism" (Uyghur Rights Advocacy Project 2022).

URAP grouped incidents into five general and overlapping categories: intimidation; intelligence, data gathering and informant recruitment; cyberattacks and online trolling; restrictions on movement and travel; and contact with family members being cut off or these family members being threatened (Uyghur Rights Advocacy Project 2022).

Notably, the transnational harassment and cyber-attacks have extended to also target those assisting the Uyghur community, including human rights lawyers (Teich and Tohti 2022; Nuttall 2022; Uyghur Rights Advocacy Project 2022).

Genocide

Per Article II of the Genocide Convention:

> Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> a. Killing members of the group;
>
> b. Causing serious bodily or mental harm to members of the group;

c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

d. Imposing measures intended to prevent births within the group;

e. Forcibly transferring children of the group to another group. (United Nations, General Assembly 1948/1951, article II)

The charge of genocide is a serious one, and it is true that it should not be made lightly (Sachs and Schabas 2021). However, the atrocities occurring in Xinjiang (East Turkestan) have been found by multiple, credible bodies, to constitute genocide. Numerous parliaments, governments, and non-profit organizations have found that these crimes constitute genocide.

In October 2020, following multiple hearings on the subject, the Canadian Subcommittee on International Human Rights was "persuaded that the actions of the Chinese Communist Party constitute genocide as laid out in the Genocide Convention" (Canada, House of Commons 2020).

Reputable Canadian non-profit organizations immediately echoed these statements. In November 2020, the Friends of Simon Wiesenthal Center (FSWC) and RWCHR called on the government of Canada to implement the Subcommittee's recommendations and recognize the atrocities as constituting genocide (Teich 2021). RWCHR Chair and former Minister of Justice Irwin Cotler stated that "the mass atrocities targeting the Uyghurs constitute acts of genocide under the Genocide Convention" and urged "the Canadian Parliament [to] make [this] determination" (Teich 2021).

In March 2021, the Newlines Institute for Strategy and Policy, together with the RWCHR, came to the same conclusion on the matter of genocide, following an in-depth factual and legal analysis (Newlines Institute and RWCHR 2021). The 55-page report concluded that the evidence supports a finding of genocide against the Uyghurs in breach of each of the five acts prohibited by Article II of the Genocide Convention (Newlines Institute and RWCHR 2021).

In May 2021, URAP released a report highlighting the destruction of Uyghur families as a component of the ongoing genocide, documenting long-standing Chinese government policies of Uyghur family separations that is indicative of the intent to destroy a group (Uyghur Rights Advocacy Project 2021). URAP found that this targeting of Uyghur family units dated back to at least 2014 and included not just massive internment and forced displacement of Uyghurs, but also coerced divorce, forced marriage, forced birth control, mass rape of Uyghur men and women, and the assignment of Han Chinese cadres to live in Uyghur households (Uyghur Rights Advocacy Project 2021).

On December 9, 2021, the Uyghur Tribunal, chaired by Sir Geoffrey Nice QC,

released its final judgment in which it found that the People's Republic of China (PRC) had committed genocide against the Uyghurs within the meaning of the Genocide Convention. Specifically, the panel wrote:

> the Tribunal is satisfied beyond a reasonable doubt that the PRC, by the imposition of measures to prevent births intended to destroy a significant part of the Uyghurs in Xinjiang as such, has committed genocide. (Uyghur Tribunal 2021, para 190)

While the evidence and legal argumentation in support of such findings of genocide are strong, arguments to the contrary have tended to lack substance. In an April 2021 opinion piece written by Jeffrey D. Sachs and William Schabas, they argue that the US State Department should retract its declaration that the PRC has committed genocide against Uyghurs, focusing their objections on a perceived lack of evidence provided specifically by the State Department, to demonstrate killings. They go on to write that:

> Technically, genocide can be proven even without evidence that people were killed. But because courts require proof of intent to destroy the group physically, it is hard to make the case in the absence of proof of large-scale killings. (Sachs and Schabas 2021)

This is not persuasive. Article II of the Genocide Convention specifically includes five enumerated acts, only one of which need be present, and only one of which involves killings. Sachs and Schabas acknowledge this and say that there may be evidence of the imposition of measures intended to prevent births within the group – but then swiftly dismiss such evidence by stating that "Xinjiang [still] records a positive overall population growth rate"[6] and by attempting to discredit the Newlines Institute as an institution (due to its purportedly small size and perceived conservativism).

Putting outliers like Sachs and Schabas aside, the main remaining point of disagreement seems to be simply on the multiplicity of the underlying acts under the Genocide Convention. For instance, the Newlines Institute for Strategy and Policy and the RWCHR have concluded that China is committing genocide under all five underlying acts enumerated in Article II of the Genocide Convention (Newlines Institute and RWCHR 2021). In contrast, the Uyghur Tribunal has concluded that the PRC is committing genocide only under Article II (d) – "Imposing measures intended to prevent births within the group" (Uyghur Tribunal 2021, paras 177-190). Ultimately, this point of disagreement

does not matter, since as noted, the Genocide Convention requires only one underlying act to ground a finding of genocide under the convention (United Nations, General Assembly 1948/1951, article II).

As such, multiple independent and credible bodies have come to the legal conclusion, based on comprehensive reviews of the evidence, that China is committing genocide against the Uyghurs in Xinjiang (East Turkestan).

Part II: International avenues of recourse

Having established that numerous atrocities are taking place, the next question becomes, what can be done? There are several avenues of recourse, spanning international and domestic mechanisms. Some are already in process. These include (1) referral to the International Criminal Court (ICC), (2) submission of a case to the International Court of Justice (ICJ), (3) use of United Nations human rights bodies, (4) imposition of targeted sanctions, (5) initiation of civil lawsuits, (6) initiation of criminal prosecutions, (7) use of ombudsman or other neutral arbiter, and (8) passage of novel legislation or policy. These will be discussed in turn in this and the following sections, starting with a discussion of the international mechanisms available.

International criminal court

As noted, Chinese actions with respect to the Uyghur population have been found to constitute genocide. Further, there is substantial evidence of numerous crimes against humanity committed by the CCP against the Uyghurs. This may expose Chinese officials to possible prosecution at the ICC. The major hurdle is jurisdictional, because China is not a state party to the Rome Statute.

The ICC has specific jurisdictional constraints. It can generally only investigate crimes that occur in the territory of a state party, or crimes committed by state party nationals. One exception is that the ICC can receive a specific declaration by a non-state party accepting jurisdiction under Article 12 of the Rome Statute. Another exception is that the UN Security Council can refer a situation to the ICC even if the state in question is not a state party to the Rome Statute.

China is not a state party to the Rome Statute, and it is safe to assume that China would not file a specific declaration granting the Court jurisdiction to investigate. Further, it is safe to assume that China would veto any UN Security Council action attempting to refer the situation to the ICC for investigation. So, in order for the ICC to have jurisdiction, the crimes would have to be

framed as having occurred in the territories of states that are parties to the Rome Statute. This may be possible based on the precedent set by the Myanmar/Bangladesh case.

In the Myanmar/Bangladesh case, the ICC considered whether it had jurisdiction to investigate the alleged deportation of members of the Rohingya people from Myanmar (not a state party) to Bangladesh (a state party). Pre-Trial Chamber I held that it did have jurisdiction over these crimes. The Chamber concluded that "the Court may assert jurisdiction … if at least one element of a crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party of the Statute" (International Criminal Court 2019, para 64). Among other factors, the Chamber considered that "the inherently transboundary nature of the crime of deportation further confirms this interpretation" (International Criminal Court 2019, para 71).

> *Chinese actions with respect to the Uyghur population have been found to constitute genocide.*

Using this precedent, other groups have asked the ICC prosecutor to open an investigation in cases where people are deported from the territory of a state party to a non-state party (or vice versa). For example, the International Tamil Refugee Assistance Network and the Tamil Rights Group recently filed a communication to the prosecutor asking him to use the Myanmar/Bangladesh precedent to open a preliminary examination into crimes against humanity of deportation and persecution committed by Sri Lankan government officials against the Tamils (Steiner 2021).[7]

This precedent has already been used in the Uyghur context to ask the Office of the Prosecutor at the ICC to initiate the investigative process. UK Barrister Rodney Dixon QC submitted a communication based on the forcible transfer of Uyghurs from Cambodia and Tajikistan (state parties to the Rome Statute) back to China. The communication asserted "that genocide and crimes against humanity … were committed by Chinese officials against Uyghurs and members of other Turkic minorities in the context of their detention in mass internment camps in China" and that "the crimes occurred in part on the territories of ICC States Parties Cambodia and Tajikistan as some of the victims were arrested (or 'abducted') there and deported to China" (International Criminal Court 2020). As noted, the Pre-Trial Chamber I previously held that the Court may assert jurisdiction if at least part of the crime was committed on the territory of a state that is a party to the Rome Statute. This may be the

case if, as Dixon has submitted, Uyghurs were forcibly transferred from the territory of Cambodia and/or Tajikistan, back to China.

In its December 2020 *Report on Preliminary Examination Activities*, the Office of the Prosecutor responded to Dixon's communication and stated that, based on the evidence received until that point, the conduct alleged did not appear to amount to the crime against humanity of deportation (International Criminal Court 2020). The report specified that the crime against humanity of deportation "is associated with a particular protected legal interest and purposive element … the legal interest [is] the right of individuals to live in the State in which they are lawfully present" and that "from the information available, it [did] not appear that the Chinese officials involved in these forcible repatriation fulfilled the required elements described" (International Criminal Court 2020, 19-20).

The prosecutor's office had, based on this, determined that there was no basis to proceed with an investigation. However, since this decision was issued, Dixon communicated to the prosecutor's office a request for reconsideration based on new facts or evidence (International Criminal Court 2020, 20). Presumably, his team is now collecting and submitting evidence relating to this legal interest and purposive element. Of course, even if such evidence is presented, the prosecutor's office could still prove unwilling to grant a formal investigation for discretionary reasons. However, there may still be a worthwhile role for lawyers and non-profit organizations to play to assist in these legal efforts and submit further evidence and legal argumentation to the prosecutor's office.

There may also be a role for states to play. Lawyers and non-profit organizations can, and they have, request that the prosecutor open a preliminary examination on his own initiative into the situation. However, if a state formally refers the situation to ICC, the process becomes expedited.[8]

International Court of Justice

The ICJ is the principal judicial organ of the United Nations and is located in The Hague. It was established by the UN Charter in 1945 and began working in 1946. Its role is to settle international legal disputes between states. Generally, the ICJ cannot make a binding ruling unless both states to the dispute agree that the ICJ shall settle the dispute. However, states do not always have to provide consent on a case-by-case basis; states may consent to have disputes adjudicated by the ICJ in advance, for example by signing onto a treaty that says so.

Relying on human rights treaties to get a case to the ICJ

Both the UN Genocide Convention and the Convention Against Torture contain provisions that provide that disputes shall be submitted to the ICJ. Therefore, by ratifying those treaties, states parties essentially consent in advance to the ICJ's jurisdiction over disputes arising.

Article 30, paragraph 1 of the Convention Against Torture provides that:

> Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

Similarly, Article IX of the Genocide Convention provides that:

> Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

Based on these articles, a state party to either treaty may submit a dispute to the ICJ. Regarding the Convention Against Torture, of course, a state party would have to first attempt to negotiate, and then submit the case to arbitration – consistent with the wording of Article 30 of the Convention Against Torture.

The ICJ recently reaffirmed in its order on provisional measures in the case of *Gambia v. Myanmar* (relying on *Belgium v. Senegal*) that a state need not be "specially affected" to bring a case against another state party for breach of the Genocide Convention (Pillai 2020). The court concluded:

> It follows that any State party to the Genocide Convention, and not only a specially affected State, may invoke the responsibility of another State party with a view to ascertaining the alleged failure… and to bring that failure to an end. (Pillai 2020)

Therefore, a state party such as Canada that may not have been "specially affected" should not be barred from bringing a case to the ICJ for this reason. If the state is a party to the Genocide Convention, it can bring the case before the ICJ (Global Centre for the Responsibility to Protect 2020).[9]

China is a state party to both the Genocide Convention and the Convention Against Torture. However, China has made reservations under both those treaties, declaring that it is not bound by Article IX, and paragraph 1 of Article 30, respectively.

Under international law, a state may sign and ratify a treaty, but make certain reservations regarding articles to which it does not consent to be bound. As described by the Office of the High Commissioner for Human Rights (OHCHR):

> A reservation is a statement made by a State by which it purports to exclude or alter the legal effect of certain provisions of a treaty in their application to that State. A reservation may enable a State to participate in a multilateral treaty that it would otherwise be unable or unwilling to participate in. (OHCHC Undated a)

However, as the OHCHR website goes on to state, "reservations cannot be contrary to the object and purpose of the treaty" (OHCHC Undated a). Therefore, a state party may bring a dispute against the Chinese government for its violations of the Genocide Convention and/or the Convention Against Torture, and ask the ICJ to conclude that the Chinese government's reservation(s) should be considered invalid because they are contrary to the object and purpose of the treaty.

The ICJ examined this question in the context of the Genocide Convention in the case of Rwanda's reservation. The Democratic Republic of the Congo (DRC) contended "that Rwanda's reservation was invalid because it sought to prevent the Court from safeguarding peremptory norms" (International Court of Justice 2006). Although the Court in that case disagreed with the DRC and held that the reservation was not incompatible with the object and purpose of the Genocide Convention (International Court of Justice 2006, paras 66-70), Judge Koroma provided a strong dissenting opinion. Judge Koroma held that Rwanda's Article IX reservation was contrary to the object and purpose of the Genocide Convention, which is "the prevention and punishment of the crime of genocide, and this encompasses holding a State responsible whenever it is found to be in breach of its obligations under the Convention" (Koroma 2006, para 12).

Importantly, there is no concept of stare decisis in international law (i.e., relying on precedent set by previous cases or decisions). The Statute of the International Court of Justice, at Article 59, explicitly provides that a "decision of the Court has no binding force except between the parties and in respect of that particular case." This means that if asked again, in a different situation, the ICJ would be free to decide differently. The ICJ would be free to decide that China's Article IX reservation under the Genocide Convention (and/or China's Article 30 reservation under the Convention Against Torture) is invalid.

Asking the ICJ for an advisory opinion

Another option is to seek an advisory opinion from the ICJ. The ICJ is entitled to provide advisory opinions on legal questions referred to it by authorized United Nations organs and agencies. An advisory opinion is not binding, but it does often carry persuasive weight. For example, following the ICJ's 2004 advisory opinion, Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, referred to it by the UN General Assembly, Israeli courts overseeing a wall's construction directed Israel's government to adjust its direction due to constitutionality concerns. Although Israel did not accept the ICJ's opinion, it still changed course.

Seeking an advisory opinion from the ICJ on Chinese culpability for atrocities committed against the Uyghurs may push the CCP to change course in order to have a favourable impact on public opinion. Of course, the major hurdle to seeking an advisory opinion would be to get the necessary votes in the UN General Assembly or other authorized UN organ or agency. This may prove difficult with China's influence at the United Nations.

UN Human Rights Bodies

Violations of internationally recognized human rights can be brought to the various UN human rights bodies. These include the human rights treaty bodies; the special procedures, including special rapporteurs and working groups; and the United Nations Human Rights Council (UNHRC).

Human Rights Treaty Bodies

Human rights treaty bodies are tasked with monitoring states parties' compliance with international human rights treaties. Each human rights treaty is monitored by its own human rights treaty body. For example, the Committee against Torture monitors states parties' implementation and compliance with the Convention Against Torture; the Human Rights Committee monitors states parties' implementation and compliance with the International Covenant on Civil and Political Rights; and the Committee on the Rights of the Child monitors states parties' implementation and compliance with the Convention on the Rights of the Child. Human rights treaty bodies may investigate Chinese compliance with treaties to which China has acceded, and publish periodic reports.

Although treaty bodies are generally empowered to engage in country reviews and write periodic reports – and they have done so concerning China[10] – this is somewhat frustrated by the fact that there is no human rights treaty body that is empowered to receive individual complaints about China. For the treaty bodies monitoring the Convention Against Torture, the International Convention for the Protection of All Persons from Enforced Disappearance, and the International Convention on the Elimination of All Forms of Racial

Discrimination, China would have had to make a specific declaration recognizing the competence of the treaty body to receive and consider complaints. China has not done that. For the treaty bodies monitoring the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of Persons with Disabilities, and the Convention on the Rights of the Child, China would have had to ratify an Optional Protocol. Again, China has not done that. This also limits civil society engagement with human rights treaty bodies on this issue, as there is no way of lodging an individual complaint with any of the human rights treaty bodies regarding Chinese breaches of human rights treaties.

Special Procedures

Complaints of human rights breaches may also be lodged with the "special procedures" of the Human Rights Council. The special procedures are international human rights experts with mandates to advise and report on human rights from either a thematic or a country-specific perspective. They can act on individual cases of reported violations, conduct annual studies, undertake country visits, and engage in advocacy. Any individual or group can submit information to special procedures.[11]

Special procedures are either special rapporteurs or working groups. Several special procedures have mandates that may be relevant, including:

- the Working Group on Arbitrary Detention;
- the Working Group on the issue of human rights and transnational corporations and other business enterprises;
- the Special Rapporteur in the field of cultural rights;
- the Working Group on Enforced or Involuntary Disappearances;
- the Special Rapporteur on extrajudicial, summary, or arbitrary executions;
- the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression;
- the Special Rapporteur on the rights to freedom of peaceful assembly and of association;
- the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health;
- the Special Rapporteur on the situation of human rights defenders;

- the Special Rapporteur on the rights of Indigenous peoples;
- the Special Rapporteur on the right to privacy;
- the Special Rapporteur on freedom of religion or belief;
- the Special Rapporteur on contemporary forms of slavery, including its causes and its consequences;
- the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism;
- the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment;
- the Special Rapporteur on violence against women, its causes and consequences; and
- the Working Group on discrimination against women and girls.

All these special procedures can be engaged by individuals, groups, or concerned states. One that may be particularly important to engage is the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. The Chinese government justifies its oppression of the Uyghurs by claiming that, among other things, it is countering terrorism. Engagement by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, and particularly a country visit to Xinjiang (East Turkestan) by that Special Rapporteur, would be valuable.

Human rights council

Complaints of human rights violations can be lodged with UNHRC. Any individual, group, or non-governmental organization can submit a complaint to UNHRC, against any state member of the United Nations. There are seven criteria for admissibility:

- The complaint must be in writing, in one of the six UN official languages (English, French, Arabic, Chinese, Russian, or Spanish);
- It must contain a description of the relevant facts, including the names of the alleged victims, dates, and location, and contain as much detail as possible without exceeding 15 pages;
- It must not be manifestly politically motivated;

- It must not be exclusively based on reports disseminated by mass media;
- It is not already being dealt with by a special procedure, a treaty body, or other UN or similar regional complaints procedure in the field of human rights;
- Domestic remedies must have been exhausted, unless it appears that such remedies would be ineffective or unreasonably prolonged; and
- It must not use language that is abusive or insulting.[12]

Beyond receiving complaints, UNHRC can pass a condemnatory resolution or establish a commission of inquiry. In addition, any country can deliver an oral statement to UNHRC, whether that country is a member of the council or not.

The difficulty is that UNHRC may only be an option in theory. China's position on UNHRC may, in effect, preclude action on that front. UNHRC has long been populated by some of the world's worst human rights violators; the list now includes China, Eritrea, Sudan, Cuba, and Pakistan (see United Nations, Human Rights Council 2022). This reality has, unfortunately, served to undermine the credibility of UNHRC and draw the ire of many civil society leaders.[13] However, it is noteworthy that the UN General Assembly recently voted to suspend Russia from UNHRC in response to its invasion of Ukraine (United Nations 2022). If China were to be similarly suspended, lodging a human rights violation complaint against it may be open not just in theory but in practice.

Part III: Domestic avenues of recourse

Targeted actions

Another option available to many domestic governments, including Canada, is to impose targeted sanctions on Chinese individuals and entities complicit in atrocities committed against Uyghurs. In Canada, the relevant pieces of legislation are the *Justice for Victims of Corrupt Foreign Officials Act* (Sergei Magnitsky Law) (popularly called the Magnitsky Act) and the *Special Economic Measures Act* (SEMA), which was amended with the passage of the *Magnitsky Act* in 2017.

Similar acts exist in many countries around the world. Magnitsky acts generally allow for the imposition of sanctions on officials of foreign states who have engaged in significant corruption or gross violations of internationally

recognized human rights. Sanctions can include property-blocking sanctions and visa restrictions, so that individuals sanctioned under the law may have their assets frozen and visas (if any) revoked. In Canada, there is also new proposed legislation that would permit Canada to sell off assets of these perpetrators and use proceeds to compensate victims (Chase 2022).[14]

Magnitsky acts exist in Canada, the United States, the United Kingdom, the European Union, Estonia, Lithuania, Latvia, Gibraltar, Jersey, and Kosovo. Other countries including Australia are contemplating passing a Magnitsky act. Even in countries without a Magnitsky act, they may have other legislation that permits the imposition of similar sanctions on CCP officials.

Domestic governments like Canada (and any other government with a *Magnitsky Act* or a Magnitsky-style act) can impose targeted sanctions on Chinese individuals and entities complicit in atrocities committed against Uyghurs.

The Magnitsky Act (Canada)

The *Magnitsky Act* in Canada allows for the imposition of sanctions on officials of foreign states who have engaged in significant corruption or gross violations of internationally recognized human rights. Specifically, the following foreign nationals may be subjected to sanctions:

- Foreign nationals responsible for or complicit in extrajudicial killings, torture, or other gross violations of internationally recognized human rights committed against individuals in any foreign state who seek (i) to expose illegal activity carried out by foreign public officials, or (ii) to obtain, exercise, defend, or promote internationally recognized human rights and freedoms;

- Foreign nationals acting as agent of or on behalf of a foreign state in a matter relating to an activity described in point [a] above;

- Foreign public officials or associates of such officials responsible for or complicit in ordering, controlling, or otherwise directing, acts of significant corruption, including bribery, expropriation of private or public assets for personal gain, corruption related to government contracts or the extraction of natural resources, or the transfer of the proceeds of corruption to foreign jurisdictions; and

- Foreign nationals materially assisting, sponsoring, or providing financial, material or technological support for or goods or services in support of an activity described in point [c] above.

The *Magnitsky Act* permits the government to impose property-blocking and travel sanctions on listed individuals. Specifically, the governor in council may

"by order, cause to be seized, frozen or sequestrated… any of the foreign national's property situated in Canada" (Sergei Magnitsky Law 2017, 4). In addition, the governor in council may prohibit "any person in Canada [and] Canadians outside Canada" from:

- Dealing, directly or indirectly, in any property, wherever situated, of the listed foreign national;
- Entering into or facilitating, directly or indirectly, any financial transaction related to a dealing described above;
- Providing or acquiring financial or other related services to, for the benefit of, or on the direction or order of the listed foreign national; and
- Making available any property, wherever situated, to the listed foreign national or to a person acting on behalf of the listed foreign national.

The *Magnitsky Act* also amended the *Immigration and Refugee Protection Act* (IRPA) to designate these foreign nationals inadmissible to Canada on grounds of human or international rights violations. To date, the Magnitsky Act in Canada has not been used to sanction Chinese individuals complicit in the atrocities committed against the Uyghurs. However, Canada has used SEMA, another related sanctions regime, to do so.

The Special Economic Measures Act (Canada)

Pursuant to section 4 (1.1) (c) of SEMA, sanctions may be imposed if "gross and systematic human rights violations have been committed in a foreign state."[15] If this circumstance applies, the governor in council may order that property situated in Canada be seized, frozen, or sequestrated, if such property belongs to the foreign state, any person in that state, or a national of that state who does not ordinarily reside in Canada. The governor in council may also restrict or prohibit dealing with the foreign state in a variety of ways, including restricting or prohibiting Canadians (or persons in Canada) from dealing in property held by nationals of that foreign state.

SEMA is wider than the *Magnitsky Act* in several respects, including in that legal entities may also be sanctioned, whereas the *Magnitsky Act* may only be used to list and sanction individuals.[16]

Existing targeted sanctions levied

In March 2021, Canada, the EU, the UK, and the US all imposed sanctions on four individuals and one entity responsible for atrocities committed against the Uyghurs.[17] The listed individuals were Zhu Hailun, Wang Junzheng, Wang Mingshan, and Chen Mingguo. The listed entity was Xinjiang Production and Construction Corps (XPCC) Public Security Bureau.

The list has been enlarged in the US, and a total of 107 sanctions have been imposed, with 57 Chinese companies and 33 Chinese officials and government agencies sanctioned by the US government (Uyghur Human Rights Project 2022). More officials and entities should be sanctioned everywhere, particularly in Canada, the EU, and the UK.

While it is commendable that Canada has used SEMA to impose sanctions in response to the atrocities committed against Uyghurs, and that the EU and the UK have similarly imposed sanctions, listing four individuals and one entity is not sufficient. Other individuals and entities for whom there is evidence of complicity in the atrocities committed against Uyghurs should be listed and sanctioned. To assist in these efforts, civil society, and in particular Uyghur non-profit organizations, should be consulted.

For example, in January 2020, URAP submitted 10 names of CCP officials to the sanctions division of Global Affairs Canada. Only one of those 10 names was subsequently sanctioned by Canada, the EU, and the UK.

The 10 names URAP provided are listed immediately below. As noted, Canada, the EU, and the UK have yet to sanction nine of the 10.

1. **Hu Lianhe, Deputy Head, Secretariat for Coordinating Xinjiang Work, Central Political and Legal Affairs Committee of the CCP**

   Hu has been described by the Jamestown Foundation as "arguably the most important Party official overseeing day-to-day Xinjiang work in Beijing" (Leibold 2018). Hu was the CCP official to mount China's first international defence of the security campaign in Xinjiang (East Turkestan) at the United Nations (Shepherd 2019). The United States sanctioned Hu in December 2021 (United States, Embassy in Chile 2021).

2. **Shohret Zakir, Chairman of Xinjiang Uyghur Autonomous Region (XUAR) (2018-2021)**

   During Shohret's tenure as Chairman (United States, Department of the Treasury 2021a), numerous crimes were committed against the Uyghurs, as described in detail above. Among other things, millions of Uyghurs have been arbitrarily detained. On July 9, 2020, the US sanctioned the Xinjiang Public Security Bureau (XPSB), a constituent department of the XUAR, for its role in the serious human rights abuses occurring in Xinjiang (East Turkestan) since at least 2016. Shohret is sanctioned by the US, pursuant to E.O. 13818, and has been designated as a foreign person who is or has been a leader or official of an entity, including any government entity, that has engaged in, or whose members have engaged in, serious

human rights abuse relating to their tenure. The United States sanctioned Shohret in December 2021 (United States, Department of the Treasury 2021a).

3. **Chen Quanguo, Former Party Secretary of XUAR, Political Commissar of the Xinjiang Production and Construction Corps (XPCC), and member of the 19th Politburo of the CCP**

   After his appointment as Party Secretary of XUAR in August 2016, Chen oversaw the implementation of a comprehensive surveillance, mass detention, and indoctrination program targeting Uyghurs and other Turkic Muslims. Chen also oversaw the construction of a network of internment camps. Another measure Chen introduced was the establishment of state boarding schools to which Uyghur and other Turkic children were sent. Prior to his appointment to Party Secretary of XUAR, Chen was the Party Secretary of the Tibet Autonomous Region. In that role, Chen focused on "stability maintenance" through the establishment of an extensive security architecture enabling surveillance, control, and coercion. Chen led repressive initiatives including the blocking of external media sources, re-education programs, and promoting intermarriage. In August 2016, due to his perceived successes in the Tibet Autonomous Region, Chen was appointed to the position of Party Secretary of XUAR. The United States sanctioned Chen in July 2020 (United States, Department of the Treasury 2020a).

4. **Zhu Hailun, Former Secretary of the Political and Legal Affairs Committee of the XUAR**

   The United States sanctioned Zhu in July 2020 (United States, Department of the Treasury 2020a). Canada, the UK, and the EU subsequently sanctioned him in March 2021. (In Canada, this was pursuant to Special Economic Measures (People's Republic of China) Regulations, SOR/2021-49.)

5. **Sun Jinlong, Former Political Commissar of XPCC**

   As former Political Commissar of the Xinjiang Production and Construction Corps (XPCC), Sun had responsibility for its activities, including the organization's involvement in crimes against Uyghurs. The XPCC is directly involved in implementing surveillance systems, systems of mass detention, and Uyghur forced labour in Xinjiang (East Turkestan). The United States sanctioned Sun in July 2020 (United States, Department of the Treasury 2020b).

6. **Peng Jiarui, Deputy Party Secretary and Commander, XPCC**

   The XPCC is a state-owned organisation that exercises administrative authority and controls economic activities in the Uyghur Region. The XPCC is involved in the atrocities committed against the Uyghurs, including in the implementation of a large-scale surveillance, detention, and indoctrination program targeting Uyghurs and other Turkic Muslims. The Public Security Bureau of the XPCC has been sanctioned by Canada, the US, the EU, and the UK. As commander of the XPCC, Peng directs the organization in these activities. The United States sanctioned Peng in July 2020 (United States, Department of the Treasury 2020b).

7. **Shawket Imin, Head, United Front Department, XPCC**

   The XPCC is involved in the atrocities committed against the Uyghurs, including in surveillance, detention, and indoctrination. Shawket is head of the United Front Department of the XPCC. The United States sanctioned him in July 2020 (Talley 2020).

8. **Zhou Jianguo, XUAR armed police commander**

9. **Guan Yanmi, former commander of the XUAR armed police**

10. **Yang Huan Ning, Executive Vice Minister of Security**

Other individuals that should be considered for targeted sanctions are Erken Tuniyaz and Huo Liujun. Erken Tuniyaz is currently the acting Chairman of the XUAR and had previously served as Vice Chairman since 2008. The United States has already sanctioned Erken; he is designated pursuant to E.O. 13818 for being a foreign person who is or has been a leader or official of an entity, including any government entity, that has engaged in, or whose members have engaged in, serious human rights abuses relating to their tenure (United States, Department of the Treasury 2021b).

Huo Liujun is the former Party Secretary of the Xinjiang Public Security Bureau (XPSB). He led the XPSB from at least March 2017 to 2018. Under his command, the XPSB deployed an AI-assisted computer system called the Integrated Joint Operations Platform (IJOP), which created biometric records for millions of Uyghurs in Xinjiang (East Turkestan). The XPSB, through the IJOP, uses digital surveillance to track Uyghurs' movements and activities. IJOP then uses this data to determine which persons could be potential threats, and then some of these individuals are detained and sent to detention camps, where they may be held indefinitely and without charges or trial. The United States has already sanctioned Huo (United States, Department of the Treasury 2020a).

Civil lawsuits

Civil lawsuits against the Chinese government

Domestic courts in Canada and other common-law countries may provide other avenues through which to hold to account those responsible for atrocities committed against Uyghurs. The first possibility to explore is possible civil lawsuits against the Chinese government. Civil lawsuits have the potential of providing real redress to victims. For example, in Canada, if a Canadian court finds that the Chinese government is liable and must provide compensation for damages caused, some of its assets in Canada may be seized, then sold, and the proceeds may be distributed to those who have incurred losses.

The major hurdle to advancing such a lawsuit is overcoming the general principle of sovereign immunity. This is the principle that foreign states are generally immune from the jurisdiction of domestic courts. In Canada, no foreign state can be sued in domestic courts unless the situation fits one of the specific, limited exceptions articulated in Canada's *State Immunity Act* (*State Immunity Act*, RSC 1985, c. S-18). The United States law on this topic is nearly identical. The two exceptions to sovereign immunity that may apply are:

- The commercial activity exception (states do not have immunity for commercial activity); and

- The harm exception (states do not have immunity for death, injury, or property damage that occurs in Canada or the United States, as the case may be).

The Commercial Activity Exception

Pursuant to section 5 of the Canadian *State Immunity Act*, "a foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state" (State Immunity Act, RSC 1985, c. S-18 at section 5). Per section 2, "commercial activity means any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character" (State Immunity Act, RSC 1985, c. S-18 at section 2).

The US *Foreign Sovereign Immunities Act* provides for a similar exception, stating as follows:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which … the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere;

> or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States. (*Foreign Sovereign Immunities Act*, 28 USC § 1605(a)(2) (1976))

Commercial activity is defined in the US legislation as meaning "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose" (28 USC 1603, reproduced in *Kuwait Airways Corp v. Iraq*, 2010 SCC 40, at para 26).

The rationale behind the commercial activity exception is that a government should not be immune from the jurisdiction of domestic courts for actions that a private actor is empowered to take – in other words, commercial activity. The difficulty in using this exception tends to be discerning whether an activity is commercial or political, as many government actions can be construed as both (for example, think of a government engaging in a construction contract or tender). In settling this, courts across Commonwealth systems have typically held that one must look to the nature of the transaction and not the purpose or underlying motivation. This interpretation of the exception is the current law in the US, whereas Canadian courts still look to "the entire context," which includes both the nature of the transaction and the purpose of the activity (28 USC 1603 at para 31; *Re Canada Labour Code*, [1992] 2 SCR 50, at paras. 27-28).

Although certain aspects of certain crimes committed against Uyghurs may have links to commerce – for example, use of Uyghur forced labour in the camps and beyond – it would likely be a challenge to frame Chinese actions as constituting commercial activity.

In the Canadian context, this exception has been interpreted restrictively in Canadian courts. For example, in *Bouzari v Iran*, 2004 CanLII 871 (ONCA), the Ontario Court of Appeal held that the commercial activity exception could not be extended to cover torture (a political act) that was committed for a commercial purpose. Despite this restrictive interpretation of the commercial activity exception in Bouzari, it may be possible to argue in this case that the use of forced labour is an act of a commercial nature for a political purpose (as opposed to an action of a political nature for a commercial purpose) and is therefore distinguishable from Bouzari on those grounds. However, the restrictive interpretation of the commercial activity exception in Bouzari together with the blended nature of the analysis in Canadian law would likely still make this a challenging argument.

Moreover, the Chinese government was likely not relying on power that a private actor possesses – the original legal test upon which this exception to sovereign immunity was first philosophized.

The Harm Exception

Per section 6 of Canada's *State Immunity Act*:

> a foreign state is not immune from the jurisdiction of a court in any proceeding that relates to
>
> - any death or personal or bodily injury, or
>
> - any damage to or loss of property that occurs in Canada. (*State Immunity Act*, RSC 1985, c. S-18 at section 6)

Similarly, 28 USC 1605 (the US *Foreign Sovereign Immunities Act*) provides:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which … 1605(a) (5) money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to –
>
> (a) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or
>
> (b) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. (*Foreign Sovereign Immunities Act*, 28 USC § 1605(a)(2) (1976) at 1605(a)(5))

Case law in both Canada and the United States has held that this exception only applies when the acts causing injury or damage occurred domestically.

The Supreme Court of Canada has held that the harm exception "does not apply where the impugned events, or the tort causing the personal injury or death, did not take place in Canada" (*Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, at para. 73). Similarly, US courts have found in several cases that the act that causes the harm must occur in the United States.[18] It cannot be an act that occurs in another country and causes effects in the United States.

This feature of the exception makes it unlikely to apply to lawsuits regarding Chinese atrocities committed against Uyghurs. The one exception may be regarding injury or damage that occurs in Canada or the United States, as the case may be, due to transnational repression.

As discussed in Part I above, transnational repression of Uyghurs outside of China is pervasive and rising. In an August 2019 report, the Uyghur Human Rights Project (UHRP) documented that the CCP "is implementing a systematic, ambitious, multi-year, well-resourced, relentless and cruel policy to inflict pain and suffering on Uyghurs abroad," and that this includes the intimidation and silencing of Uyghurs now residing in the United States (Uyghur Human Rights Project 2019). A subsequent report by the UHRP and the Oxus Society for Central Asian Affairs found that 95.8 percent of Uyghurs surveyed in liberal democracies reported feeling threatened, and 73.5 percent reported having experienced digital threats, risks, or other forms of harassment online (Hall and Jardine 2021). The Canadian-based Uyghur Rights Advocacy Project (URAP) found similar patterns in Canada, finding that, of the numerous Uyghurs interviewed in Canada, "not a single of these community members" has escaped transnational repression by the CCP (Uyghur Rights Advocacy Project 2022).

If any of these actions, in a particular case, lead to personal or bodily injury, or damage to or loss of property, this could potentially ground a civil lawsuit against the Chinese government in Canada or the United States (or other democratic countries, if they have similar laws). Of course, claims for harm must still also meet the tort law requirement that the action "proximately caused" the injury, so a plaintiff would still need to demonstrate that the Chinese government proximately caused the damage or injury suffered. This would require analysis on a case-by-case basis.

Civil lawsuits against corporations

As discussed in Part I above, there is significant evidence of Uyghur forced labour. Human rights groups have documented this use of Uyghur forced labour across several Chinese provinces, as well as the complicity of dozens of multinational corporations. The Australian Strategic Policy Institute (ASPI) found that 27 factories across nine Chinese provinces use Uyghur forced labour, and that the supply chains of 82 corporations are implicated, including Nike, Zara, and Apple (Xu et al. 2020). Since the ASPI report was released, additional companies have been exposed.[19]

Use of forced or compulsory labour is prohibited in international law, including in customary international law. Further, the prohibition against slavery is a *jus cogens* norm: a fundamental norm of international law that is binding on all states and from which no derogation is permitted.

It is not just states that have a duty to protect these human rights; enterprises do as well. As noted by the *OECD Guidelines for Multinational Enterprises*, "respect for human rights is the global standard of expected conduct for enterprises independently of States' abilities and/or willingness to fulfil their human rights obligations" (OECD 2011). The UN's *Guiding Principles on*

Business and Human Rights also makes clear that there is corporate responsibility to respect human rights, and that corporations have a responsibility to conduct human rights due diligence and ensure that their operations abroad do not adversely affect human rights (OHCHR 2011).

Corporations complicit in Uyghur forced labour may be vulnerable to civil lawsuits in Canada and the United States – as well as other common-law countries with similar laws.

In Canada, a civil lawsuit against one of these corporations would rely on the precedent set by *Nevsun Resources Ltd. v. Araya*, a landmark Supreme Court of Canada judgment from 2020. In *Nevsun*, the Supreme Court ruled that customary international law, including *jus cogens* norms, automatically form part of Canadian law unless there is legislation to the contrary. The Supreme Court also found that such customary international law applies not just to states, but to corporations. The court found that, as a result, the plaintiffs, who were victims of forced labour in Eritrea, could sue the corporation in tort for damages in a Canadian court (*Nevsun Resources Ltd. v. Araya*, 2020 SCC 5). The plaintiffs had been subject to forced labour in a mine in Eritrea; the mine was owned by a corporation that was in turn owned by Nevsun, a Vancouver-based mining company (*Nevsun Resources Ltd. v. Araya*, 2020 SCC 5). The *Nevsun* case can be used as a precedent to pursue civil lawsuits against Canadian corporations that use Uyghur forced labour abroad.

In the United States, civil lawsuits against corporations may be pursued using the *Trafficking Victims Protection Reauthorization Act*, which creates a civil cause of action for such crimes. In certain European countries, some companies are facing legal process for complicity in crimes against humanity due to use of Uyghur forced labour. There may be similar precedents or legislation that permit civil lawsuits against companies in other jurisdictions, and this should involve consultations with local lawyers.

Criminal prosecutions using universal jurisdiction

China is not a party to the Rome Statute, and so initiating international criminal prosecutions at the ICC will be a challenge. However, the ICC is not the only body that may prosecute individuals for crimes against humanity, war crimes, and genocide. Many countries can prosecute individuals in their domestic legal systems for these crimes and other *jus cogens* norms, even when there is no link between the activity and the state. In other words, there exists universal jurisdiction for these crimes that enables these crimes to be tried (almost) anywhere.

The exercise of universal jurisdiction depends on the particulars of each country's domestic legislation. For example, in Canada, the *Crimes Against Humanity and War Crimes Act* permits Canadian courts to prosecute crimes

against humanity, war crimes, and genocide that occurred outside of Canada, so long as the individual to be prosecuted is a Canadian citizen, resident, or visitor. Further, heads of state and other high-ranking officials are immune from domestic criminal jurisdiction (they are "internationally protected persons" under section 2 of the Canadian *Criminal Code*, and enjoy common-law personal immunity in international law).

As discussed in Part I, multiple credible bodies have already found that the atrocities occurring in Xinjiang (East Turkestan) constitute genocide. There is also substantial evidence that crimes against humanity are occurring. According to Article 7, paragraph 1 of the Rome Statute:

> "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
>
> - Murder;
> - Extermination;
> - Enslavement;
> - Deportation or forcible transfer of population;
> - Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
> - Torture;
> - Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
> - Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
> - Enforced disappearance of persons;
> - The crime of apartheid;
> - Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. (International Criminal Court 2011)

Based on the evidence summarized in Part I above, and in addition to genocide, there is evidence that all of these crimes against humanity are being committed against Uyghurs. As described above, Uyghurs are killed, enslaved, forcibly transferred, imprisoned, tortured, raped, persecuted, and forcibly disappeared. There is also a strong argument to be made that the crime against humanity of apartheid is being committed, with legal academics finding that "prosecutors will likely be able to demonstrate that China has intentionally created and perpetuated a system of apartheid by pointing to evidence of widespread discrimination against Muslim minorities" (Lim 2021, 122-24).

These acts are likely committed as part of a widespread and systematic attack directed against Uyghurs. As the ICC's "Elements of Crimes" document makes clear, the acts underlying "attack directed against a civilian population" need not constitute a military attack (International Criminal Court 2011, 5).

As a result, and under universal jurisdiction laws, perpetrators that end up in Canada, even as visitors, may be prosecutable for these crimes and tried criminally in Canadian courts.

Some domestic systems may even permit universal jurisdiction prosecutions without the perpetrator's physical presence in the country. This would require consultations with local lawyers.

Use of ombudsman or other neutral arbiter

In Canada, the Canadian Ombudsperson for Responsible Enterprise (CORE) operates at arm's length from government and has a mandate to investigate human rights abuses committed by Canadian companies' operations abroad. CORE is limited to investigating companies that operate in one of three sectors: garment, mining, and oil and gas. CORE was established in 2019 and became operational in 2021. The office has yet to investigate a single case.

In April 2022, a coalition of 28 Canadian non-profit organizations submitted a complaint to CORE, asking it to investigate 14 Canadian companies alleged to use Uyghur forced labour in their supply chains. Twelve of the companies operate in the garment sector and two operate in the mining sector. The lawyers on the file are Sarah Teich, David Matas, and Maria Reisdorf.

The 14 Canadian companies named were: Costco Canada, Gap Canada, Hugo Boss Canada, Nike Canada, Ralph Lauren Canada, Zara Canada, Diesel Canada, Guess Canada, Levi Strauss Canada, Walmart Canada, Lululemon Canada, Amazon Canada, Dynasty Gold Corp, and GobiMin. As of time of writing, CORE has yet to determine if they will open the investigation per our request.

If CORE opens an investigation into these Canadian companies, they may be held accountable for their use of Uyghur forced labour in their supply chains.

This use of an ombudsman or other neutral arbiter should be considered in other jurisdictions where such offices exist. Local lawyers should be consulted.

Novel legislation and policy changes

Forced labour

Another step that countries can take domestically, to specifically tackle Uyghur forced labour, is to institute a presumption that goods from Xinjiang (East Turkestan) are produced using forced labour. The United States has already done this. In Canada, Uyghur groups have argued that instituting such a presumption is something that the Canada Border Services Agency (CBSA) is already permitted to do, pursuant to the existing provisions of the Customs Tariff.

On November 24, 2020, a group of lawyers and advocates wrote to CBSA with a request that they "prohibit the import of all goods produced in Xinjiang on the basis that, absent clear and convincing evidence to the contrary, those goods have been produced wholly or in part by forced labour."[20] On January 13, 2021, the CBSA replied by email and stated that "the Customs Tariff does not provide the authority to [do that]" and that this would require novel legislation.[21] Lawyer David Matas then filed an application for judicial review in Federal Court of Canada, on behalf of the applicants, asking the Court to rule that the imposition of such a presumption is something that the CBSA is presently authorized to do, pursuant to the relevant provisions of the Customs Tariff. URAP intervened in the court case, represented by the author (Sarah Teich). The hearing date in Federal Court was December 6, 2021. We received a negative judgment on April 5, 2022. The applicants have filed a notice of appeal, and URAP intends to apply for leave to intervene.

If the CBSA remains unwilling to institute the requested presumption, novel legislation can be passed to mandate the imposition of such a presumption. In fact, there are presently three forced labour bills under consideration in Canadian Parliament. Bill S-204, introduced by Senator Leo Housakos, would amend the Customs Tariff to prohibit the importation of any and all goods produced in the Uyghur region on the basis that they are produced using Uyghur forced labour. The other two – Bill S-211 and Bill C-243 – are not Uyghur-specific but would generally impose reporting obligations on government institutions and private-sector entities to "report on the measures taken to prevent and reduce the risk that forced labour or child labour is used [in their supply chains]" (Senate 2021a, Bill S-211).

All three Canadian bills, if passed, would contribute to the tackling of Uyghur forced labour. Similar steps as these may be available in other countries. Particularly in countries that already prohibit the importation of goods made

with forced labour, groups can write to government asking for the imposition of a presumption that goods from the Uyghur region are produced using forced labour. If that fails, judicial review may be sought, if such a remedy is available. Legislation may also be pursued. Consultations should always be undertaken with local lawyers.

Forced organ harvesting

In Canada, Bill S-223, *An Act to amend the Criminal Code and the Immigration and Refugee Protection Act (trafficking in human organs)*, was proposed to address forced organ harvesting. Bill S-223 passed the Senate on December 9, 2021 and had its second reading at the House of Commons on May 18, 2022. It would amend the *Criminal Code* to create new offences in relation to forced organ harvesting, and it would amend the *Immigration and Refugee Protection Act* to provide that a permanent resident or foreign national would become inadmissible to Canada if they engaged in any such activities. Bill S-223 is not Uyghur- or China- specific but rather, generally concerning forced organ harvesting. Different versions of the bill had previously received unanimous, bipartisan support from both the House of Commons and the Senate. Similar domestic legislation to combat forced organ harvesting can and should be pursued in other countries.

Uyghur refugees

Uyghurs located in Xinjiang (East Turkestan) cannot currently escape. However, there are still populations of vulnerable Uyghurs in other locations that should be protected by Canada and by other liberal democracies.

As found by the UHRP and the Oxus Society for Central Asian Affairs, the CCP is engaged in transnational repression across dozens of countries, and these efforts include CCP efforts to have Uyghurs located outside of China detained and deported back to Chinese custody. These populations of Uyghurs, in unsafe third countries, should be protected by Canada and by other liberal democracies.

The principle of non-refoulement has been described by the UNHCR as "the cornerstone of international refugee protection" (UNHCR 2007). This is the principle that refugees and asylum-seekers should not be sent back or removed, "directly or indirectly, to a place where their lives or freedoms would be in danger" (UNHCR 2007, 3). The UNHCR considers the principle of non-refoulement as part of customary international law (UNHCR 2007, 7). This means that the principle of non-refoulement is binding on all states.

As a result, when any of these countries – which may include Egypt, Thailand, Malaysia, Kyrgyzstan, Pakistan, Afghanistan, Kazakhstan, Cambodia, Turkey, and Myanmar – deports Uyghurs back to Xinjiang (East Turkestan), they are in

breach of their international legal obligations. It also means that if liberal democracies such as Canada or the United States were to deport Uyghurs back to one of those countries (for example, by sending Uyghur asylum-seekers back to Thailand), they may be in breach of their international legal obligations as well, because this would be, indirectly, sending the asylum-seeker(s) back "to a place where their lives or freedom would be in danger" (UNHCR 2007, 3).

The principle of non-refoulement does not, according to the UNHCR, "entail a right of the individual to be granted asylum in a particular state" (UNHCR 2007, 3). As noted in the preamble to the Refugee Convention, "the grant of asylum may place unduly heavy burdens on certain countries" (UNHCR 1951, preamble). However, as the preamble goes on to say, "a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot … be achieved without international cooperation" (UNHCR 1951, preamble). The Executive Committee of the UN High Commissioner for Refugees' *Conclusion on International Protection No. 90 (LII)* reiterated "its strong commitment to international solidarity, burden-sharing and international cooperation to share responsibilities" and commended "uses of resettlement as an important tool of international protection, as a durable solution… and as an expression of international solidarity and a means of burden or responsibility sharing" (UNHCR 2001). Resettlement allows "states to share responsibility for refugee protection and reduce the impact of forced displacement on countries that are hosting refugees" (UNHCR and Canada 2022).

> *"The CCP is engaged in transnational repression across dozens of countries.*

As the Immigration Refugees and Citizenship Canada's *Minister Transition Binder 2021: Refugee Resettlement* states, "resettlement is used when refugees do not have a durable solution in their first country of asylum and cannot be voluntarily repatriated" (Canada, Immigration, Refugees and Citizenship 2021). It is obvious that Uyghur refugees who risk detention and deportation back to China do not have a durable solution where they are.

As a result, the principle of non-refoulement may not obligate Canada or any other state to grant asylum in a particular case, but such countries do have obligations to share the burden in terms of resettlement, prioritizing those in need of protection. As the Centre for International Governance Innovation's Jessie Thomson has recommended, "UN member states should redouble efforts to enhance the strategic use of resettlement, increasing the role of host

states and countries of asylum in comprehensive solutions efforts" (Thomson 2017).

In the Canadian context, the entry and resettlement of Uyghur refugees can be accomplished in any number of ways.

Presently, other than for refugees sponsored by a constituent group of a sponsorship agreement holder, an asylum-seeker needs a referral from a settlement agency like the UNHCR. This is a broader problem plaguing Immigration, Refugees and Citizenship Canada. In many cases, asylum seekers in vulnerable positions cannot feasibly obtain UNHCR status. This is true for many Uyghurs in unsafe third countries, but it is also true more broadly. The UNHCR requirement can be waived as a matter of policy, as it has been waived previously for other groups. Another simple and obvious reform would be for Canada to expand the numerical cap that exists for the sponsorship agreement holders, remove it, or declare that it no longer exists for a particular group. The current numerical cap on sponsorship agreement holders is another broader problem that merits reform as it frustrates the generosity of Canadians and has an impact on Uyghurs as well as other asylum-seekers. Canada can and should fix the above problems to help Uyghur refugees enter Canada. Canada can also specifically create a special or exceptional stream for Uyghur refugees, as it did for Afghani and now Ukrainian asylum-seekers.

None of this should even require novel legislation, as Canada can do much of this as a simple matter of policy. Of course, novel legislation can always be passed to mandate one or more of the above reforms or avenues.

Canada has demonstrated several times that where it has the political will, it can flexibly accommodate large numbers of asylum-seekers. Less than two weeks after the start of the Russian invasion of Ukraine in 2022, Canada announced special measures to permit Ukrainian asylum-seekers to enter Canada quickly and without the usual limitations; to accomplish this, it created the Canada-Ukraine Authorization for Emergency Travel (Canada, Immigration, Refugees and Citizenship 2022a; Canada, Immigration, Refugees and Citizenship 2022b). A few years earlier and following a campaign promise from Prime Minister Justin Trudeau to do so, *Operation Syrian Refugees* saw 26,172 Syrian refugees resettled in Canada within a span of 118 days from November 2015 to February 2016 (Hamilton, Veronis, and Walton-Roberts 2019).

In the United States, the *Uyghur Human Rights Protection Act* has already been introduced. This Act would grant priority designation to Uyghurs and members of other predominately Turkic or Muslim ethnic groups, and the spouses, children, and parents of such individuals. The bill would also waive certain immigration-related requirements for such individuals. The Uyghur Human Rights Protection Act should be prioritized and passed into law.

Canada, the United States, and other democratic countries should take measures to facilitate the resettlement of Uyghur asylum-seekers, particularly considering the risk of detention and deportation that many face in third countries. As the Office of the UNHCR emphasizes, the strategic use of resettlement should involve, first, protection. Those first resettled, from anywhere, should be those who face refoulement in their current host country. Second, that resettlement should be used as a basis for negotiation with the host country, not just to stop refoulement, but also to treat refugees in their own country better by taking steps towards local integration.

Conclusions and recommendations

Numerous crimes and abuses are being committed by the CCP against the Uyghurs in Xinjiang (East Turkestan). There is pervasive surveillance, to the level where the region has been characterized as a police state; massive numbers of arbitrary detentions; widespread physical and sexual torture; medical crimes; killings; forced labour; and transnational repression. The crimes committed against the Uyghurs have been found to amount to genocide pursuant to the 1948 UN Genocide Convention. Numerous parliaments, governments, and non-profit organizations have found that these crimes constitute a genocide. On December 9, 2021, the Uyghur Tribunal released its final judgement in which it found that the People's Republic of China had committed genocide against the Uyghurs within the meaning of the 1948 UN Genocide Convention.

These crimes are in breach of China's legal obligations. By ratifying the UN Genocide Convention, China has undertaken to prevent and punish genocide. This is an undertaking which the Chinese government has now breached. The CCP's actions are also in breach of several other human rights treaties, including the Convention Against Torture and the International Covenant on Civil and Political Rights. The CCP's actions are also in violation of many of the fundamental norms which make up customary international law.

The obligations under international law do not rest solely on China. Every other state party to the UN Genocide Convention has also undertaken to prevent and to punish genocide. Every other state that has ratified the Genocide Convention, has not only a moral obligation to take action to combat the Uyghur genocide, but also a legal one.

What can be done? The answer is that there is quite a lot that can be done, both internationally and domestically. Every viable option that is summarized below and was described in detail in Parts II and III above should be pursued.

1. **Encourage the Office of the Prosecutor at the International Criminal Court to open a preliminary examination into the situation.** The ICC has specific jurisdictional constraints. Absent a referral by the UN Security Council, the ICC prosecutor can only investigate crimes that occur on a state party's territory, or crimes committed by state party nationals. China is not a state party to the Rome Statute, and because of China's veto power at the UN Security Council, a referral is not a viable option either. However, using the precedent of the Myanmar/Bangladesh case, certain crimes (namely, the crimes against humanity of deportation and persecution) can be framed as having occurred, in part, on the territories of states parties.

   UK Barrister Rodney Dixon QC has already submitted a communication to the prosecutor's office on this issue and has asked them to open a preliminary examination into the forcible transfer of Uyghurs from Cambodia and Tajikistan (state parties to the Rome Statute) back to China. Other lawyers and non-profit organizations may assist in this effort by submitting further evidence and/or legal argumentation. Further, a state party to the Rome Statute can refer the situation to the ICC, and individuals as well as civil society can lobby states parties to do so. Dixon is asking the prosecutor to open a preliminary examination on his own initiative, but if a state party formally refers the situation, the process becomes expedited.

2. **Refer the matter to the International Court of Justice. Multiple human rights treaties, including the UN Genocide Convention and the Convention Against Torture, contain provisions that provide that disputes shall be submitted to the ICJ.** In the Genocide Convention, this is contained in Article IX. In the Convention Against Torture, this is contained in paragraph 1 of Article 30. By ratifying these treaties, states parties consent in advance to the ICJ's jurisdiction over disputes arising. China is a state party to both the Genocide Convention and the Convention Against Torture. However, China has made reservations under both treaties, declaring that it is not bound by Article IX, and paragraph 1 of Article 30, respectively. Under international law, a state may ratify a treaty, but make certain reservations regarding articles to which it does not consent to be bound.

   However, "reservations cannot be contrary to the object and purpose of the treaty." Therefore, **a state party such as Canada may bring a dispute against the Chinese government for its violations of the Genocide Convention and/or the Convention Against Torture, and ask the ICJ to conclude that the Chinese government's reservation(s) should be considered invalid because they are contrary to the object and purpose of the treaty. Individuals and civil society can lobby government to this effect. Another option is to seek an advisory opinion from the ICJ.** The ICJ is entitled to provide advisory opinions on legal questions referred to it by authorized UN organs and agencies.

An advisory opinion is not binding, but it may carry persuasive weight. Seeking an advisory opinion on Chinese culpability for atrocities committed against the Uyghurs may push the CCP to change course and/or take actions that would have a favourable impact on public opinion.

3. **Engage the various UN human rights mechanisms.** Generally, violations of internationally recognized human rights can be brought to the various UN human rights bodies, including human rights treaty bodies, special procedures, and the Human Rights Council. Human rights treaty bodies may investigate Chinese compliance with treaties to which China has acceded, and publish periodic reports. They have done so. However, because China has not ratified any of the relevant optional protocols or lodged any of the requisite declarations, none of the human rights treaty bodies are empowered to receive individual complaints about China. This limits the possibility of civil society engagement with human rights treaty bodies on this issue. However,

   Yet complaints of human rights breaches may be lodged with the special procedures, several of which have relevant mandates, including the Working Group on Arbitrary Detention, the Special Rapporteur on the right to privacy, the Special Rapporteur on contemporary forms of slavery, the Special Rapporteur on torture, and the Special Rapporteur on violence against women. **Any individual or group can submit information online or by mail to special procedures. Finally, complaints of human rights violations can be lodged with the UN Human Rights Council. Any individual, group, or non-governmental organization can submit a complaint to the Human Rights Council, against any state member of the UN.** There are seven criteria for admissibility which are listed earlier in this report. Of course, China's position on the Human Rights Council may, in effect, preclude effective action on that front.

4. **Impose targeted sanctions using domestic law.** Another option available to many domestic governments, including Canada, is to impose targeted sanctions on Chinese individuals and entities complicit in atrocities committed against Uyghurs. **In March 2021, Canada, the US, the UK, and the EU imposed sanctions on four individuals and one entity responsible for atrocities committed against the Uyghurs. Since then, the United States has imposed sanctions on dozens of other individuals and entities. More individuals and entities should be sanctioned by Canada, the UK, the EU, and others.** In January 2020, URAP submitted to the sanctions division of Global Affairs Canada 10 names of CCP officials. Only one of those names was subsequently sanctioned by Canada, the UK, and the EU In contrast, the United States has now sanctioned all of them. Canada should impose further targeted sanctions in consultation with civil society and in particular with Uyghur non-profit organizations in Canada.

5. **Engage in civil lawsuits in domestic courts.** Actions to hold China to account may also be sought in domestic courts, including in Canada and the United States, through the filing of civil lawsuits. Civil lawsuits against the Chinese government will generally be precluded by China claiming sovereign immunity. However, there may be a narrow opening for such lawsuits based on the personal injury or harm exception to sovereign immunity, which holds that "a foreign state is not immune from the jurisdiction of a court in any proceeding that relates to … any death or personal or bodily injury, or … any damage to or loss of property that occurs in Canada."

   The United States law on this topic is nearly identical. The case law in both Canada and the United States is clear that this exception only applies when the acts causing injury or damage occurred domestically. **Using this exception, there may be the possibility for a civil suit against the Chinese state for injury or damage that occurs in Canada or the United States due to transnational repression.** Of course, claims would still have to meet the tort law requirement that the action "proximately caused" the injury, so a plaintiff would still need to demonstrate that the Chinese government proximately caused the damage or injury suffered. **Further, civil lawsuits may be pursued against companies that use Uyghur forced labour, using the Trafficking Victims Protection Reauthorization Act in the United States, and/or the precedent set by Nevsun Resources Ltd. v. Araya in Canada.**

6. **Criminally prosecute perpetrators using universal jurisdiction laws.** The ICC is not the only body that may prosecute individuals for crimes against humanity, war crimes, and genocide. There is universal jurisdiction for these crimes and other jus cogens norms, such that many countries, including Canada, can prosecute individuals in their domestic legal systems for these crimes even when there is no link between the activity and the state. The operation of universal jurisdiction varies by country. In Canada, the Crimes Against Humanity and War Crimes Act permits Canadian courts to prosecute crimes against humanity, war crimes, and genocide that occurred outside of Canada, so long as the individual to be prosecuted is a Canadian citizen, resident, or visitor.

   As discussed in Part I of this report, multiple credible bodies have found that the atrocities occurring in Xinjiang (East Turkestan) constitute genocide as well as crimes against humanity. **As a result, using universal jurisdiction, perpetrators may be prosecuted for atrocity crimes in domestic criminal systems. Individuals and civil society can work to encourage prosecutors in Canada and elsewhere to initiate these prosecutions where appropriate.**

7. **Use ombudsman or other neutral arbiter.** In Canada, CORE may in-

vestigate human rights abuses committed by Canadian companies' operations abroad in one of three sectors: garment, mining, and oil and gas. In April 2022, a coalition of 28 Canadian non-profit organizations submitted a complaint to CORE, asking it to investigate 14 Canadian companies alleged to use Uyghur forced labour in their supply chains. The lawyers on the file are Sarah Teich, David Matas, and Maria Reisdorf. The 14 Canadian companies named were Costco Canada, Gap Canada, Hugo Boss Canada, Nike Canada, Ralph Lauren Canada, Zara Canada, Diesel Canada, Guess Canada, Levi Strauss Canada, Walmart Canada, Lululemon Canada, Amazon Canada, Dynasty Gold Corp, and GobiMin. **This use of an ombudsman or other neutral arbiter should be considered in other jurisdictions where such offices exist. Local lawyers should be consulted.**

8. **Pass novel legislation and/or a policy to address forced labour. Another step that countries can take domestically to tackle Uyghur forced labour specifically is to institute a presumption that goods from Xinjiang (East Turkestan) are produced using forced labour.** Legislation to this effect is already passed in the United States, and a similar Uyghur forced labour bill has been introduced in Canada. Canadian Bill S-204 introduced by Senator Housakos would amend the Customs Tariff to prohibit the importation of any and all goods produced in Xinjiang (East Turkestan), on the basis that they are produced using Uyghur forced labour. There are another two proposed bills, Bill S-211 and Bill C-243, which are general in nature and would impose reporting requirements.

9. **Pass novel legislation and/or a policy to address forced organ harvesting.** In Canada, Bill S-223 is a general bill (not Uyghur- or China-specific), that was proposed to address forced organ harvesting. Different versions of the bill have previously received unanimous, bipartisan support from both the House of Commons and the Senate. Bill S-223 should be prioritized and passed into law, and similar domestic legislation to combat forced organ harvesting can and should be pursued in other countries.

10. **Pass novel legislation and/or a policy to address Uyghur refugee non-refoulement and resettlement.** There are populations of vulnerable Uyghurs across the world that Canada and other liberal democracies should protect. The UNHCR has described the principle of non-refoulement as "the cornerstone of international refugee protection," and as constituting customary international law. If Canada or any other liberal democracy were to deport Uyghurs back to a country that may, from there, deport them back to China, that may be a breach of international legal obligations.

As a result, **democratic countries must ensure that they are not indirectly deporting Uyghurs back to China by returning them to unsafe third countries. Further, although the principle of non-refoulement does not per se "entail a right of the individual to be granted asylum in a particular state," democratic countries should take in Uyghur refugees. In Canada, this could be accomplished by simple policy change(s) and would not require novel legislation, although it can be done that way as well. The United States should pass the *Uyghur Human Rights Protection Act*, which would grant priority designation to Uyghurs and other Turkic Muslims and waive certain immigration-related requirements for such individuals.**

This paper has demonstrated that a number of reliable sources have concluded that the Chinese government is committing genocide against the Uyghurs in Xinjiang (East Turkestan). Democratic nations – as well as individual people – should not sit by knowing that atrocities are taking place. There are several options available for holding the CCP and others complicit to account. This paper has listed many of them and calls for them to be pursued.

About the author

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28 USC 1603, reproduced in *Kuwait Airways Corp v. Iraq, 2010 SCC 40*, at para 26.

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Kazemi Estate v. Islamic Republic of Iran, 2014 SCC 62. Available at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14384/index.do.

Nevsun Resources Ltd. v. Araya, 2020 SCC 5.

Endnotes

1 See for example, Adrian Zenz quoted in Chan (2018) and Buckley and Mozur (2019). This language was also employed by the Canadian Parliamentary Subcommittee on International Human Rights (Canada, House of Commons 2020).

2 See, for example, Buckley and Mozur (2019).

3 See for example, the Star's exposing of Costco Canada as being implicated in Uyghur forced labour (McNaughton and Nuttall 2021).

4 Those 14 letters were drafted by Sarah Teich, David Matas, CM, Iman M'Hiri, Executive Director of CSRDN, and Maria Reisdorf.

5 Jus cogens norms are norms that are fundamental in international law; these are the norms from which no derogation is permitted. Jus cogens norms include slavery, piracy, torture, crimes against humanity, war crimes, and genocide.

6 This appears to be false; see Catholic News Agency (2020). In any case, even if Xinjiang did still record a positive overall population, the PRC could still be committing genocide if they "[impose] measures intended to prevent births within the group" coupled with an "intent to destroy."

7 The lawyers on this communication were Sarah Teich and David Matas.

8 There are three ways for a preliminary examination to be launched by the Office of the Prosecutor at the ICC. First is by state referral (whereby a state party to the Rome Statute asks the Prosecutor to look into a situation). Second is on the prosecutor's own initiative (proprio motu). Third is through a UN Security Council referral. Following the conclusion of a preliminary examination, the Office of the Prosecutor may open an investigation. If the preliminary examination is initiated in the first or second way, the alleged crimes must have occurred on the territory of a state party or by state party nationals. Further, if the preliminary examination is initiated the second way, the prosecutor must obtain confirmation from the Chambers to proceed into an investigation following the preliminary examination. This is an extra step that is not required if there is a state party referral.

9 Note that the state would have to have not made a reservation under Article IX or Article 30, respectively.

10 For example, the Committee Against Torture has conducted five reviews concerning China. See United Nations, Human Rights Treaty Bodies (2015).

11 The complaint form can be found at https://spsubmission.ohchr.org/. Communications may also be sent by mail to Special Procedures, OHCHR-UNOG, 8-14 Avenue de la Paix, 1211 Geneva 10, Switzerland.

12 Communications to UNHRC may be sent by email (CP@ohchr.org), fax (41 22 917 90 11), or mail (Complaint Procedure Unit, Human Rights Council Branch, Office of the United Nations High Commissioner for Human Rights, United Nations Office at Geneva, CH-1211 Geneva 10, Switzerland). The complaint form can be found online at https://www.ohchr.org/en/hr-bodies/hrc/complaint-procedure/hrc-complaint-procedure-index.

13 See for example, the advocacy of Hillel Neuer (@HillelNeuer) of UN Watch, https://twitter.com/hillelneuer?s=21.

14 Steven Chase, "Canada giving itself power to turn over sanctioned Russian assets to Uktraine", The Globe and Mail, April 26, 2022, https://www.theglobeandmail.com/canada/article-canada-giving-itself-power-to-pay-out-compensation-from-sanctioned/.

15 Note that subsections (a), (b), and (d) provide for three other circumstances where sanctions may be imposed using SEMA. These are not discussed in this section because Canada has used subsection (c) to impose sanctions, as will be discussed below.

16 This limitation of the Magnitsky Act – that it excludes the listing of legal entities – has been criticized by former Minister of Justice Irwin Cotler (see Cotler and Silver 2020.)

17 In Canada, this was using the Special Economic Measures Act. See Special Economic Measures (People's Republic of China) Regulations, SOR/2021-49.

18 Argentine Republic v Amerada Hess Shipping Corp, 488 US 428, 439 (1989); Jerez v. Republic of Cuba, 964 F. Supp. (2d) 52, No. 09-466 (RWR), 2013 WL 4578999, at *2–3 (DDC 29 August 2013); Doe I v. State of Israel, 400 F. Supp. (2d) 86, 108 (DDC 2005); O'Bryan v. Holy See, 556 F. (3d) 361, 382 (6th Cir. 2009); Frolova v. Union of Soviet Socialist Republics, 761 F. (2d) 370, 379 (7th Cir. 1985); see also Stewart (2013).

19 See for example, the Star's exposing of Costco Canada as being implicated in Uyghur forced labour: McNaughton and Nuttall (2021).

20 Personal correspondence (letter to Canada Border Services Agency), November 24, 2020.

21 Personal correspondence (email response to David Matas), January 13, 2021.

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