

# Why Corporations Should Be Held Liable for China’s Crimes Against Humanities in Xinjiang: Seeking Civil and Criminal Solutions

*ABSTRACT: Serious human rights abuses have been reported in China involving the Chinese government’s persecution against its ethnic and religious minorities in Xinjiang, with the Uyghurs being its main target. The Chinese authorities have been using advanced technologies like facial recognition, voice recognition, and DNA screening to target and oppress the Uyghurs, with the help of western corporations. This Note focuses on the long-debated topic of corporate liability under international criminal law, especially crimes against humanity. This Note explores the use of corporate civil and criminal liability as a way to motivate corporations to take the necessary responsibility in avoiding perpetrating, or aiding and abetting, serious human rights abuses. This Note urges Congress to reform the current Alien Tort Statute to provide a civil cause of action in the U.S. federal courts. At the same time, this Note proposes a framework to impose corporate criminal liability, including establishing extraterritorial jurisdiction and deciding the mens rea and actus reus elements that may meet the present challenge.*

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## I. INTRODUCTION

China has been using Artificial Intelligence (“AI”) and other advanced technologies like facial and voice recognition technology<sup>1</sup> to persecute Muslim minorities living in Xinjiang, one of its largest autonomous regions, and to mainly target the Uyghur ethnic group.<sup>2</sup> Western corporations are often behind the technologies used by the Chinese authorities.<sup>3</sup> These entities, knowingly or otherwise, sell important technologies such as DNA sequencing<sup>4</sup> to Chinese corporations that are state-owned or closely tied to the Chinese government. These technologies allow the Chinese government to track people’s every movement and monitor people’s every facial expression and every word uttered.<sup>5</sup> The incorporation of advanced technologies in human rights abuses makes corporate liability in transnational human rights violations a pressing concern. The world needs a mechanism, civil or criminal, to tackle this issue. This Note proposes some domestic legal reforms, both civil and criminal, to incentivize corporations from getting involved in serious human rights abuses happening abroad.

The topic of corporate liability in international human rights violations is very broad. Corporations come in all forms and human rights abuses come in varying degrees of severity. This Note only focuses on corporations that are

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1. See *infra* Section II.B.4.

2. See *infra* Section II.B.4.

3. See *infra* Section III.B.

4. See *infra* Section III.B.

5. See *infra* Section II.B.4.

involved in Xinjiang, China. Additionally, this Note focuses on serious human rights abuses—crimes against humanity—as the legal basis. Part II of this Note introduces the historical background and current situation of the Uyghurs in Xinjiang, and includes the broad landscape of the present issue of crimes against humanity. Part III focuses on corporate liability and provides information on the foreign corporations currently involved in Xinjiang’s crimes against humanity. Part IV argues that China’s persecution against Uyghurs and other Muslim minorities in Xinjiang are crimes against humanity in violation of international criminal law. Part V examines both civil and criminal approaches for imposing corporate liability on these actions, and proposes a legal framework that could work as a solution. Part VI provides a brief conclusion on the proposed legal framework, including the need to involve all corporations in the protection of international human rights.

## II. THE XINJIANG UYGHUR AUTONOMOUS REGION AND CURRENT SITUATION

### A. HISTORY & RECENT DEVELOPMENT

Located at the northwestern corner of China, Xinjiang occupies a strategic location<sup>6</sup> and has been a key point in the ancient Silk Road trading routes since the Han Dynasty.<sup>7</sup> Marked by its rich ethnic diversity, Xinjiang is home to 13 ethnic groups, including the four largest: the Uyghurs, Han Chinese, Kazakh, and Hui.<sup>8</sup> According to the People’s Republic of China’s (“PRC”) sixth national population census conducted in 2010, Uyghurs and Han Chinese are two dominant ethnic groups in Xinjiang, accounting for 45.84 percent and 40.47 percent of the total population respectively,<sup>9</sup> whereas Kazakh and Hui make up 6.5 percent and 4.51 percent of the population.<sup>10</sup> Among the four dominant ethnic groups in Xinjiang, the Han

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6. “Xinjiang’s centrality and intermediate position in Eurasia” earns it the name “pivot of Asia.” JAMES A. MILLWARD, *EURASIAN CROSSROADS: A HISTORY OF XINJIANG* 1 (2007).

7. Silk Road, or Silk Routes, refers to the trade routes across Eurasia between 130 BCE to 1453 CE. These ancient networks span many regions of the ancient world and were crucial to the exchange of commerce and communication between the East and the West for thousands of years. See Joshua J. Mark, *Silk Road*, ANCIENT HIST. ENCYCLOPEDIA (May 1, 2018), [https://www.ancient.eu/Silk\\_Road](https://www.ancient.eu/Silk_Road) [<https://perma.cc/HTT4-NH6Y>]; *About the Silk Roads*, UNESCO, <https://en.unesco.org/silkroad/about-silk-roads> [<https://perma.cc/92LS-J4DB>].

8. See *Chinese Ethnic Groups: Overview Statistics*, UNC: U. LIBR. (Aug. 7, 2020, 1:22 PM), [https://guides.lib.unc.edu/china\\_ethnic/statistics](https://guides.lib.unc.edu/china_ethnic/statistics) [<https://perma.cc/URF9-SAP4>]. There are 56 ethnic groups officially recognized in China. See *id.* Han Chinese make up for 92 percent of the total population, making them the largest ethnic majority in the country. Uyghurs, on the other hand, are the fifth largest ethnic group in China and the largest ethnic group in Xinjiang. See *id.*

9. See Li Jianxin & Chang Qingling, *The Current Status and Dynamic Characteristics of Xinjiang’s Population of Major Ethnic Groups*, NW. J. ETHNOLOGY, no. 3, 2015, at 21, 23.

10. See *id.*

Chinese are the only ethnic majority in China, making up 92 percent of the country's total population.<sup>11</sup>

Uyghurs, who are typically farmers, traders, or craftsmen,<sup>12</sup> are Turkic-speaking Muslims.<sup>13</sup> Prior to the mid-twentieth century, Uyghurs shared mostly an "oasis-based or broad *musulman* (Muslim) identity,"<sup>14</sup> calling themselves "*Musulman . . . , yerlik* (local), *Turki*, or, rarely, *Altishahrlik* or *Altishahri*."<sup>15</sup> It was not until the PRC's rule that the identity of "Uyghur" was finally settled and adopted by the Uyghurs today.<sup>16</sup> The "Us and Them" dichotomy distinguishing the Uyghurs from the Han Chinese gradually surfaced and reached its peak in the 1990s.<sup>17</sup> This distinction contributed to the growth of the Uyghur ethno-national identity as well as the "aspirations to Uyghur independence,"<sup>18</sup> leading to the increase of ethnic tension in the area.

Lying at the heart of Eurasia, Xinjiang has been regarded as a gateway to Central Asia,<sup>19</sup> making it important to the success of PRC's Belt & Road Initiative,<sup>20</sup> a trillion-dollar infrastructure investment project that started in late 2013. Since the beginning of the Initiative, maintaining regional stability has become a priority.<sup>21</sup> However, the Chinese authority's heavy-handed rules and sensitivity to any trace of minority separatism has worsened the racial tension in the country.<sup>22</sup> Ethnic tensions peaked between 2013 and 2014 when several mass-killing incidents with significant casualties shocked the whole country as well as the ruling party. Incidents include the suicide car crash in Beijing's Tiananmen Square,<sup>23</sup> knife attacks in Kunming's Railway

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11. See *Chinese Ethnic Groups: Overview Statistics*, *supra* note 8.

12. Rian Thum, *The Uyghurs in Modern China*, OXFORD RSCH. ENCYCLOPEDIAS: ASIAN HIST. (Apr. 2018), <https://oxfordre.com/asianhistory/view/10.1093/acrefore/9780190277727.001.0001/acrefore-9780190277727-e-160> [<https://perma.cc/9C4A-CR2D>].

13. *Id.*

14. JOANNE SMITH FINLEY, *THE ART OF SYMBOLIC RESISTANCE: UYGHUR IDENTITIES AND UYGHUR-HAN RELATIONS IN CONTEMPORARY XINJIANG* 3 (Michael R. Drompp & Devin DeWeese eds., 2013).

15. Thum, *supra* note 12.

16. *Id.*

17. See FINLEY, *supra* note 14, at 124.

18. *Id.*

19. Mahesh Ranjan Debata, *Xinjiang in Central Asia's Regional Security Structure*, 52 INT'L STUD. 53, 60 (2017).

20. Tom Phillips, *The \$900bn Question: What Is the Belt and Road Initiative?*, GUARDIAN (May 11, 2017, 9:02 PM), <https://www.theguardian.com/world/2017/may/12/the-900bn-question-what-is-the-belt-and-road-initiative> [<https://perma.cc/69Z4-GMZL>].

21. Adrian Zenz, *Thoroughly Reforming Them Towards a Healthy Heart Attitude: China's Political Re-Education Campaign in Xinjiang*, 38 CENT. ASIAN SURV. 102, 103 (2019).

22. *Id.*

23. *China Tiananmen Square Car Blaze Kills Five People*, BBC: NEWS (Oct. 28, 2013), <https://www.bbc.com/news/world-asia-china-24672291> [<https://perma.cc/JE25-WN4F>] (reporting that a car explosion in Tiananmen Square killed five people and wounded 38).

Station,<sup>24</sup> and explosives in Urumqi, Xinjiang's capital, killing at least 31 people,<sup>25</sup> to name a few.

## B. CURRENT SITUATION

### 1. People's War on Terror

Facing the rise of ethnical tensions and terrorist attacks, the Chinese authority reacted by further tightening its control on the Uyghurs' religious practices.<sup>26</sup> In 2014, the then Xinjiang Party Secretary, Zhang Chunxian, declared a war on terrorism.<sup>27</sup> China's President Xi Jinping called for strict counter-terrorism measures, using rhetoric like "nets spread from the earth to the sky" and "walls made of copper and steel"<sup>28</sup> to signal the party's determination to employ every precaution to prevent terrorist attacks. Campaigns against terrorism or Islamic "radicalism" were subsequently carried out. As part of the counter-terrorism scheme, the authorities implemented rules to ensure that the Uyghurs' religious practices and affairs conform to the policies of the Chinese Communist Party (the "Party").<sup>29</sup> Under this counter-terrorism campaign, Uyghurs were jailed for preaching<sup>30</sup> or practicing their religion, and underage Uyghurs were even forbidden from

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24. Katie Hunt, *4 Found Guilty of Railway Station Knife Attack in China*, CNN: WORLD (Sept. 12, 2014, 5:20 AM), <https://www.cnn.com/2014/09/12/world/asia/china-kunming-attack-trial/index.html> [<https://perma.cc/E2WN-LJC2>] (reporting that four Uyghurs were accused of carrying out a terrorist attack in Kunming, killing 31 people and wounding 141).

25. *Urumqi Car and Bomb Attack Kills Dozens*, GUARDIAN (May 22, 2014, 10:37 AM), <https://www.theguardian.com/world/2014/may/22/china-urumqi-car-bomb-attack-xinjiang> [<https://perma.cc/7AB3-TN8D>].

26. Roseanne Gerin, *Religious Extremism Law Imposes New Restrictions on China's Uyghurs*, RADIO FREE ASIA (Dec. 10, 2014), <https://www.rfa.org/english/news/uyghur/religious-extremism-law-12102014160359.html> [<http://perma.cc/R3D4-3GQF>] (reporting that People's Congress, the region's parliament, passed new regulation that claims to curb religion extremism, yet "regulations also restrict customary aspects of Uyghur religious practice").

27. *Xinjiang's Party Chief Wages 'People's War' Against Terrorism*, CHINADAILY.COM.CN (May 26, 2014, 3:23 PM) [hereinafter *People's War*], [https://www.chinadaily.com.cn/china/2014-05/26/content\\_17541318.htm](https://www.chinadaily.com.cn/china/2014-05/26/content_17541318.htm) [<http://perma.cc/4DEX-MQRJ>].

28. Ed Adamczyk, *China's President Calls for Anti-Terrorism 'Nets Spread from the Earth to the Sky'*, UPI (May 29, 2014, 2:42 PM), [https://www.upi.com/Top\\_News/World-News/2014/05/29/Chinas-president-calls-for-anti-terrorism-nets-spread-from-the-earth-to-the-sky/1911401385094](https://www.upi.com/Top_News/World-News/2014/05/29/Chinas-president-calls-for-anti-terrorism-nets-spread-from-the-earth-to-the-sky/1911401385094) [<http://perma.cc/8KQU-476Y>].

29. "The region will launch special campaigns to regulate illegal religious activities, crack down on criminal offences by religious extremists in accordance with law, and guide religions to accommodate a socialist society." *People's War*, *supra* note 27.

30. Gerin, *supra* note 26 (reporting that 22 Uyghurs including religious leaders were sentenced to prison from five years to 16 years—accusations including preaching illegally).

following any religion.<sup>31</sup> In a recent report,<sup>32</sup> based on leaked official documents from some Chinese authorities, reasons for being detained include: violation of family planning policy, being a potential threat (of various kinds), having a criminal record, holding a passport without visiting a foreign country, visiting one of the 26 countries designated as sensitive by the Chinese authorities, illegal preaching of Islam, prone to Islamic radicalization due to religious traditions in family,<sup>33</sup> and the list continues.

## 2. De-Radicalization Regulations

In 2017, Xinjiang welcomed its new leader, Chen Quanguo, whose policy brought the Chinese government's clamp-down on the Uyghurs and other Muslim minorities to another level.<sup>34</sup> Soon after Chen came to power, the Chinese authority in Xinjiang enacted the Xinjiang Uyghurs Autonomous Region Regulation on De-Radicalization (hereinafter "De-Radicalization Regulation").<sup>35</sup> Chapter two, article nine of the De-Radicalization Regulation stipulates that "[t]he following words and actions under the influence of extremism are extremification."<sup>36</sup> "Extremification" is a term used to refer to radicalization. Actions sanctioned include: "[g]eneralizing the concept of Halal," "wearing . . . gowns with face coverings, or to bear symbols of extremification," "spreading religious fanaticism through irregular beards or name selection," and "[o]ther speech and acts of extremification."<sup>37</sup> However, the regulation never defines the word "extremification," nor does it distinguish non-radical practice of Islam religion from the allegedly radical one. The vagueness of the statutory language leaves questions as to the legality

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31. Qiao Long & Luisetta Mudie, *China Clamps Down on 'Underage Religion' Among Muslim Uyghurs*, RADIO FREE ASIA (Oct. 30, 2014), <https://www.rfa.org/english/news/uyghur/underage-10302014120731.html> [<http://perma.cc/Z7A2-KP2M>] (reporting that authorities require Uyghur parents to pledge that they would not allow their underage kids to take part in any religious activities).

32. Ivan Watson & Ben Westcott, *Watched, Judged, Detained*, CNN, <https://www.cnn.com/interactive/2020/02/asia/xinjiang-china-karakax-document-intl-hnk> [<http://perma.cc/P5WT-B3WU>].

33. *Id.*

34. There is little doubt that Chen Quanguo was behind the implementation of the reeducation camp and other policies targeting the Uyghurs and other Muslim minorities. William Zheng, *Architect of China's Muslim Camps Chen Quanguo Expected to Stay on in Xinjiang for Now*, S. CHINA MORNING POST (Mar. 24, 2019, 8:00 PM), <https://www.scmp.com/news/china/politics/article/3003047/architect-chinas-muslim-camps-chen-quanguo-expected-stay> [<http://perma.cc/FF9S-LKSZ>].

35. Passed on Mar. 29, 2017, amended on Oct. 9, 2018.

36. *Xinjiang Uyghur Autonomous Region Regulation on De-Extremification*, INT'L UYGHUR HUM. RTS. & DEMOCRACY FOUND. (Mar. 31, 2017, 3:38 PM) [hereinafter *2017 De-Radicalization Regulation*], <http://www.iuhrdf.org/content/xinjiang-uyghur-autonomous-region-regulation-de-extremification> [<http://perma.cc/2U64-LG9W>].

37. *Id.*

of such regulation. Lines between radical and non-radical practice of Islam are deliberately left blank and the ultimate power of interpretation is at the hand of the authority. A group of United Nations experts issued an unprecedented assessment of the Chinese government's counter-terrorism laws,<sup>38</sup> concluding that extremist, or radical crime, "is a very vague and problematic category. . . . [T]he terms remain broad and overly vague and may encroach on duly protected human rights."<sup>39</sup>

Chapter three of the De-Radicalization Regulation spells out the details of the precautions for religious radicalization. First, article 12 specifies that "de-extremification shall persist in the correct political orientation and [the correct] direction of public opinion."<sup>40</sup> Next, article 13 stresses the need to "educate the public,"<sup>41</sup> while article 14 clearly points out that de-extremification requires an "educational transformation."<sup>42</sup> These articles, read together, call for systematic, large-scale educational programs aiming to de-radicalize the public.

Achieving political goals through education is an old tactic used to discipline political dissidents starting in Mao's era.<sup>43</sup> In the 1980s, "reform through labour," convicted without any trials or legal procedures, was used as an extrajudicial penal system.<sup>44</sup> It "was widely used for [political] dissidents, petitioners and [other] criminals."<sup>45</sup> Similar to "reform through labour," "transformation through education" has been used as an extrajudicial system alongside other regular criminal punishment.<sup>46</sup>

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38. FIONNUALA NÍ AOLAIN ET AL., MANDATES OF THE SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS WHILE COUNTERING TERRORISM; THE WORKING GROUP ON ARBITRARY DETENTION; THE WORKING GROUP ON ENFORCED OR INVOLUNTARY DISAPPEARANCES; THE SPECIAL RAPPORTEUR ON THE RIGHT TO EDUCATION; 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 MINORITY ISSUES; THE SPECIAL RAPPORTEUR ON THE RIGHT TO PRIVACY; THE SPECIAL RAPPORTEUR ON FREEDOM OF RELIGION OR BELIEF; AND THE SPECIAL RAPPORTEUR ON TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 2 (2019), [https://www.ohchr.org/Documents/Issues/Terrorism/SR/OL\\_CHN\\_18\\_2019.pdf](https://www.ohchr.org/Documents/Issues/Terrorism/SR/OL_CHN_18_2019.pdf) [<https://perma.cc/E75B-D7JT>].

39. *Id.*

40. 2017 *De-Radicalization Regulation*, *supra* note 36.

41. *Id.*

42. *Id.*

43. Zenz, *supra* note 21, at 5.

44. *Id.*

45. *Id.*

46. *Id.* at 6.

### 3. Re-Education Camps

As a result of the De-Radicalization Regulation, the emergence of mass-scale internment camps has been reported in Xinjiang starting in 2017.<sup>47</sup> There are no official records confirming the exact number of people being held in the “re-education camps,” nor are there records as to the number of the re-education institutions. However, the German scholar Adrian Zenz was able to estimate the number from piecing together a large number of leaked governmental records and work reports scattered across the Internet.<sup>48</sup> The number Mr. Zenz came up with was shocking: Approximately one million of Xinjiang’s Muslim adult population<sup>49</sup> has been detained in the so-called re-education camps. In August of 2018, a United Nations human rights panel supported this estimate by citing to additional reports.<sup>50</sup>

The re-education camps, or, to be more precise, “thought-reform institutes,” look like anything but a normal educational institution. Satellite imagery shows that the schools are equipped with razor wire fences and watchtowers.<sup>51</sup> Other sources report that “barbed wire, bombproof surfaces, reinforced doors and guard rooms”<sup>52</sup> are used. The schools share a striking resemblance to heavily-guarded prisons.

In addition, the Xinjiang authorities have adopted a series of terminologies that conform to the theme of “transformation through education.” They “refer to re-education internment as ‘attending/entering class’ . . . or ‘getting an education.’”<sup>53</sup> People who are in the programs are ethnic minorities, including Uyghurs, Kazakhs, and Kyrgyz.<sup>54</sup> Trainings include watching “patriotic videos, writing personal statements and reflections, [and] acting out contents through drama performance.”<sup>55</sup> Former students have reported that they were forced “to memorize patriotic texts, confess their ‘faults,’ criticize their religious traditions and denounce

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47. Qiao Long & Luisetta Mudie, *China’s Mass Detention of Xinjiang’s Ethnic Minorities Shows No Sign of Let-Up*, RADIO FREE ASIA (Nov. 1, 2017), <https://www.rfa.org/english/news/uyghur/detention-11012017120255.html> [https://perma.cc/4695-Z6qJ].

48. See Zenz, *supra* note 21, at 27–29.

49. *Id.* at 28.

50. *Xinjiang Territory Profile*, BBC: NEWS (Oct. 12, 2018), <https://www.bbc.com/news/world-asia-pacific-16860974> [https://perma.cc/8GJ7-RFVN].

51. Jessica Batke, *What Satellite Images Can Show Us About ‘Re-education’ Camps in Xinjiang: A Q&A with Shawn Zhang*, CHINAFILE (Aug. 23, 2018), <http://www.chinafile.com/reporting-opinion/features/what-satellite-images-can-show-us-about-re-education-camps-xinjiang> [https://perma.cc/ZJ9P-2NX8].

52. Rian Thum, *What Really Happens in China’s ‘Re-Education’ Camps*, N.Y. TIMES (May 15, 2018), <https://www.nytimes.com/2018/05/15/opinion/china-re-education-camps.html> [https://perma.cc/A7F3-FB7G].

53. See Zenz, *supra* note 21, at 7.

54. See *id.* at 27.

55. See *id.* at 9.



fellow [prisoners].”<sup>56</sup> Re-education classes also place an important emphasis on learning the national language (Mandarin Chinese).<sup>57</sup> Students who disobey are subject to severe abuses, “including sleep and food deprivation, solitary confinement and beatings.”<sup>58</sup> The Chinese authorities first denied the existence of any internment camps, but later called these camps “vocational training centres,”<sup>59</sup> and insisted citizens voluntarily admit to these programs because of the importance for de-radicalization.<sup>60</sup>

Not only were citizens in Xinjiang living in fear of having to attend re-education camps, but Uyghurs and Muslim minorities from other countries who happened to travel to Xinjiang were under the same threat. Mihrigul Tursun, a Uyghur woman living in Egypt who later testified in the congressional hearing on China’s crackdown on religion, was detained in one of the re-education camps when she and her three children were visiting Xinjiang.<sup>61</sup> When the Chinese authorities stopped her at the airport, the only questions asked targeted her Uyghur identity.<sup>62</sup> No questions were asked regarding ties to terrorism or to certain targeted terrorist groups. She was separated from her children and detained for three months for “inciting ethnic hatred and discrimination.”<sup>63</sup> A similar story is told by Sayragul Sauytbay, a Uyghur teacher forced to teach in the camp but later able to escape to Sweden.<sup>64</sup> She was interrogated by the police on the whereabouts of her son and husband, who were then in Kazakhstan.<sup>65</sup> Her interrogation did not involve any questions on terrorism or even religious radicalism. The authority targeted her mainly for her Uyghur connections.<sup>66</sup> Although the

56. *Id.* at 9–10.

57. *Id.* at 10–11.

58. *Id.* at 10.

59. Nectar Gan & Mimi Lau, *China Changes Law to Recognize ‘Re-Education Camps’ in Xinjiang*, S. CHINA MORNING POST (Oct. 10, 2018, 5:15 PM), <https://www.scmp.com/news/china/politics/article/2167893/china-legalises-use-re-education-camps-religious-extremists> [<https://perma.cc/S7L7-GJ4G>].

60. Steve Chao, *Exposed: China’s Surveillance of Muslim Uighurs*, ALJAZEERA (Jan. 31, 2019), <https://www.aljazeera.com/blogs/asia/2019/01/exposed-china-surveillance-muslim-ughurs-190130011449217.html> [<https://perma.cc/KTB3-S769>].

61. Ivan Watson & Ben Westcott, *Uyghur Refugee Tells of Death and Fear Inside China’s Xinjiang Camps*, CNN: WORLD (Jan. 21, 2019, 9:48 AM) [hereinafter *Death and Fear*], <https://www.cnn.com/2019/01/18/asia/uyghur-china-detention-center-intl/index.html> [<https://perma.cc/SgUZ-2DKN>].

62. “They start to ask me, what you take from Egypt? Who (do) you know in Egypt? How many Uyghurs do you know?” *Id.* (alteration in original).

63. *Id.*

64. David Stavrou, *A Million People Are Jailed at China’s Gulags. I Managed to Escape. Here’s What Really Goes on Inside*, HAARETZ (Oct. 17, 2019), <https://www.haaretz.com/world-news/.premium.MAGAZINE-a-million-people-are-jailed-at-china-s-gulags-i-escaped-here-s-what-goes-on-inside-1.7994216> [<https://perma.cc/3P7R-9WC4>].

65. *Id.*

66. *Id.*

Chinese government has established these camps under the banner of the so-called Chinese “War on Terror,” people are targeted—not based on their connection to terrorism—merely based on their Uyghur identity.

While the Chinese authority insisted that the internment camps are for educational purposes, testimonies on torture and rape have been reported by former inmates who managed to flee the country.<sup>67</sup> Inside the detention camps, people are forced to stay in over-crowded rooms where they have to take turns sleeping while others stand to make room.<sup>68</sup> The hygiene in the cell is terrible as well. People have to share one bucket as the only toilet and are limited to use it for two minutes at one time.<sup>69</sup> Detainees die because of the hostile conditions.<sup>70</sup> People who are regarded as disobedient are taken to “the black room,”<sup>71</sup> a phrase used to refer to secret torture or interrogation chambers in Chinese. Punishment for the disobedient includes electric shocks, pulling out fingernails, and sleep deprivation.<sup>72</sup> People are forced to take unknown pills and injections,<sup>73</sup> while those who need medication are denied treatment.<sup>74</sup> People who return from the black room are also known to “suffer from cognitive decline.”<sup>75</sup>

Sexual assaults have also been widely reported.<sup>76</sup> Women in the detention camps are not only routinely raped, but sexual assault has been used as a way to rule.<sup>77</sup> One gruesome personal account supports this finding.<sup>78</sup> According to Sayragul Sauytbay, the teacher who was detained but later fled to Sweden, while in the camp, all the men and women were gathered together one day to observe a group of prison officials gang-raping a woman.<sup>79</sup> While the gruesome act was taking place, bystanders’ reactions were

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67. *Id.*

68. *Id.*

69. “Each room had a plastic bucket for a toilet. Every prisoner was given two minutes a day to use the toilet, and the bucket was emptied only once a day. If it filled up, you had to wait until the next day.” *Id.*

70. According to Tursun, during her time in the camp she saw nine “detainees die due to hostile conditions.” See *Death and Fear*, *supra* note 61.

71. See Stavrou, *supra* note 64.

72. “Some prisoners were hung on the wall and beaten with electrified truncheons. There were prisoners who were made to sit on a chair of nails. I saw people return from that room covered in blood. Some came back without fingernails.” *Id.*; see also *Death and Fear*, *supra* note 61 (reporting a similar account of torture inside the camps).

73. Stavrou, *supra* note 64.

74. *Id.* (detailing a personal account of witnessing a woman who just underwent brain surgery being denied any medication).

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

observed.<sup>80</sup> Those “who turned their head[s] or closed their eyes” were taken away, possibly for punishment.<sup>81</sup> This event scarred not only the victims, but also those who were forced to witness it.<sup>82</sup> What happens inside these camps is mental torture for all.

#### 4. Big Brother Is Watching You: The Use of Technologies to Persecute

Xinjiang has now become the living nightmare of George Orwell’s novel, *1984*.<sup>83</sup> The Chinese authorities have already “collect[ed] blood, fingerprints, voice recordings, head portraits from multiple angles, and scans of irises”<sup>84</sup> for every Muslim minority in Xinjiang. However, control over Muslim minorities is not limited to what is underneath the skin. With hundreds of thousands of surveillance cameras across every corner of the region, the Chinese authorities seek to control people’s every move and facial expression.<sup>85</sup> Chinese leaders are investing billions of dollars each year on facial recognition technologies and other high-tech surveillance systems.<sup>86</sup> These technologies allow the authorities to track “U[y]ghurs based on their appearance and keep[] records of their comings and goings for search and review.”<sup>87</sup> The Chinese police communicate through the “Integrated Joint Operations Platform,” an app that can “aggregate[] data about people and flag[] to officials those it deems potentially threatening; some of those targeted are detained and sent to political education camps and other facilities.”<sup>88</sup> Those who are deemed suspicious are at great risk of being taken to the re-education camps.<sup>89</sup> The effect of this wide surveillance is profound.

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80. *Id.*

81. *Id.*

82. Sayragul Sauytbay stated, “After that happened, it was hard for me to sleep at night.” *Id.*

83. See GEORGE ORWELL, 1984 (1949); Humeyra Pamuk, Makini Brice, Chris Reese & Richard Chang, *Pompeo Says Orwell’s ‘1984’ Coming to Life in China’s Xinjiang Region*, REUTERS (Oct. 11, 2019, 11:27 AM), <https://www.reuters.com/article/us-usa-china-muslims-pompeo/pompeo-says-orwells-1984-coming-to-life-in-chinas-xinjiang-region-idUSKBN1WQ27U>.

84. Chris Buckley & Paul Mozur, *How China Uses High-Tech Surveillance to Subdue Minorities*, N.Y. TIMES (May 22, 2019), <https://www.nytimes.com/2019/05/22/world/asia/china-surveillance-xinjiang.html> [<https://perma.cc/6F6K-7NPJ>].

85. See *id.*; *How Mass Surveillance Works in Xinjiang, China*, HUM. RTS. WATCH (May 2, 2019), <https://www.hrw.org/video-photos/interactive/2019/05/02/china-how-mass-surveillance-works-xinjiang> [<https://perma.cc/X3X6-LV77>].

86. See Buckley & Mozur, *supra* note 84.

87. Paul Mozur, *One Month, 500,000 Face Scans: How China is Using A.I. to Profile a Minority*, N.Y. TIMES (Apr. 14, 2019), <https://www.nytimes.com/2019/04/14/technology/china-surveillance-artificial-intelligence-racial-profiling.html> [<https://perma.cc/VFW5-QYKS>].

88. *China’s Algorithms of Repression: Reverse Engineering a Xinjiang Police Mass Surveillance App*, HUM. RTS. WATCH (May 1, 2019), <https://www.hrw.org/report/2019/05/02/chinas-algorithms-repression/reverse-engineering-xinjiang-police-mass> [<https://perma.cc/AE3A-DAQY>].

89. “[S]ome of those targeted are detained and sent to political education camps and other facilities.” *Id.*

Their freedom of movement is restricted, and they are required to censor their own speech even when they are at home with their families.<sup>90</sup> The ultimate goal “is instilling fear.”<sup>91</sup> So far, this tactic has been very successful. Many Uyghurs living in Xinjiang have abruptly ceased to communicate with their family and relatives abroad for fear of persecution.<sup>92</sup> This leaves their loved ones uncertain of the whereabouts of family and friends.<sup>93</sup>

### III. CORPORATE LIABILITY

#### A. HISTORICAL EVOLVEMENT

China, being one of the United States’ major trade partners, has significant business ties to U.S. corporations. This connection facilitates great business opportunities, and yet at the same time poses significant challenges when it comes to human rights protection. In the case of Xinjiang, the Chinese authorities could not have conducted such a mass-scale monitoring scheme without the help of western corporations, which leads to the issue of corporate liability in the context of human rights abuses. In the United States, early common law considered corporations to be “an intangible entity,” incapable of committing crimes.<sup>94</sup> A corporation had no “mind” to form the necessary mens rea, nor did it have a “body” to be punished,<sup>95</sup> and therefore criminal acts were “ultra vires”—beyond the powers of corporations—and hence, unpunishable.<sup>96</sup> “Courts eventually abandoned the [notion] that [corporate crimes] were ultra vires.”<sup>97</sup> Now, corporations can be held vicariously liable for the crimes of corporate agents within the scope of their employment.<sup>98</sup> The idea here is that a corporation can only act through its agents—its employees. Therefore, if criminal liability is to be imposed, the

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90. Dilnur Kurban, *My Uyghur Family is Quietly Living in Fear. This is How We Become Lost*, GLOBE & MAIL (July 27, 2019), <https://www.theglobeandmail.com/opinion/article-my-uyghur-family-is-quietly-living-in-fear-this-is-how-we-become-lost> [<https://perma.cc/8JK8-PCK3>].

91. *See id.*

92. Alexandra Ma, *Relatives of China’s Oppressed Muslim Minority Are Getting Blocked Online by Their Own Family Members, Who Are Terrified to Even Tell Them How Bad Their Lives Are*, BUS. INSIDER (Feb. 16, 2019, 4:18 AM), <https://www.businessinsider.com/family-of-uyghurs-in-china-say-are-blocked-deleted-by-scared-family-2019-2> [<https://perma.cc/55EQ-TPFB>]; *see also* Watson & Westcott, *supra* note 32 (detailing the Chinese government’s surveillance of Uyghur families).

93. Ma, *supra* note 92; Watson & Westcott, *supra* note 32.

94. 10 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 4942 (2020).

95. Paul J. Galanti, *Business Organizations*, in 17 INDIANA PRACTICE SERIES § 9.6 (2020).

96. “Describes actions taken by government bodies or corporations that exceed the scope of power given to them by laws or corporate charters.” *Ultra Vires*, CORNELL L. SCH.: LEGAL INFO. INST., [https://www.law.cornell.edu/wex/ultra\\_vires](https://www.law.cornell.edu/wex/ultra_vires) [<https://perma.cc/KN4K-2DVP>].

97. *See* Galanti, *supra* note 95, § 9.6.

98. Andrew Weissmann & David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 412 (2007).

corporation must be responsible for the actions of its employees who are acting on its behalf.<sup>99</sup>

Although corporate criminal liability can be found in different legal systems around the world,<sup>100</sup> corporate criminal liability in international law is still considered an underdeveloped area in the legal field.<sup>101</sup> In fact, corporate liability is underdeveloped even in civil litigation.<sup>102</sup> Corporate liability for international human rights violations occurring abroad, is rarely a litigated issue in the courts of the United States.<sup>103</sup> “To date, international [mechanisms do not impose] . . . liability o[n] corporations”<sup>104</sup> even when they deal with the most serious human rights violations, like crimes against humanity.

Recent years have shown a growing demand for corporations to take on criminal liability for their actions abroad.<sup>105</sup> The United Nations’ Guiding Principles on Business and Human Rights (“UNGPs”)<sup>106</sup> calls for States to “explor[e] . . . criminal liability for enterprises domiciled or operating in their territory . . . or jurisdiction that commit or contribute to gross human rights abuses.”<sup>107</sup> In 2016, the European Parliament passed a resolution in response to the UNGPs concerning corporate liability for serious human rights abuses

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99. *Id.*

100. “Common law countries, such as England, the United States and Canada . . . impose . . . criminal liability [on corporations]. . . . By the 1970s, civil law [countries like] . . . [t]he Netherlands, Belgium, Switzerland, [and] France” started to impose criminal responsibilities on corporations. Desislava Emanouilova Stoitchkova, *Towards Corporate Liability in International Criminal Law*, in 38 SCHOOL OF HUMAN RIGHTS RESEARCH SERIES 1, 7 (2010). The same can be seen in Japan, South Africa, and India. *Id.* Even countries like Germany, Italy, and Argentina, that are reluctant to implement statutory criminal corporate liability, incorporate “quasi-criminal sanctions” on corporate entities. *Id.* at 7–8.

101. “[L]ittle emphasis has been put on the criminal law as an accountability mechanism.” Cedric Ryngaert, *Accountability for Corporate Human Rights Abuses: Lessons from The Possible Exercise of Dutch National Criminal Jurisdiction Over Multinational Corporations*, 29 CRIM. L.F. 1, 2 (2018).

102. In *Jesner v. Arab Bank, PLC*, the Court noticed that “[t]he jurisdictional reach of more recent international tribunals also has been limited to ‘natural persons.’” *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1400–01 (2018).

103. See Ryngaert, *supra* note 101, at 2 (“Hardly any criminal proceedings have been initiated against corporations in respect of human rights abuses committed abroad.”).

104. *Corporate Criminal Liability Under International Law*, LAW NATIONS (Mar. 13, 2018), <https://lawofnationsblog.com/2018/03/13/corporate-criminal-liability-international-law> [<https://perma.cc/LG2A-YWQD>].

105. See generally Caroline Kaeb, *The Shifting Sands of Corporate Liability Under International Criminal Law*, 49 GEO. WASH. INT’L L. REV. 351 (2016) (noting that there is a growing trend calling for corporate criminal liability in courts and regulators around the world).

106. UNITED NATIONS, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS “PROTECT, RESPECT AND REMEDY” FRAMEWORK (2011), [https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf) [<https://perma.cc/AVB3-3AS7>].

107. *Id.* at 10.

in third-world countries.<sup>108</sup> The 2016 resolution calls on the European Council and Commission to define rules and create sanctions for criminal offenses in “cross-border” crimes involving “serious human rights violations in third [world] countries committed by corporations.”<sup>109</sup> Some countries follow the National Action Plan on Business and Human Rights, which also discusses the possibility of creating criminal extraterritorial jurisdictions on human rights abuses perpetrated by corporations.<sup>110</sup> More and more international treaties now include provisions governing corporate criminal liability.<sup>111</sup>

Imposing corporate criminal liability has always been controversial.<sup>112</sup> In the past, discussion of corporate criminal liability often focused on human rights concerns perpetrated by Multinational Corporations (“MNCs”) through their complex parent-subsiidiary structures and cross-border supply chains. In Xinjiang, China, however, there are more and more domestic corporations of all sizes involved in the Chinese government’s actions.<sup>113</sup> Today, any U.S. technology companies, big or small, and regardless of where supply chains are located, can potentially help aid human rights abuses abroad. Technology-aided human rights violations are highly intrusive and the impact can be detrimental. The world needs a solution that can effectively deter corporations from contributing to human rights abuses.

#### B. WESTERN CORPORATE INVOLVEMENTS IN XINJIANG

Looking behind China’s Orwellian surveillance on Muslim minorities in Xinjiang uncovers the shadows of many western technology corporations. These western corporations are involved in China’s control of the Uyghurs, knowingly or unknowingly, mostly in two ways: they either (a) contribute directly in furtherance of China’s control of the Uyghurs, or (b) contribute indirectly by profiting from it through their supply chains.

One example of a corporation’s direct contribution in assisting Chinese government’s control over Uyghurs is through technology sales. An American high-tech company based in Massachusetts, Thermo Fisher Scientific, was found by Human Rights Watch in 2017 to have “sold DNA sequencers to the Xinjiang Public Security Bureau”—the Chinese equivalent of a police

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108. European Parliament Resolution on Corporate Liability for Serious Human Rights Abuses in Third Countries, 2016 O.J. (C 215) 125.

109. *Id.* at 132.

110. For example, Denmark’s National Action Plan promotes the discussion on creating extraterritorial legislation based on the nationality of the perpetrator. *See* THE DANISH GOV’T, DANISH NATIONAL ACTION PLAN: IMPLEMENTATION OF THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS 15 (2014), [https://www.ohchr.org/Documents/Issues/Business/NationalPlans/Denmark\\_NationalPlanBHR.pdf](https://www.ohchr.org/Documents/Issues/Business/NationalPlans/Denmark_NationalPlanBHR.pdf) [<https://perma.cc/5YRU-TUYK>].

111. Kaeb, *supra* note 105, at 351.

112. *See supra* Section III.A.

113. *See infra* Section III.B.

station.<sup>114</sup> This was same year that the Chinese authorities in Xinjiang were found to have collected DNA information and other biodata from the Uyghurs and other Muslim minorities.<sup>115</sup> Similarly, a German megacorporation, Siemens, was also found to have collaborated with China Electronics Technology Group Corporation<sup>116</sup> on developing automation and digitization using advanced technologies.<sup>117</sup> Both Thermo Fisher Scientific and Siemens are great examples of the risk western corporations expose themselves to as they wittingly, or otherwise, help perpetrate human rights abuses abroad when doing business with the Chinese government or private entities in China.

However, domestic U.S. corporations could also contribute indirectly through their supply chains. Non high-tech companies are running a similar risk as well. Badger Sportswear, a sports gear company based in North Carolina, was surprised when it found out that it could be profiting from products made “through forced labor in Xinjiang”.<sup>118</sup> Other megacorporations like Adidas and Coca-Cola are also involved in, and potentially profiting from, forced labor through their long and remote supply chains.<sup>119</sup>

Western corporations’ involvement in human rights abuses in China, inadvertent or not, is very damaging. The mass-scale use of advanced technology to persecute Uyghurs and other Muslim minorities is unprecedented. In Xinjiang, the implication of western corporations’ involvement could be deadly, given that the technologies they provide could lead to Uyghurs being sent to one of these notorious internment camps.<sup>120</sup> However, solutions are needed to ensure sellers are incentivized to exercise great caution when deciding whom to do business with. While profiting from forced labor has increasingly become the concern of the international community,<sup>121</sup> this Note focuses on corporations’ direct contribution to

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114. Sophie Richardson, *Foreign Firms Operating in Xinjiang Need to Consider Human Rights—Or Risk Being Complicit*, WASH. POST (Aug. 16, 2019, 1:09 PM), <https://www.washingtonpost.com/opinions/2019/08/16/foreign-firms-operating-xinjiang-need-consider-human-rights-or-risk-being-complicit> [https://perma.cc/57BG-5M43].

115. *China: Minority Region Collects DNA from Millions*, HUM. RTS. WATCH (Dec. 13, 2017, 10:48 AM), <https://www.hrw.org/news/2017/12/13/china-minority-region-collects-dna-millions> [https://perma.cc/CFD6-4PLY].

116. China Electronics Technology Group Corporation is a state-owned military contractor that developed the app that Chinese police use to track Uyghurs’ movement in Xinjiang. *Id.*

117. *Id.*

118. Richardson, *supra* note 114.

119. Eva Dou & Chao Deng, *Western Companies Get Tangled in China’s Muslim Clampdown*, WALL ST. J. (May 16, 2019, 10:37 AM), <https://www.wsj.com/articles/western-companies-get-tangled-in-chinas-muslim-clampdown-11558017472> [https://perma.cc/L2K8-CNC9].

120. *See supra* Section II.B.4.

121. *Xinjiang: US Seizes ‘Forced Labour’ Chinese Hair Imports*, BBC: NEWS (July 2, 2020), <https://www.bbc.com/news/world-asia-china-53259557> [https://perma.cc/FF5D-MVCF].

serious human rights abuses. It is time to put more responsibility on corporations and take a hard look at how they conduct their business.

#### IV. SERIOUS HUMAN RIGHTS VIOLATIONS IN XINJIANG

It is not uncommon for corporations to be involved in human rights abuses through their supply chains or otherwise. Nevertheless, what is happening in Xinjiang deserves our immediate attention because its human rights violations are so severe, and on such a large scale, that they warrant international criminal law sanctions. What is happening in Xinjiang are crimes against humanity.

##### A. *CRIMES AGAINST HUMANITY: AN INTRODUCTION*

The use of the term “crimes against humanity” or its similar variations, likely came from the context of the slave trade as early as the eighteenth or nineteenth century.<sup>122</sup> However, the modern concept can be traced back to the drafting of the Nuremberg Charter in 1946.<sup>123</sup> In 2010, a group of scholars and jurists started to study the possibility of an international convention on crimes against humanity, but to date, this idea is still developing.<sup>124</sup> Since there is no international convention on crimes against humanity, this Note uses the Rome Statute’s definition and framework as a guideline.<sup>125</sup> The idea is that to justify imposing a greater liability on corporations it is necessary that their involvement leads to severe human rights infringement.

The Rome Statute of the International Criminal Court defines crimes against humanity in article seven as “acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”<sup>126</sup> The enumerated crimes relevant to the issue in Xinjiang include: forcible transfer of population, imprisonment or other severe deprivation of physical liberty, torture, rape, persecution, enforced disappearance of persons, and other inhumane acts of a similar character intentionally causing great mental suffering.<sup>127</sup> Although more facts still need to be uncovered, there is sufficient evidence that the above-mentioned crimes

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122. Dou & Deng, *supra* note 119 (“Some scholars . . . point to the use of this term (or very similar terms) as early as late eighteenth and early nineteenth century, particularly in the context of slavery and the slave trade.”).

123. DAVID LUBAN, JULIE R. O’SULLIVAN & DAVID P. STEWART, *INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW* 929 (3d ed. 2019).

124. *Id.* at 943.

125. The International Law Commission, which takes up the role of drafting the International Convention of Crimes Against Humanity, also adopts the definition from the Rome Statute. *Id.*

126. Rome Statute of the International Criminal Court art. 7(1), July 17, 1998, 2187 U.N.T.S. 90.

127. *Id.*



have been committed in the so-called re-education camps in Xinjiang. This Note narrowly focuses on persecution, the crime with the closest connection to western corporations.

### B. PERSECUTION

According to the International Criminal Court's definition of crimes against humanity, persecution is defined as follows: "Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender . . . in connection with any act referred to in this paragraph or in connection with the crime of genocide or war crimes."<sup>128</sup> A reading of the definition of persecution requires determining whether there is an identifiable group being targeted, and, if so, determining if the persecution is based on the enumerated traits listed in the statute.

In Xinjiang, the targeted or persecuted group is ethnic and religious Muslim minorities in Xinjiang, including Uyghurs, Kazaks, and Kyrgyz.<sup>129</sup> Although the Uyghurs, Kazaks and Kyrgyz are Muslims, not all Muslims in Xinjiang are targeted. While some Hui ethnic people, who are also Muslims, were reported to be taken to re-education camps, it is not clear whether the Hui people were actually targeted, or if they were simply innocent casualties.<sup>130</sup> However, in *Prosecutor v. Bosco Ntaganda*,<sup>131</sup> the International Criminal Court held that "it may be the case that the perpetrator targeted only members of certain groups or targeted individuals for not belonging to a certain group, for instance by targeting all but one ethnic group within a community."<sup>132</sup> This holding supports a non-rigid reading of the identified group. Targeting Muslim minorities in Xinjiang might not require that all the Muslim minorities be targeted. It would be enough that certain groups—the Uyghurs, Kazaks or Kyrgyz—are targeted.

Acts of persecution can be broad. The *Bosco Ntaganda* court held that persecution consists of a severe attack on fundamental rights, such as the right to life, liberty and the security of person, the right not to be subjected to cruel,

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128. See AMNESTY INT'L, INTERNATIONAL LAW COMMISSION: THE PROBLEMATIC FORMULATION OF PERSECUTION UNDER THE DRAFT CONVENTION ON CRIMES AGAINST HUMANITY 6 (2018), <https://www.amnesty.org/download/Documents/IOR4092482018ENGLISH.pdf> [<https://perma.cc/7UDD-YACR>].

129. See *supra* Section II.B.3.

130. More and more Hui ethnic groups are worried that the same fate will eventually come to them as well. Tara Francis Chan, *As the U.S. Targets China's 'Concentration Camps,' Xinjiang's Human Rights Crisis is Only Getting Worse*, NEWSWEEK (May 22, 2019, 6:18 PM), <https://www.newsweek.com/xinjiang-uyghur-crisis-muslim-china-1398782> ("Many Hui Muslims and other ethnic minorities in China are now concerned that the repression fine-tuned by authorities in Xinjiang will be exported across the country . . .").

131. *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Judgment (July 8, 2019), [https://www.icc-cpi.int/CourtRecords/CR2019\\_03568.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_03568.PDF) [<https://perma.cc/B6AQ-BBG6>].

132. *Id.* ¶ 1009.

inhuman or degrading treatment or punishment, and the right not to be subjected to arbitrary arrest, detention or exile.<sup>133</sup> Here, the forced disappearance as well as the detention in the re-education camps are a “severe attack on fundamental rights” since they invade a person’s freedom of movement,<sup>134</sup> security of person,<sup>135</sup> and the right not to be subjected to arbitrary arrest.<sup>136</sup> The imposition of mass surveillance systems in Xinjiang is a gross violation of fundamental rights since it effectively limits Chinese citizens’ freedom of movement.<sup>137</sup> The collection of DNA data from Uyghurs or Muslim minorities, and the employment of facial and voice recognition technologies to track the movement of citizens, are violations of the fundamental right to privacy and freedom of movement, because the effect is to intimidate Chinese citizens from conducting their normal lives.<sup>138</sup>

The attack on Muslim minorities is widespread and affects hundreds of thousands of people. The targeted population in Xinjiang is large in number and the geographical territory impacted spans across the entire autonomous region. The attack is also systematic, since it is enforced pursuant to a clear, organized governmental policy. These acts targeting the Uyghurs and other Muslim minorities are sufficient to constitute an attack within the meaning of article seven of the Rome Statute of the International Criminal Court. Thus, the Chinese authority’s persecution of Muslim minorities in Xinjiang constitutes a crime against humanity.

## V. CORPORATE LIABILITY: SEEKING SOLUTIONS

This Note attempts to solve the issue of corporate contributions to these crimes in the United States and proposes the following solutions: Congress should impose corporate civil liability by amending the Alien Tort Statute,<sup>139</sup> and Congress should create corporate criminal liability for a corporation’s involvement in gross human rights violations.

### A. SEEKING DOMESTIC SOLUTIONS

This Note proposes domestic solutions in the United States because it is a more practical and relatively speedy fix to this urgent problem. A solution

133. *Id.* ¶ 991.

134. G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 13(1) (Dec. 10, 1948).

135. *Id.* art. 3.

136. *Id.* art. 9.

137. “If you go to the post office and you try to send something to them, and the CCTV picks you up, that can get you in trouble, too.” Jacky Habib, *In Xinjiang, China, Surveillance Technology is Used to Help the State Control Its Citizens*, CBC: PASSIONATE EYE, <https://www.cbc.ca/passionateeye/features/in-xinjiang-china-surveillance-technology-is-used-to-help-the-state-control> [<https://perma.cc/S7PF-RKZD>].

138. For more details, see *supra* Section II.B.4.

139. 28 U.S.C. § 1350 (2018).

in the international forum would be our first instinctual response; however, the world's current political reality makes it extremely unlikely. Many of our modern international legal mechanisms as well as international organizations are borne out of the mass atrocity that happened in WWII. The United Nations (1945) is one of the many examples. The Rome Statute of the International Criminal Court (1998) is another. These mechanisms have been successful in safeguarding human rights and serving justice in certain cases. For instance, the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") successfully prosecuted several gross human rights abusers in mass atrocity crimes.<sup>140</sup> The International Criminal Court has also achieved similar success in prosecuting human rights abuses in some African countries.<sup>141</sup> At the time of this Note's publication, the International Court of Justice ("ICJ") is handling a case against Myanmar for its genocide against the Rohingya, the Muslim minority people in its country.<sup>142</sup>

Yet, none of these examples involve stopping the world's superpowers from committing—or being involved in—gross human rights abuses. They all involved small, third-world countries. Although a group of countries have raised concerns over the persecution of the Uyghurs to the United Nations Human Rights Council,<sup>143</sup> that number remains few compared to those who endorse China's actions.<sup>144</sup> Even if the United Nations General Assembly managed to come up with a resolution condemning China's treatment of the Uyghurs,<sup>145</sup> this would have a very limited, if any, effect since the United Nations General Assembly resolution is only advisory, and non-binding.<sup>146</sup>

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140. For a list of cases, see *Cases*, UNITED NATIONS: INT'L RESIDUAL MECHANISM FOR CRIM. TRIBUNALS, <https://www.icty.org/en/cases> [<https://perma.cc/3T3V-7gZY>]; and *The Cases*, UNITED NATIONS: INT'L RESIDUAL MECHANISM FOR CRIM. TRIBUNALS, <https://unictr.irmct.org/en/cases> [<https://perma.cc/28GR-EH6S>].

141. Out of the 27 cases, only four of them led to convictions. See *Cases*, INT'L CRIM. CT., <https://www.icc-cpi.int/cases>.

142. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, INT'L CT. JUST., <https://www.icj-cij.org/en/case/178> [<https://perma.cc/LR9B-QY4Y>].

143. Louis Charbonneau, *Countries Blast China at UN Over Xinjiang Abuses*, HUM. RTS. WATCH (Oct. 30, 2019, 7:11 PM), <https://www.hrw.org/news/2019/10/30/countries-blast-china-un-over-xinjiang-abuses> [<https://perma.cc/9XK7-MZRH>].

144. There were 23 countries that expressed concern about the human rights conditions of the Uyghurs, while around 50 countries stood behind China for its actions. *Id.*

145. This is highly unlikely though, given China's increasing influence in the United Nations. See Courtney J. Fung, *Is China's Influence at the United Nations All It's Cracked up to Be?*, WASH. POST (Oct. 7, 2019, 4:00 AM), <https://www.washingtonpost.com/politics/2019/10/07/is-chinas-influence-united-nations-all-that-its-cracked-up-be> [<https://perma.cc/JTU7-QQLN>] (noting that China has been assuming a greater leadership role in the United Nations).

146. See U.N. Charter art. 10 ("The General Assembly . . . may make recommendations . . . to the Members or to the Security Council or to both.").

The only binding resolution must come from the United Nations Security Council,<sup>147</sup> but given that China is one of the permanent five members of the Council who enjoys the mighty yet notorious veto power, any Security Council resolution seems impossible. The ICJ is an unlikely solution as well. In the genocide of the Rohingya,<sup>148</sup> it is Gambia that filed the case against Myanmar in the ICJ.<sup>149</sup> Given China's strong influence in both Africa and the Middle East,<sup>150</sup> counting on other Muslim countries to speak up for their suffering brothers and sisters in China seems unlikely.<sup>151</sup> The International Criminal Court is out of the question too, given that China is not a party to the Rome Statute.<sup>152</sup> When dealing with superpowers like China, the established international mechanisms seem rather helpless.

*B. THE UYGHUR HUMAN RIGHTS POLICY ACT OF 2020*

While the international community may seem tight-handed, domestic approaches in the United States could provide a solution. The U.S. Congress has been actively responding to the human rights abuses in Xinjiang. In 2019, Congress introduced the Uyghur Human Rights Policy Act of 2019, requiring the U.S. government to report on human rights abuses by the Chinese government against the Uyghurs in Xinjiang.<sup>153</sup> The bill was later amended and took a stronger stand, requiring the President to report a list of Chinese officials involved in human rights abuses against the Uyghurs and impose visa

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147. See *id.* art. 25 (“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”).

148. Press Release, Int’l Ct. of Just., The Republic of The Gambia Institutes Proceedings Against the Republic of the Union of Myanmar and Asks the Court to Indicate Provisional Measures (Nov. 11, 2019), <https://www.icj-cij.org/files/case-related/178/178-20191111-PRE-01-00-EN.pdf> [<https://perma.cc/DQM3-QPLS>].

149. Owen Bowcott, *Gambia Files Rohingya Genocide Case Against Myanmar at UN Court*, GUARDIAN (Nov. 11, 2019, 7:04 AM), <https://www.theguardian.com/world/2019/nov/11/gambia-rohingya-genocide-myanmar-un-court> [<https://perma.cc/M7UT-PUR8>].

150. For China’s increasing influence on the Middle East, see Camille Lons, Jonathan Fulton, Degang Sun & Naser Al-Tamimi, *China’s Great Game in the Middle East*, EUR. COUNCIL ON FOREIGN RELS. (Oct. 21, 2019), [https://www.ecfr.eu/publications/summary/china\\_great\\_game\\_middle\\_east](https://www.ecfr.eu/publications/summary/china_great_game_middle_east) [<https://perma.cc/PK5W-F7EQ>] (“China has significantly increased its economic, political, and—to a lesser extent—security footprint in the Middle East in the past decade, becoming the biggest trade partner and external investor for many countries in the region.”). For China’s influence on Africa, see Rolinhlanhla Kudzaishe Zinyemba, *China’s Influence on Africa is Growing. Where Does It Lead?*, NEWS DECODER (Feb. 28, 2019), <https://news-decoder.com/2019/02/28/africa-china-trade-loans> [<https://perma.cc/7R75-RRMS>].

151. Sarah Leduc, *Muslim Countries’ Silence on China’s Repression of Uighurs*, FRANCE 24 (Nov. 27, 2019, 2:46 PM), <https://www.france24.com/en/20191127-china-communist-uighurs-xinjiang-muslim-silence-camps-repression> [<https://perma.cc/HH5U-GS6F>].

152. There are currently 19 state parties to the Rome Statute in the Asia-Pacific area. China is not one of them. See *Asia-Pacific States*, INT’L CRIM. CT., [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/asian%20states/Pages/asian%20states.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/asian%20states/Pages/asian%20states.aspx) [<https://perma.cc/RET9-826C>].

153. Uyghur Human Rights Policy Act of 2019, H.R. 649, 116th Cong. (2019).

and property-blocking sanctions.<sup>154</sup> Ultimately in 2020, the Uyghur Human Rights Policy Act of 2020 (“the Act”) was signed into law by President Trump.<sup>155</sup>

The Act “imposes sanctions on foreign individuals and entities responsible for human rights abuses in China’s Xinjiang Uyghur Autonomous region and requires various reports on the topic.”<sup>156</sup> Besides imposing travel and property-blocking restrictions on individuals and entities,<sup>157</sup> the Act also requires a report to Congress regarding “the Chinese government’s acquisition and development of technology to facilitate internment and mass surveillance in Xinjiang.”<sup>158</sup>

While the Act is an applaudable effort by Congress and the current Administration in fighting against human rights abuses to the Uyghurs, it lacks teeth in terms of stopping critical technologies used for persecution from being sold and exported to China. In the amended Uyghur Human Rights Policy Act of 2019,<sup>159</sup> the bill originally required

[t]he President [] identify items that provide China with a critical capability to suppress basic human rights, including items that provide capability to (1) conduct surveillance, (2) monitor and restrict an individual’s movement, (3) monitor and restrict access to the internet, and (4) identify individuals through facial or voice recognition. The President shall (1) place such items on the Commerce Control List (a list of items subject to export controls); and (2) require authorization for the export, reexport, or transfer of such items to or within China.<sup>160</sup>

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154. UIGHUR Act of 2019, S. 178, 116th Cong. (2019). Property blocking means for the property to “be frozen and held in place.” See John P. Baker, John B. Bellinger, III, Baruch Weiss, Soo-Mi Rhee, Nicholas L. Townsend, Tal R. Machnes, Tom McSorley & Amanda J. Sherwood, *OFAC Now Requires U.S. Persons to Report Any Transaction They Reject Due to Sanctions*, ARNOLD & PORTER (July 1, 2019), <https://www.arnoldporter.com/en/perspectives/publications/2019/07/ofac-now-requires-us-persons-to-report> [<https://perma.cc/J83B-7L6R>].

155. Uyghur Human Rights Policy Act of 2020, S. 3744, 116th Cong. (2020) (enacted); Alim Seytoff & Joshua Lipas, *Trump Signs Uyghur Rights Act into Law, Authorizing Sanctions for Abuses in Xinjiang*, RADIO FREE ASIA (June 17, 2020), <https://www.rfa.org/english/news/uyghur/act-06082020173916.html> [<https://perma.cc/LT7C-ZCCW>].

156. S.3744—*Uyghur Human Rights Policy Act of 2020*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/senate-bill/3744> [<https://perma.cc/YJD7-36NE>].

157. *Id.*

158. *Id.*

159. S. 178.

160. S.178—*UIGHUR Act of 2019*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/senate-bill/178> [<https://perma.cc/4K73-V5H3>].

Compared to the 2019 bill, the Act of 2020 seems rather toothless, asking only for reports instead of banning items that help with conducting surveillance or restricting movements.<sup>161</sup>

The ongoing persecution of the Uyghurs requires more sweeping action than merely requesting reports. The United States could stop China from gaining tools from the western world to achieve its goals. While the demand side of the market may be a tough hurdle to overcome, the United States should nevertheless tackle it by tightening control on the supply end. A better solution would be to reform the current legal framework to incentivize corporations to comply with human rights protection when conducting business, bringing corporate social liability to another level.

### C. A CIVIL SOLUTION: REFORMING THE ALIEN TORT STATUTE

#### 1. Background & Current Case Law

The Alien Tort Statute (“ATS”),<sup>162</sup> as Judge Friendly famously characterized it, is a “legal Lohengrin.”<sup>163</sup> Lohengrin (spoiler alert) is a tragic hero who, soon after he saves a damsel in distress, dies, without getting to marry his bride.<sup>164</sup> ATS was passed by the first Congress as part of the Judiciary Act of 1789,<sup>165</sup> but for the 170 years since it was passed, there had been only one case that involved the ATS.<sup>166</sup> The statute stipulates that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>167</sup> One of the main objectives of the ATS is “to avoid foreign entanglements by ensuring the availability of a federal forum,”<sup>168</sup> in case that failure to have any available forum “might cause another nation to hold the United States responsible for an injury to a foreign citizen.”<sup>169</sup> The ATS, however, is only a jurisdictional grant; it does not create a new private or

161. Compare Uyghur Human Rights Policy Act of 2020, Pub. L. No. 116-145, § 9, 134 Stat. 648, 655-56 (requiring the Director of National Intelligence to submit a report on the acquisition or development of technology by China to facilitate interment and mass surveillance), with S. 178 § 9(b)(1)(A) (requiring the President to identify items that allow China to suppress individual privacy, freedom of movement, and other basic human rights through surveillance or monitoring).

162. 28 U.S.C. § 1350 (2018).

163. *HT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

164. For those who are interested in the story of Lohengrin, see Jay M. Lewis Humphrey, *A Legal Lohengrin: Federal Jurisdiction Under the Alien Tort Claims Act of 1789*, 14 U.S.F. L. REV. 105, 105 n.3 (1979).

165. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712-13 (2004).

166. *Id.* at 712.

167. 28 U.S.C. § 1350.

168. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1397 (2018).

169. *Id.*

individual right of action.<sup>170</sup> Congress enacted the ATS “against the backdrop of the general common law, which in 1789 recognized a limited category of ‘torts in violation of the law of nations.’”<sup>171</sup>

Courts have been reluctant to read “the law of nations”<sup>172</sup> broadly. Post-*Filartiga*,<sup>173</sup> the Supreme Court’s reading of the ATS has been so narrow that it has almost killed the ATS. In *Filartiga*, the Second Circuit Court recognized that “[a]lthough the Alien Tort Statute has rarely been the basis for jurisdiction during its long history, in light of the foregoing discussion, there can be little doubt that this action is properly brought in federal court.”<sup>174</sup> The success of *Filartiga* had inspired a series of ATS litigations,<sup>175</sup> and courts were mostly “friendly” toward international human rights cases.<sup>176</sup> Things started to change in *Sosa*,<sup>177</sup> when the Court held that Congress only intended the ATS to provide jurisdiction for “a relatively modest set of actions alleging violations of the law of nations.”<sup>178</sup> The first threshold question posed by *Sosa* is whether a plaintiff can show that the alleged violation is “of a norm that is specific, universal, and obligatory.”<sup>179</sup> Plaintiffs would first need to base their claims “on the present-day law of nations to rest on a norm of international character accepted by the civilized world.”<sup>180</sup> Second, the norm must be “defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”<sup>181</sup> After *Sosa*, “the door [of ATS] is still ajar subject to vigilant doorkeeping.”<sup>182</sup>

Beginning in the 1990s, suits invoking the ATS started to be brought against large foreign corporations, instead of foreign individuals.<sup>183</sup> The Court significantly narrowed the scope of ATS litigation in *Kiobel*.<sup>184</sup> In *Kiobel*, the Court held that “[t]he principles underlying the presumption against

170. “The ATS is ‘strictly jurisdictional’ and does not by its own terms provide or delineate the definition of a cause of action for violations of international law.” *Id.* (citing *Sosa*, 542 U.S. at 713–14).

171. *Id.* (quoting *Sosa*, 542 U.S. at 714).

172. 28 U.S.C. § 1350.

173. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 877 (2d Cir. 1980).

174. *Id.* at 887 (footnotes omitted).

175. MARK WESTON JANIS & JOHN E. NOYES, INTERNATIONAL LAW: CASES AND COMMENTARY 327 (5th ed. 2014).

176. *Id.*

177. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 697 (2004).

178. *Id.* at 720.

179. See *id.* at 732 (quoting *Hilao v. Estate of Marcos (In re Estate of Marcos)*, 25 F.3d 1467, 1475 (9th Cir. 1994)).

180. *Id.* at 725.

181. *Id.*

182. *Id.* at 729.

183. JANIS & NOYES, *supra* note 175, at 327. Large corporate defendants include: Barclays National Bank, Chevron, Del Monte, Ford, IBM, Rio Tinto, Talisman Energy, and Unocal. *Id.*

184. *Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108, 111 (2013).

extraterritoriality . . . constrain courts exercising their power under the ATS.”<sup>185</sup> The *Kiobel* holding considerably limited ATS lawsuits against conduct that takes place outside of the United States. In 2018, the issue of whether a foreign corporation could be held liable under the ATS for human rights violations in a foreign nation was again raised in *Jesner v. Arab Bank, PLC*.<sup>186</sup> In *Jesner*, the Court held “that foreign corporations may not be defendants in suits brought under the ATS”<sup>187</sup> because there was a lack of “a specific, universal, and obligatory norm of corporate liability”<sup>188</sup> under the international law, failing to meet the *Sosa* requirements.<sup>189</sup>

## 2. Proposed Congressional Action: Creating a New Cause of Action

Out of both separation of powers and foreign policy concerns, the Supreme Court seems extremely reluctant to create a new private right of action for corporate human rights violations absent any clear legislative intent.<sup>190</sup> In light of the involvement of U.S. corporations in hideous human rights abuses abroad, Congress should respond. Congress should either amend the ATS or enact a new law under the ATS “to ‘establish an unambiguous and modern basis for a cause of action,’”<sup>191</sup> similar to what Congress did in the Torture Victim Protection Act (“TVPA”) of 1991.<sup>192</sup> The TVPA allows plaintiffs to bring actions based on modern international human rights law,<sup>193</sup> but it limits the scope to only torture and extrajudicial killings.<sup>194</sup> This Note proposes that Congress enact a new law containing the following necessary changes: adding violation of crimes against humanity as part of the “law of nations,” and adding corporate liability for any actions involving the corporation abroad. The new law should also provide a cause of action against U.S. corporations and their foreign subsidiaries involved in crimes against

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185. *Id.* at 117.

186. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1393–94 (2018).

187. *Id.* at 1407.

188. *Id.* at 1401.

189. “[T]he international community has not yet taken that step, at least in the specific, universal, and obligatory manner required by *Sosa*.” *Id.* at 1402.

190. “[T]he Legislature is in the better position to consider if the public interest would be served by imposing a new substantive legal liability.” *Id.* (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017)). “[T]he separation-of-powers concerns that counsel against courts creating private rights of action apply with particular force in the context of the ATS. . . . The political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns.” *Id.* at 1403 (citations omitted).

191. *Id.* (first quoting H.R. REP. NO. 102-367, at 3 (1991); and then quoting S. REP. NO. 102-249, at 4-5 (1991)).

192. Torture Victim Protection Act of 1991, H.R. 2092, 102d Cong. (1991) (enacted).

193. “To carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights . . .” *Id.*

194. *Id.*



humanity, while leaving corporate entities incorporated in foreign countries intact.

Adopted from the TVPA, the proposed preamble could read something like this:

To carry out [the] obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights as well as to respond to the United Nations Guiding Principles on Business and Human Rights (UNGPs) by establishing a civil action for recovery of damages from a U.S. person or entity capable of holding a legal or beneficial interest in property who violates law of nations or engages in crimes against humanity.<sup>195</sup>

First, it is important to provide a guideline in creating the boundary of the “law of nations” and expanding the sanctioned acts from only torture and extrajudicial killing in violation of international law, to crimes against humanity. Article seven of the Rome Statute sanctions nine other categories of crimes.<sup>196</sup> Focusing only on torture and extrajudicial killings would fall short of the goal of protecting against all human rights violations like crimes against humanity.

There are several reasons to focus on crimes against humanity. For the most part, they are the “specific, universal, and obligatory norm[s]”<sup>197</sup> established under international law, as required by the *Sosa* holding. They are considered the *jus cogens* crimes;<sup>198</sup> anyone, individual or entity, who violates them can be considered “an enemy of all mankind.”<sup>199</sup> This Note only

195. Language adopted from the TVPA. *Id.*

196. They are:

- (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 90.

197. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1401 (2018).

198. *Jus cogens* is a Latin phrase that means “compelling law.” It designates norms from which no derogation is permitted by way of particular agreements. See Anne Lagerwall, *Jus Cogens*, OXFORD BIBLIOGRAPHIES (May 29, 2015), <https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0124.xml> [<https://perma.cc/WYV6-R97Z>].

199. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004).

proposes including crimes against humanity within the boundaries of the law of nations because other crimes—war crimes and crimes of aggression—though sanctioned by the Rome Statute, have a great potential of getting the judicial branch excessively entangled with the foreign policy of the executive branch. Genocide is also sanctioned by the Rome Statute; however, almost all of the genocidal acts listed in the Rome Statute are already included within the definition of crimes against humanity. Since genocide and crimes against humanity mostly differ in whether a genocidal intent exists,<sup>200</sup> focusing on crimes against humanity can achieve the same effect.

Second, a corporation or corporate entity could be added to the definition of an “alien” under the ATS. Or, if a new act were to be passed, Congress could adopt language like that in the TVPA<sup>201</sup> and stipulate that this act applies to “person[s],” who can either refers to any individual or “entity capable of holding a legal or beneficial interest in property.”<sup>202</sup> To hold a corporate entity liable is in line with the recommendation from the UNGPs.<sup>203</sup> As mentioned earlier,<sup>204</sup> including corporate liability has been a trend in international law. As the Court in *Jesner* recognized, the nature of the crimes against humanity is such that it is reasonable to subject corporations to liability for the crimes of their human agents abroad.<sup>205</sup> In the American legal system, corporations can be subject to liability for the conduct of their human employees, and so it may seem reasonable, and necessary, that corporate entities are liable for violations of international law under the ATS as well.

To avoid the Court’s separation of powers concerns, as well as the potential danger of a judicial branch inadvertently causing foreign policy tension, corporate liability should be limited to U.S. corporations and their foreign subsidiaries. Foreign corporations should not be subjected to the ATS or its related acts.<sup>206</sup> Such a limitation would avoid the situation where foreign nationals come to the United States and allege a violation committed by a foreign individual or entity on foreign soil, with little to no nexus to the United States. This would also conserve the United States’ judicial resources, and for the most part, avoid causing any foreign policy embarrassment to the executive branch. In *Kiobel*, for example, the plaintiffs were Nigerian nationals who sued Dutch, British, and Nigerian corporations for crimes that happened

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200. The Rome Statute, article 6 requires that there is an “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.” Rome Statute of the International Criminal Court art. 6, July 17, 1998, 2187 U.N.T.S. 90.

201. 18 U.S.C. § 2331 (2018).

202. *Id.* § 2331(3).

203. See generally UNITED NATIONS, *supra* note 106 (listing the recommendations of the UNGPs).

204. See *supra* Section III.A.

205. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1402 (2018).

206. Like the Arab Bank in *Jesner*. See *id.*

in Nigeria.<sup>207</sup> The *Kiobel* case resulted in many objections from Canada, Germany, Indonesia, Papua New Guinea, South Africa, Switzerland, and the United Kingdom.<sup>208</sup> This shows that cases like *Kiobel* are best resolved in an international forum. International courts like the ICJ are in a better position to deal with cases like *Kiobel*. What the United States could do is take the lead in recognizing corporate liability for human rights violations and encourage other nation states to follow suit, making corporate liability a part of the customary international law.

### 3. Limits on the Civil Approach

Despite the many benefits of imposing corporate civil liability, there are limits on taking the domestic civil liability approach. For the most part, imposing *criminal* liability has a greater “message-sending role” compared to *civil* liability.<sup>209</sup> Taking a civil approach lacks the moral condemnation that only a criminal sanction can provide.<sup>210</sup> Moreover, criminal sanctions provide stronger deterrence against future acts, general (to all other entities around the world) or specific (to the corporate perpetrator itself).<sup>211</sup> Criminal law also provides “more opportunities for asset recovery, compensation, and mandatory corporate reform.”<sup>212</sup> The stigma that attaches to a criminal prosecution is strong motivation to encourage ethical corporate behavior in the future.<sup>213</sup> For crimes to be serious crimes against humanity, such deterrent effect and moral stigma are necessary to incentivize corporations to take human rights protection into consideration when conducting business. What is more, criminalizing corporate actors can help fill the necessary gap in the current international judicial system, which still only focuses on individual responsibility, not corporate liability.<sup>214</sup>

#### D. A CRIMINAL SOLUTION: A PROPOSAL

In light of the restraint of the current corporate criminal law framework, this Note proposes creating a new statutory framework akin to that of the

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207. *Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108, 111–12 (2013).

208. *Id.* at 124.

209. V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1492 (1996).

210. CORPORATE CRIMINAL LIABILITY: EMERGENCE, CONVERGENCE, AND RISK 268 (Mark Pieth & Radha Ivory eds., 2011) (“[T]he messages of strong censure and solemn moral condemnation inherent in criminal law *cannot* be found in any other legal instrument of social control.”).

211. *Id.* at 5.

212. *Id.*

213. Khanna, *supra* note 209, at 1477.

214. Alessandra De Tommaso, *Guest Blog: Corporate Criminal Liability Under International Law*, KINGSLEY NAPLEY (Mar. 5, 2018), <https://www.kingsleynapley.co.uk/insights/blogs/criminal-law-blog/guest-blog-corporate-criminal-liability-under-international-law> [https://perma.cc/CKH7-ZNY2].

Antiterrorism Act, providing material support or resources to designated foreign terrorist organizations.<sup>215</sup> The proposed framework includes two elements: (a) establishing extraterritorial jurisdiction, and (b) inviting governmental involvement in order to address the potential mens rea problem. This Note also proposes two possible levels of sanctions on the actus reus element of the crime, with differing implications.

### 1. Establishing Jurisdiction

In order to regulate extraterritorial activities of the corporations, the first step is to establish proper jurisdiction. The UNGPs recommends two different approaches to this problem: The first approach is to adopt extraterritorial jurisdiction, while the second approach would be domestic measures with extraterritorial implications.<sup>216</sup>

While John Ruggie, the author of the UNGPs, recognized that the first approach, granting direct extraterritorial jurisdiction, would be “likely to trigger objections and resistance”<sup>217</sup> since it would infringe upon the host state’s exclusive jurisdiction,<sup>218</sup> the surest way to overcome the “presumption against extraterritoriality,”<sup>219</sup> is for Congress to expressly grant extraterritorial jurisdiction.<sup>220</sup> An example would be the Antiterrorism Act: Providing Material Support,<sup>221</sup> where Congress clearly states that “there is extraterritorial Federal jurisdiction over an offense under this section.”<sup>222</sup> If states want to hold their corporations criminally accountable for serious human rights violations, granting this extraterritorial jurisdiction is necessary.

### 2. Actus Reus: Two Approaches

A corporation can get involved in human rights violations in many ways. First of all, there could be direct perpetration, where a corporate entity intentionally and directly engages in activities that violate international human rights law(s). One such example is Coca-Cola hiring paramilitaries to

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215. 18 U.S.C. § 2339B (2018).

216. Rachel Chambers, *An Evaluation of Two Key Extraterritorial Techniques to Bring Human Rights Standards to Bear on Corporate Misconduct: Jurisdictional Dilemma Raised/Created by the Use of the Extraterritorial Techniques*, 14 *UTRECHT L. REV.*, no. 2, 2018, at 22, 22.

217. John G. Ruggie, UN Special Representative for the Sec’y Gen. for Bus. & Hum. Rts., Keynote Presentation at EU Presidency Conference on the ‘Protect, Respect and Remedy’ Framework (Nov. 10, 2009).

218. Chambers, *supra* note 216, at 23.

219. *See* *Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108, 115 (2013).

220. *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (“When a statute gives no clear indication of an extraterritorial application, it has none.”).

221. 18 U.S.C. § 2339B (2018).

222. *Id.* § 2339B(d)(2).

kill trade union activists in Colombia.<sup>223</sup> Cases like this are not common for corporate liability in human rights violations. The more common example would be a corporation's negligent behavior causing the violations, such as a corporation using forced labor or child labor in its supply chains. Other cases involve a corporation's liability for complicity—aiding and abetting the commission of human rights abuses by the principal perpetrators. This Note focuses on the last area of corporate criminal liability—complicit culpability.

Complicit culpability comes from a corporation's connection to a principal's wrong behavior.<sup>224</sup> Modes of complicity come in many forms, like aiding and abetting, incitement<sup>225</sup> and instigation. To narrow the scope of the discussion, and to focus more on the Chinese authorities' persecution against the Uyghurs and other Muslim minorities in Xinjiang, this Note focuses on the act of aiding and abetting, and specifically the act of assisting the Chinese government in human rights abuses.

Under the current framework of international criminal tribunals, aiding and abetting refers to acts or omissions that assist, encourage or lend moral support to crimes.<sup>226</sup> This Note proposes that the *actus reus*—the sanctioned acts—be limited to the “assist” element, since under the present context it is more likely that a corporation assists the principal perpetrators in committing atrocity crimes, rather than encouraging or lending its moral support. There should be two different levels of sanctioned acts. The first level should focus on the sanction of goods that are deemed to be able to facilitate human rights abuses. The second level of sanctions could focus on any acts that facilitate, or otherwise provide material support or material resources to the designated human-rights-abusing individual or entity.

The first level of proposed sanctioned acts should be similar to what has already been proposed by the members of Congress.<sup>227</sup> This could include selling, transferring, or giving what is listed as important and sensitive goods.

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223. Coca-Cola was accused of financing terrorism and allegedly hired hitmen to kill at least ten labor union leaders in Colombia. Coca-Cola was later removed from the suit. See Juan Forero, *Union Says Coca-Cola in Colombia Uses Thugs*, N.Y. TIMES (July 26, 2001), <https://www.nytimes.com/2001/07/26/world/union-says-coca-cola-in-colombia-uses-thugs.html> [https://perma.cc/JH6L-KPQD]; Sibylla Brodzinsky, *Coca-Cola Boycott Launched After Killings at Colombian Plants*, GUARDIAN (July 23, 2003, 9:16 PM), <https://www.theguardian.com/media/2003/jul/24/marketingandpr.colombia> [https://perma.cc/WL3M-BPWR]; Ryngaert, *supra* note 101, at 4.

224. Hassan M. Ahmad, *Miles Jackson, Complicity in International Law*, 16 J. INT'L CRIM. JUST. 491, 491 (2018) (book review).

225. A good example for incitement would be the International Criminal Tribunal for Rwanda's case in *Prosecutor v. Nahimana*, where a Rwandan radio-station, a corporation, was accused of inciting genocide through its radio broadcast. *Prosecutor v. Nahimana*, Case No: ICTR-99-52-T, Judgment and Sentence, ¶ 8 (Int'l Crim. Trib. for Rwanda Dec. 2, 2003).

226. Manuel J. Ventura, *Aiding and Abetting*, in *MODES OF LIABILITY IN INTERNATIONAL CRIMINAL LAW* 173, 173 (Jérôme de Hemptinne, et al. eds., 2019).

227. See UIGHUR Act of 2019, S. 178, 116th Cong. (as passed by House of Representatives, Dec. 3, 2019).

The amended UIGHUR Act of 2019<sup>228</sup> proposes that “goods” include “any article, natural or man-made substance, material, supply or manufactured product, including inspection and test equipment, and excluding technical data.”<sup>229</sup> The shortcoming of this definition is that it purposely excludes technical data. What is now currently being used to prosecute China’s Muslim minorities, including DNA sequencing, does not fall within the definition of the “article, material, or product.”<sup>230</sup> The suggested goods should include items that are listed as important and sensitive technology, equipment, information, or databases. Alternatively, instead of enumerating the various items, a possible framework could stick to what was originally proposed in the Senate’s version of the Uyghur Human Rights Policy Act of 2019,<sup>231</sup> which broadly sanctions “items that provide China with a critical capability to suppress basic human rights, including items that provide capability to (1) conduct surveillance, (2) monitor and restrict an individual’s movement, (3) monitor and restrict access to the internet, and (4) identify individuals through facial or voice recognition.”<sup>232</sup>

This limited approach is desirable to keep a balance between facilitating economic growth and safeguarding human rights. Under this limited approach, companies that sell, produce, collect, study or develop those technologies or information would be put on notice. Other businesses that do not participate in these areas could still do business with those targeted entities. However, this approach would not be perfect. There are more technologies that could be misused than human imagination could conceive. After all, an innocent study on human genomes for scientific or medical purposes could end up being used to target ethnic minorities.<sup>233</sup> It is highly likely that some unenumerated acts are inappropriately used to prosecute and oppress people. Once the technology or information is in the hands of the wrong people, “there is little [one] can do to stop them.”<sup>234</sup>

A second approach is to adopt something similar to the providing-material-support-to-terrorists provision.<sup>235</sup> This is broader and more effective than the first approach. Under this proposed framework, a corporation would

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228. *Id.*

229. *Id.* at 9–10.

230. *See id.*

231. UIGHUR Act of 2019, S. 178, 116th Cong. (as introduced in Senate, Jan. 17, 2019).

232. S.178—*UIGHUR Act of 2019*, *supra* note 160.

233. Sui-Lee Wee, *China Uses DNA to Track Its People, With the Help of American Expertise*, N.Y. TIMES (Feb. 21, 2019), <https://www.nytimes.com/2019/02/21/business/china-xinjiang-uyghur-dna-thermo-fisher.html> [<https://perma.cc/UW4R-MZY7>].

234. *Id.* (quoting Dr. Kenneth Kidd, a prominent Yale geneticist whose genomes research and DNA samples were taken to China and became part of China’s DNA drive). The Chinese ministry researchers later published a report showing that they could “tell one ethnic group from another”; for example, they gained “the ability to distinguish Uighurs from Indians.” *Id.*

235. 18 U.S.C. § 2339A (2018).

be forbidden from providing any material support to the targeted individual or entity.<sup>236</sup> Any form of material support can be a potential target, such as having key personnel that specialized in the development of the technology work for the designated Chinese entities as part of the collaboration programs. What would be the scope of the material support? One argument in support of a broad sanction would be to discourage corporations from aiding and abetting the human rights perpetrators in any shape or form. Taking this approach, however, has an obvious downside of allowing the implication to become too broad. The vagueness in the “material support” language can also raise legal issues. This Note suggests that Congress adopt the first approach, sanctioning of goods that are deemed to be able to facilitate human rights abuses, as its implication would not be too broad and can provide a clear boundary of what is sanctioned.

### 3. The Mens Rea Requirement

Finding the mind of the corporation “guilty” can be a tricky thing. After all, a corporation is a legal fiction that does not have a “mind” of its own.<sup>237</sup> A lot of debate centers on imposing criminal liability based on purpose or knowledge.<sup>238</sup> On the one hand, a requirement of intent seems too high a hurdle to overcome for prosecutors. The “intent” of a corporation, after all, is oftentimes a desire to make profits, rather than an intent to commit atrocity crimes.<sup>239</sup> On the other hand, merely requiring knowledge raises questions as to whether a corporation’s mental state reflects enough culpability to warrant criminal sanctions. In the United States, courts split on this issue of the required mens rea for imposing liability on corporations.<sup>240</sup> Scholar Caroline Kaeb has pointed out that in interpreting the mens rea standard for aiding and abetting under the ATS, the District of Columbia and Eleventh Circuit Courts of Appeals have used a knowledge standard, while the Second and Fourth Circuits have adopted a “purpose standard” that would require a corporation (or its agents) to share the criminal intent of the principal perpetrator.<sup>241</sup>

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236. *Id.*

237. Because a corporation could not be said to possess “a mind,” early common law did not recognize corporate liability. *See supra* note 95 and accompanying text.

238. Kaeb, *supra* note 105, at 384.

239. *Id.* at 372.

240. *Id.* at 384.

241. *Id.* at 372 n.115 (noting that the Eleventh Circuit in *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008) and *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1249–50 (11th Cir. 2005) endorsed a knowledge standard, whereas the Second Circuit in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259, 261 n.12 (2d Cir. 2009) and Fourth Circuit in *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 390–401 (4th Cir. 2011) held that a show of purpose was required). Since the Supreme Court reached its conclusion on jurisdictional grounds and

Rulings from international tribunals support adopting the mens rea of “knowledge” standard. The Rome Statute requires a minimum mens rea standard of knowledge unless stated otherwise.<sup>242</sup> In article seven of the Rome Statute, the mens rea required for crimes against humanity is knowledge.<sup>243</sup> In *Prosecutor v. Milan Lukic*, the Appellate Chamber of ICTY affirmed the Trial Chamber’s ruling with regard to the mens rea of aiding and abetting in the crime of persecution.<sup>244</sup> To lower the burden of the prosecution, and to deter corporations from committing serious human rights violations and atrocity crimes, adopting the knowledge standard for mens rea seem to be a better approach.

However, requiring a knowledge standard for mens rea would not necessarily make prosecution of crimes against humanity any easier. In Xinjiang, China, difficulties arise when western corporations do business with Chinese corporations. Many Chinese corporations are partially or even entirely owned by the Chinese authorities through a complex web of corporate structure. However, this information is usually not available to the general public. Western corporations often do not have full access to the entire picture of the Chinese businesses they are dealing with. For instance, in 2018, the Massachusetts Institute of Technology (“MIT”) announced a research partnership with SenseTime, a Chinese artificial-intelligence and facial-recognition leader.<sup>245</sup> “SenseTime then held a 49 percent stake in SenseNets.”<sup>246</sup> It turned out that SenseNets is one of the Chinese companies participating in the construction of the surveillance system used in Xinjiang.<sup>247</sup> MIT’s involvement in the Chinese company sheds light on the challenge: Western companies often have little if any clue regarding with whom exactly they are dealing. Proving that they are even aware of the human rights abuse taking place is extremely difficult.

One solution to the aforementioned problem is to have the United States Department of State work with other relevant departments to maintain a list

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did not address the issue of corporate liability under the ATS, we do not know the Supreme Court’s view on this issue. See *Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108, 115–17 (2013).

242. Rome Statute of the International Criminal Court art. 30, July 17, 1998, 2187 U.N.T.S. 90 (“Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.”).

243. “[W]ith knowledge of the attack.” *Id.* art. 7.

244. *Prosecutor v. Lukic*, Case No. IT-98-32/1-A, Judgment, ¶¶ 458, 588 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 4, 2012), [https://www.icty.org/x/cases/milan\\_lukic\\_sredoje\\_lukic/acjug/en/121204\\_judgement.pdf](https://www.icty.org/x/cases/milan_lukic_sredoje_lukic/acjug/en/121204_judgement.pdf) [<https://perma.cc/G82F-ENFF>].

245. Lindsay Gorman & Matt Schrader, *U.S. Firms Are Helping Build China’s Orwellian State*, FOREIGN POLY (Mar. 19, 2019, 10:39 AM), <https://foreignpolicy.com/2019/03/19/962492-orwell-china-socialcredit-surveillance> [<https://perma.cc/6TF5-CSVL>].

246. *Id.*

247. *Id.*



of Chinese (or other foreign) corporations that the United States has designated as involved in serious human rights abuses.

On October 7, 2019, the Trump Administration and the Department of Commerce published a blacklist of 28 Chinese entities for their involvement in serious human rights abuses in Xinjiang.<sup>248</sup> This list effectively blocks those entities from purchasing certain products.<sup>249</sup> A similar list containing Chinese entities that are involved in serious human rights abuses could provide U.S. corporations with the knowledge that those entities are human rights abusers. This would be similar to the Antiterrorism Act: Providing Material Support,<sup>250</sup> wherein the members of Congress tried to criminalize those who materially support terrorist organizations. In the Antiterrorism Act, “a person must have knowledge that the organization is a designated terrorist organization.”<sup>251</sup> The Secretary of State is in charge of designating groups as foreign terrorist organizations.<sup>252</sup> A list of U.S. corporations violating this Act would provide fair notice to those wanting to engage in any activities with the groups on the blacklist. Under this framework, corporations have a duty to make sure that they are not dealing with entities on the sanctioned list. Here, the effect of adopting a similar framework would be to criminalize U.S. corporations that aid or abet foreign entities designated as gross human rights abusers in the Act. Corporations then could not claim that they have absolutely no knowledge of their Chinese business partner’s human rights abuses, since they have been reasonably notified by the list published.

There are two ways of interpretation after adopting “knowledge” as the required mens rea for imposing criminal liability. The first would be requiring the prosecution to prove only the knowledge of the aiding or abetting the designated entities. Under this approach, the mens rea element is met when prosecution proves that the corporations know their client is on the sanctioned list. The second approach would require showing the corporations actually know that the support they are giving helps the perpetrator to commit serious human rights violations. A similar debate was seen in *Holder v. Humanitarian Law Project* from Justice Breyer’s dissenting opinion.<sup>253</sup> In interpreting the Antiterrorism Act, the majority supported a textual reading:

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248. 15 C.F.R. pt. 744 (2019); see also Ana Swanson & Paul Mozur, *U.S. Blacklists 28 Chinese Entities Over Abuses in Xinjiang*, N.Y. TIMES (Oct. 7, 2019), <https://www.nytimes.com/2019/10/07/us/politics/us-to-blacklist-28-chinese-entities-over-abuses-in-xinjiang.html> [<https://perma.cc/D3ZN-4NUY>] (detailing the Trump Administration’s decision in adding 28 Chinese organizations to a U.S. blacklist).

249. Swanson & Mozur, *supra* note 248.

250. 18 U.S.C. § 2339B (2018).

251. *Id.* § 2339B(a)(1).

252. For the current list, see *Foreign Terrorist Organizations*, U.S. DEP’T ST.: BUREAU COUNTERTERRORISM, <https://www.state.gov/foreign-terrorist-organizations> [<https://perma.cc/CWN6-6AHL>].

253. *Holder v. Humanitarian L. Project*, 561 U.S. 1, 40 (2010) (Breyer, J., dissenting).

knowing that the organization is a designated terrorist organization is sufficient.<sup>254</sup> However, Justice Breyer, on the other hand, proposed that the “knowledge” mens rea must be applied to every element of “providing material support.”<sup>255</sup> Therefore, “[a] person acts with the requisite knowledge if he is aware of (or willfully blinds himself to) a significant likelihood that his or her conduct will materially support the organization’s terrorist ends.”<sup>256</sup>

In the case of Xingjiang, the majority’s approach is better. To require the prosecution to prove that corporations know or are aware that there is a significant likelihood that their conduct would only aid or abet Chinese entities’ human rights abuses would make the prosecutorial hurdle too great to overcome, and defeat the purpose of having a sanctioned list of liable corporations. Therefore, proving knowledge of the fact that their client is on the sanctioned list should be sufficient.

## VI. CONCLUSION

The situation in Xinjiang raises the issue of whether the United States should continue to allow corporations to get away with human rights abuses without repercussion. If the United States were to impose sanctions on corporate involvement in human rights abuses, the better approach would be to rely on a clearly defined statutory framework that would provide sufficient notice and guidance for corporations to follow when interacting with Chinese corporations or governmental entities. This could be done either through the reformation of the ATS, or by creating a new legal criminal framework. Under the proposed civil reform, a clear and unambiguous grant of a cause of action should be made. Under the proposed criminal framework, the U.S. government would play an active role in deciding which entities are suspected of human rights abuses and what U.S. products or technologies are at stake. This way, there is less worry that an overly broad implication of the law would hinder business development, while it will force corporations to exercise human rights due diligence when doing business.

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254. *Id.* at 16 (majority opinion) (“To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization . . . , that the organization has engaged or engages in terrorist activity . . . , or that the organization has engaged or engages in terrorism . . . .” (quoting 18 U.S.C. § 2339B(a)(1))).

255. *Id.* at 56–58 (Breyer, J., dissenting).

256. *Id.* at 56.