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Accountability Gaps in International Justice: Can Corporations Be Held Accountable for Crimes Against Humanity in Xinjiang?

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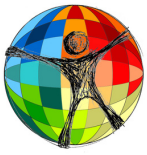

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ABSTRACT

The Chinese government's crimes against humanity against Muslim Uyghurs in the Xinjiang province of China have been met with outrage from the international community, as allegations of forced labour, sexual abuse, and other human rights violations have come to light. However, there has been less awareness surrounding the role of corporations who either directly manufacture their goods in factories that use forced labour, or source their materials from these factories further down in their supply chains.

This paper explores avenues for accountability for this complicity of Western corporations in the crimes against humanity of the Chinese government against Muslim Uyghurs. There is no satisfying pathway for accountability under international law: international legal instruments in this domain are either non-binding or unenforceable, and major international criminal courts have failed to exercise jurisdiction over corporate legal persons.

This paper therefore focuses elsewhere: namely, on the ability of national courts to hold corporations accountable for international crimes. Using a comparative approach, this paper examines attempts from Canada, the United States, and France to hold corporations domiciled within their national territory accountable for crimes against humanity and other grave violations of international criminal law. This paper argues that the French model for criminal corporate accountability—a broad framework based on universal jurisdiction—is the strongest approach to corporate criminal accountability and should be adopted by other countries.

CONTENTS

1. Introduction

Over the past few years, the publication of several investigative non-governmental organization ("NGO") reports exposing the details of the Chinese government's crimes against Uyghur[1] Muslims in the Xinjiang province of China have solicited outrage from the international community. Reports have detailed a coercive surveillance regime and a system of "re-education camps" (or, more accurately, concentration camps)[2] designed to erase minority cultures and religions, as well as a number of shocking and egregious human rights violations. Recent figures have estimated that there are as many as two million Uyghur Muslims currently interned in these concentration camps—where many are subject to mental, physical, and sexual abuse.[3]

After being released from the concentration camps, many former prisoners are forced to work in factories across the

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[1] Both the spelling "Uyghur" and "Uighur" are used in English media content and literature, but a few sources note that "Uyghur" is preferred by members of the ethnic group being referred to, so that spelling will be used (except in titles of sources where the opposite is specified): see " 'Uyghur' or 'Uighur'?" (9 October 2010), online: *Radio Free Asia* <www.rfa.org/english/news/uyghur/uyghur-spelling-09062010161733.html>.

[2] A note on terminology: the Chinese government insists that these camps are "re-education camps"—but due to the reality of the situation in the camps, scholars and activists reporting on the situation have characterized the camps more accurately as internment or concentration camps, so this is the terminology that will be employed throughout the paper. For reference, Merriam Webster defines a concentration camp as "a place where large numbers of people (such as prisoners of war, political prisoners, refugees, or the members of an ethnic or religious minority) are detained or confined under armed guard." The term "internment camp" is not in the dictionary, but the two terms are often used interchangeably.

[3] See "China continues its labour abuse practices against Uighurs: UN", *Al Jazeera* (11 February 2022), online: <www.aljazeera.com/economy/2022/2/11/china-continues-its-labour-abuse-practices-against-uighurs-un>; Matthew Hill, David Campanale & Joel Gunter, " 'Their goal is to destroy everyone': Uighur camp detainees allege systematic rape", *BBC News* (2 February 2021), online: <www.bbc.com/news/world-asia-china-55794071>; Ewelina U Ochab, "Behind The Camps' Gates: Rape And Sexual Violence Against Uyghur Women", *Forbes* (3 February 2021), online: <www.forbes.com/sites/ewelinaochab/2021/02/03/behind-the-camps-gates-rape-and-sexual-violence-against-uyghur-women/?sh=d3d62a168a5b>.

province, where they continue to be subject to invasive surveillance and attempts at cultural erasure. Recently, there has been increased attention on the actions and complicity of Western-based multinational corporations ("MNCs") who manufacture their goods at factories that use forced labour sourced from concentration camps. In turn, this has elicited questions over the legal ramifications of profiting off of abuses that human rights NGOs claim amount to crimes against humanity.[4] To date, MNCs have largely been able to slip through the cracks of international justice processes, but with recent reports revealing that at least eighty-three major brands are currently profiting off of the forced labour of Uyghur ethnic minorities in the region,[5] it poses the question: what will it take to change the culture of impunity that enables corporations to profit off and/or commit grave breaches of international law?

This paper will loosely use clothing manufacturers that either manufacture their goods in, or source materials from, factories using forced labour in the Xinjiang region—an involvement that, I argue, amounts to complicity in crimes against humanity—as a case study to explore how the question of corporate accountability has been broached in international law, focusing on the role of foreign national courts in spurring accountability processes. Section 2 of this paper will give a broad overview of the abuses taking place in the Xinjiang region, detailing relevant violations of international law and the complexities of holding a corporate legal person liable under criminal law. Next, Section 3 will explore the international legal frameworks governing corporate accountability, exposing the insufficiency of available

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[4] See " 'Break Their Lineage, Break Their Roots': China's Crimes against Humanity Targeting Uyghurs and Other Turkic Muslims" (19 April 2021), online (pdf): *Human Rights Watch* <www.hrw.org/report/2021/04/19/break-their-lineage-break-their-roots/chinas-crimes-against-humanity-targeting#> [HRW Report].

[5] See "China: 83 major brands implicated in report on forced labour of ethnic minorities from Xinjiang assigned to factories across provinces; Includes company responses" (last visit 4 December 2021), online: *Business & Human Rights Resource Center* <www.business-humanrights.org/en/latest-news/china-83-major-brands-implicated-in-report-on-forced-labour-of-ethnic-minorities-from-xinjiang-assigned-to-factories-across-provinces-includes-company-responses/> (the Business and Human Rights resource center has a running list of all allegations of corporate crimes in the Xinjiang region, including a record of company responses to allegations).

mechanisms. In light of this, Section 4 will look at how national courts have attempted to fill this gap. The comparative approach will focus on legal regimes in the United States, Canada, and France, arguing that the French model for criminal corporate accountability—a broad framework based on universal jurisdiction—is a preferred method that other countries should model.

2. Crimes Against Humanity in Xinjiang Province

The Chinese government's alleged[6] human rights abuses against Uyghurs and other Muslim minorities in Xinjiang has created what Amnesty International's Secretary General has called a "dystopian hellscape on a staggering scale."[7] Publications from NGOs and journalists have reported Muslim minorities being interned in "re-education camps," tortured and persecuted by a surveillance state. However, due to the Chinese government's refusal to allow a United Nations ("UN") investigation into the region,[8] there is little to no transparency surrounding happenings in the region. In response to calls for a UN-led fact-finding mission to Xinjiang, Foreign Minister Wang Yi denounced concerns over human rights abuses as "slanderous attacks" on China and defended the government's actions in the Xinjiang region as a necessary security and counter-terrorism

[6] The term "alleged" is used here due to the Chinese government's persistent denial of wrongdoing: see Rhoda Kwan, "China says it upholds human rights, opposes 'slanderous attacks' over Hong Kong, Xinjiang, Tibet", *Hong Kong Free Press* (24 February 2021), online: <hongkongfp.com/2021/02/24/china-says-it-upholds-human-rights-opposes-slanderous-attacks-over-hong-kong-xinjiang-tibet/>.

[7] See "China: Draconian repression of Muslims in Xinjiang amounts to crimes against humanity" (10 June 2021), online: *Amnesty International* <www.amnesty.org/en/latest/press-release/2021/06/china-draconian-repression-of-muslims-in-xinjiang-amounts-to-crimes-against-humanity/> [Amnesty Report].

[8] See Stephanie Nebehay, "China says door to Xinjiang 'always open', but U.N. rights boss should not prejudge", *Reuters* (2 March 2021), online: <www.reuters.com/article/us-china-rights-un-idUSKCN2AU0Z3>.

measure.[9] While the Chinese government is not alone in using "terrorism" as a blanket defence for mass human rights abuses, the refusal to acknowledge human rights abuses occurring in the region makes the possibility of domestic liability for corporations in China a very unlikely scenario—which is why this paper will focus on accountability occurring in international or foreign spaces, rather than exploring domestic processes.

2.A Background

China's *Da,* or "Strike Hard" campaign was commenced in 1996 as a police tactic.[10] The early campaign involved mainly raids, characterized by high levels of aggression and violence, attacking Uyghur neighbourhoods. The Chinese government's form of Han ethnonationalism was forced upon the region as materials found in relation to Uyghur literature, music, religion, and language were destroyed and anyone found to defend them was punished or shot.[11] It is thought that Muslim minorities in the Xinjiang region began to be rounded up and placed in detention centers as early as 2016.[12] Since then, it is estimated that up to two million Muslims have been detained in political education camps, detention centers, or prisons.[13] There is often no reason given for detention, but leaked government documents reveal that those who are educated, frequently travel (either domestically or internationally), or engage in certain Islamic religious practices have been targeted.[14] While interned, detainees are subject to brutal torture; documentation reveals "police detention facility staff beat detainees, hung them from ceilings and walls, forcibly deprived them of sleep, and subjected them to prolonged shackling." [15] Interviews with former detainees exposed other

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[9] Kwan, *supra* note 6.

[10] See Amnesty Report, *supra* note 7 at 21.

[11] See Connor W Dooley, "Silencing Xinjiang: The Chinese Government's Campaign Against the Uyghurs" (2019) 48:233 Ga J Intl & Comp L 235 at 247–48.

[12] See HRW Report, *supra* note 4 at 12.

[13] See *ibid* at 12–13

[14] See *ibid* at 14.

[15] *Ibid* at 19.

shocking forms of physical and psychological torture, as well as the emotional distress caused by the squalid living conditions. Women and girls at the centers were also the subject of extreme sexual violence, including forced sterilization. [16] Forced sterilization, recognized both as both a war crime and crime against humanity under the *Rome Statute*,[17] has historically been used by violent settler colonial states—including Canada and the United States—as a horrific form of population control. Reports on the situation estimate that there are plans to subject up to eighty percent of women of childbearing age to "intrusive birth prevention surgeries."[18]

The goal of the arbitrary mass detention and systemic abuse is primarily cultural and religious erasure. Termed "transformation through education" (or *jiaoyu zhuanhua* in Mandarin), the government's campaign slogan "wash brains, cleanse hearts" describes the re-education campaigns designed to strip Muslim minorities in China of their culture, religion, and traditional ways of life.[19] Part of this cultural and religious erasure has been the destruction of mosques, burial grounds, and other important historical sites.[20] To ensure that released detainees do not go back to their original ways of life, those targeted by the campaign are subject to surveillance after their release. Though the Chinese government is known for its mass surveillance throughout Mainland China and Hong Kong, the tracking of Muslim minorities

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[16] See Lisa Reinsberg, "China's Forced Sterilization of Uyghur Women Violates Clear International Law" (29 July 2020), online: *Just Security* <www.justsecurity.org/71615/chinas-forced-sterilization-of-uyghur-women-violates-clear-international-law/>.

[17] See *Rome Statute of the International Criminal Court*, (last amended 2010), 17 July 1998 [*Rome Statute*].

[18] Reinsberg, *supra* note 16.

[19] See Adrian Zenz, " 'Wash Brains, Cleanse Hearts': Evidence from Chinese Government Documents about the Nature and Extent of Xinjiang's Extrajudicial Internment Campaign" (2019) 7:11 J Political Risk 1.

[20] See Giavanna O'Connell, "How China is Violating Human Rights Treaties and its own Constitution in Xinjiang" (19 August 2020), online: *Just Security* <www.justsecurity.org/72074/how-china-is-violating-human-rights-treaties-and-its-own-constitution-in-xinjiang/>. See also "ICC opens trial against Mali national over Timbuktu destruction", *Al Jazeera* (14 July 2020), online: <www.aljazeera.com/news/2020/7/14/icc-opens-trial-against-mali-national-over-timbuktu-destruction> (this article details how similar crimes occurred in Timbuktu that were later prosecuted as war crimes by the ICC).

in the Xinjiang region is particularly invasive. Citizens have been encouraged to monitor each other, with collective punishment imposed for one household's violation of state rules.[21]

Numerous reports also cite instances of forced labour taking place within the context of the Chinese government's "idle labour transfer program."[22] This program began in 2006, but intensified in 2017, with a marked increase in the amount of coerced labour.[23] Since 2017, forced labour in the Xinjiang region has been deeply tied to the political education camps in the province.[24] As part of the Chinese government's propaganda campaigns, the Communist party has aired videos of Muslim inmates in internment camps sitting at sewing machines praising the program as "providing job training and putting detainees on the production lines for their own good, offering an escape from poverty, backwardness and the temptations of radical Islam."[25] However, increasing evidence points to these so-called "vocational training centers" being staffed through forced labour. Atajurt Kazakh Human Rights, a Kazakhstan-based organization that has been pivotal in uncovering the abuses occurring in Xinjiang, conducted interviews with former detainees who affirmed being forced to work in the camps after completing indoctrination programs.[26] The Xinjiang region hosts manufacturing factories for a variety of products, but is known for the production of textile goods and cotton.[27] Many former political detainees cite being compelled to work in these textile and clothing manufacturing centers after their detention in difficult

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[21] See HRW Report, *supra* note 4 at 18.

[22] *Ibid* at 34.

[23] See *ibid* at 34.

[24] See Amnesty Report, *supra* note 7 at 21.

[25] Chris Buckley & Austin Ramzy, "China's Detention Camps for Muslims Turn to Forced Labor", *The New York Times* (16 December 2018), online: <www.nytimes.com/2018/12/16/world/asia/xinjiang-china-forced-labor-camps-uighurs.html>.

[26] See *ibid*. See also Mehmet Volkan Kaşıkçı, "Documenting the Tragedy in Xinjiang: An Insider's View of Atajurt", *The Diplomat* (16 January 2020), online: <thediplomat.com/2020/01/documenting-the-tragedy-in-xinjiang-an-insiders-view-of-atajurt/>.

[27] See Amnesty Report, *supra* note 7 at 128.

and dangerous conditions for an extremely low wage, and under constant surveillance of the Chinese government.[28]

The list of violations of international law violations is long, but among the conventions that China has ratified, and provisions considered either customary international law or *jus cogens*, some alleged violations include:

- *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (ratified by China in 1988): allegations of widespread physical and mental abuse at the detention centres, including waterboarding and electric shock, [29] meet the CAT's definition of torture (Article 1).[30]
- *International Convention on the Elimination of All Forms of Racial Discrimination* (ratified by China in 1981): the forced sterilization of women violates Article 11 of CEDAW.[31]
- *Convention on the Elimination of All Forms of Discrimination against Women* (ratified by China in 1980): discrimination against Uyghur minorities violates prohibitions on discrimination in the granting of civil rights, including freedom of movement, freedoms to education and healthcare, and freedoms to thought, religion and expression (Articles 2 and 5).[32]
- *International Covenant on Economic, Social and Cultural Rights* (ratified by China in 2001): the difficult work conditions and ongoing cultural

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[28] See *ibid* at 128; Buckley & Ramzy, *supra* note 25.

[29] See O'Connell, *supra* note 20.

[30] See *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987, in accordance with article 27 (1)) [CAT].

[31] See *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) [CERD].

[32] See *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) [CEDAW].

erasure violate provisions of the ICESCR, including the right to work in which she freely chooses or accepts (Article 6), right to safe and properly remunerated working conditions (Article 7), and rights to participate in cultural life (Article 15).[33]

- *International Covenant on Civil and Political Rights* (signed by China in 1998): without ratification this is not binding, but a number of violations, including the right to life (Article 6), right to be free from forced labour (Article 8), right to liberty and security of the person (Article 9), and due process rights (Article 14) are widely considered part of customary international law (or even *jus cogens*).[34]
- *Universal Declaration of Human Rights*: contraventions of the UDHR, which is widely recognized as customary international law, include violations of rights to life, liberty and security of the person (Article 3), right to be free from discrimination (Article 7), due process rights violated by practice of arbitrary detention (Articles 9 to11), right to freedom of movement (Article 13), and freedoms of religion, opinion and association (Articles 18 to 20).[35]

The above list is non-exhaustive, as there is much overlap among the treaties, but the brief list gives a sense of the extensive human rights violations taking place in Xinjiang. Moreover, many of the policies being implemented in the Xinjiang region also contradict China's own Constitution, including provisions

[33] See *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

[34] See *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) [ICCPR].

[35] See *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) [UDHR]. See also Christine Chinkin, "Sources" in Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran, eds, *International Human Rights Law*, 3rd ed (Oxford University Press, 2018).

proposing to protect minority rights,[36] freedom of religion,[37] and freedom of speech,[38] as well as provisions restricting state powers of arbitrary arrest.[39] The argument being made by NGOs, including Human Rights Watch and Amnesty International, is that the violations have reached the systemic nature required to meet the threshold for crimes against humanity. The relevant provision of the *Rome Statute*, Article 7(1), reads:

> For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
>
> (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

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[36] See *China (People's Republic of)'s Constitution of 1982 with Amendments through 2018* (English translation last visited online at: www.constituteproject.org/constitution/China_2018.pdf?lang=en), art 4 [*China Constitution*].

[37] See *ibid*, art 36. See especially Article 36(2): "No state organ, public organization, or individual may compel citizens to believe in, or not to believe in, any religion; nor may they discriminate against citizens who believe in, or do not believe in, any religion."

[38] See *ibid*, art 41.

[39] See *ibid*, art 27

> 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.[40]

Despite the many violations committed by the State listed above, this paper will focus on the complicity of corporations in the crimes against humanity being committed by the Chinese government. The focus on crimes meeting this threshold is that, as violation classified as a crime under the *Rome Statute* and as a violation of customary international law, there is more of a basis for prosecution than for other crimes on the list; this will be further explored in Section 4 of this paper.

2.B Global Supply Chains and Criminal Accountability for Legal Persons

The Chinese government should be held liable under international law for committing crimes against humanity. However, they are not the only actors responsible for the atrocities in the Xinjiang region. By manufacturing goods in factories that use forced labour from internment camps currently housing hundreds of thousands of Uyghurs and other Muslim minorities, corporations are playing a direct role in the Chinese government's crimes against humanity.

In 2020, the Australian Strategic Policy Institute released a report titled "Uyghurs for sale" drawing a connection between forced labour in Xinjiang and the global supply chain, implicating a number of high-profile Western clothing brands and manufacturers of miscellaneous goods.[41] The response from civil

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[40] See *Rome Statute, supra* note 17 [emphasis added].

[41] See Vickey Xiuzhong et al, "Uyghurs for sale" (1 March 2020), online: *Australian Strategic Policy Institute* <www.aspi.org.au/report/uyghurs-sale> [ASPI Report]; The full list of all eighty-two brands linked with factories in the Xinjiang region known to use forced labour are: Abercrombie & Fitch, Acer,

society has been powerful; exposing abuses and launching boycotts against key brands. However, due to the complexity of global supply chains, consumers are not fully aware of the implications of their consumption habits, limiting the effectiveness of such strategies.[42] This tactic of "naming and blaming" can be quite effective in shaping corporate behaviour—but it should not be a substitute for criminal sanctions, and should operate in conjunction with criminal prosecution. In addition to the conventional criminal law justifications for the prosecution of criminal behaviour, firms are ultimately driven by financial incentives, and "[c]riminal sanctions could lead to a public relations disaster for a multinational firm, which in turn would translate into tangible financial losses and potential shareholder litigation."[43] However, there are several conceptual difficulties to holding legal persons liable for criminal acts, that should be broached before further exploring the legal frameworks that make this liability possible.

Holding a corporation criminally responsible for wrongdoing is often difficult to conceptualize because, as a legal person, a corporation cannot possess the same *mens rea* requirements required for individual criminal responsibility. On this point, former Chief Justice Lamer of the Supreme Court of Canada opined that:

> when the criminal law is applied to a corporation, it loses much of its "criminal" nature and becomes, in essence, a

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Adidas, Alstom, Amazon, Apple, ASUS, BAIC Motor, Bestway, BMW, Bombardier, Bosch, BYD, Calvin Klein, Candy, Carter's, Cerruti 1881, Changan Automobile, Cisco, CRRC, Dell, Electrolux, Fila, Founder Group, GAC Group (automobiles), Gap, Geely Auto, General Motors, Google, Goertek, H&M, Haier, Hart Schaffner Marx, Hisense, Hitachi, HP, HTC, Huawei, iFlyTek, Jack & Jones, Jaguar, Japan Display Inc., L.L.Bean, Lacoste, Land Rover, Lenovo, LG, Li-Ning, Marks & Spencer, Mayor, Meizu, Mercedes-Benz, MG, Microsoft, Mitsubishi, Mitsumi, Nike, Nintendo, Nokia, Oculus, Oppo, Panasonic, Polo Ralph Lauren, Puma, SAIC Motor, Samsung, SGMW, Sharp, Siemens, Skechers, Sony, TDK, Tommy Hilfiger, Toshiba, Tsinghua Tongfang, Uniqlo, Victoria's Secret, Vivo, Volkswagen, Xiaomi, Zara, Zegna, ZTE.

[42] See "These Brands Are Still Linked to Uyghur Forced Labor. Help Stop Them Now" (15 April 2021), online: *Save Uighur* <www.saveuighur.org/these-brands-are-still-linked-to-uyghur-forced-labor-help-stop-them-now/>.

[43] Fien Schreurs, "Nestlé & Cargill v. Doe Series: Remedying the Corporate Accountability Gap at the ICC" (11 January 2021), online: *Just Security* <www.justsecurity.org/74035/nestle-cargill-v-doe-series-remedying-the-corporate-accountability-gap-at-the-icc/>.

> "vigorous" form of administrative law. With the possibility of imprisonment removed, and the stigma which attaches to conviction effectively reduced to loss of money, the corporation is in a completely different situation than is an individual.[44]

As will be explored below, some jurisdictions have distinguished criminal liability for legal persons from the "vigorous administrative liability" discerned by Chief Justice Lamer, as he then was, by devising a wider range of sanctions for corporations found guilty of criminal misconduct.

It is not just the applicability of sanctions that separate corporate criminal accountability from individual responsibility, but modes of liability. International criminal law (ICL) recognizes individual criminal liability as "[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime … shall be individually responsible for the crime."[45] While corporations can be directly involved in the commission of violations of international human rights law—as can corporate officers and executives, who can and should be prosecuted alongside the corporate legal person—often they are not the direct perpetrators of crimes, but are complicit in the crimes of others.[46] In ICL, complicity is a "doctrine that attributes criminal responsibility to those who are involved with but do not physically perpetrate a crime" and while

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[44] *R v Wholesale Travel Group Inc,* [1991] 3 SCR 154 at 182, 84 DLR (4th) 161.

[45] *Statute of the International Criminal Tribunal for the Former Yugoslavia,* (last amended 2002), 25 May 1993, art 7(1) [*ICTY Statute*]; *Statute of the International Criminal Tribunal for Rwanda* (last amended 2006), 8 November 1994 [*ICTR Statute*], art 6(1). See also *Rome Statute of the International Criminal Court*, (last amended 2010), 17 July 1998 [Rome Statute] (similar components are in the definition covering modes of liability in Article 25 of the Rome Statute, notably Article 25(3)(c) states that, "In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person … For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission").

[46] See "Corporate Complicity & Legal Accountability: Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes" (2008), online (pdf): *International Commission of Jurists* <www.icj.org/wp-content/uploads/2012/06/Vol.1-Corporate-legal-accountability-thematic-report-2008.pdf>.

its normal scope of application is disputed, it is an essential aspect of corporate liability.[47]

International jurists have argued that the scope of ICL in the context of corporate liability extends to the manner in which corporations benefit from opportunities or an environment created by human rights violations. This can include enabling ("without the company's conduct the abuses would not have occurred"), exacerbating ("the company's conduct makes the abuses and harm worse") and/or facilitating ("the company's conduct changes the way the abuses are carried out") violations.[48] This "causation continuum" ranges from corporations silently operating in countries where gross human rights abuses are being perpetrated without taking any action, to corporations receiving an economic or commercial benefit arising from activities aligned with the abuses, to direct involvement or commission of crimes. I would argue that most corporate involvement in the Xinjiang region falls on the latter half of this spectrum.[49] For instance, Qingdao Taekwang Shoes Co. Ltd (which produces Nike shoes), employs over 600 Uyghur ethnic minorities, many of whom were formerly interned at "re-education camps." After their day making Nike products at the factory, workers are forced to undergo "night school" where they study Mandarin, sing the Chinese anthem, and undertake other so-called patriotic education.[50] Nike's complicity arises both from its irrefutable knowledge of the factory's connection to the concentration camps, and how it is profiting off of forced labour arising from the Chinese government's crimes against humanity.[51] However, the dynamics

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[47] Marina Aksenova, *Complicity in International Criminal Law* (Oxford: Hart, 2016) at 1. See also Sabine Michalowski "Due Diligence and Complicity: A Relationship in Need of Clarification" in Surya Deva & David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press, 2013).

[48] See *ibid*.

[49] See *ibid*.

[50] See *ASPI Report, supra* note 41.

[51] See Wesley J Smith, "Nike Chooses China Profits Over Uyghur Slaves" (29 June 2021), online: *Humanize* <humanize.today/2021/06/nike-chooses-china-profits-over-uyghur-slaves/>; Elizabeth Brotherton-Bunch, "Despite Accusations That It Benefits From Forced Labor in Xinjiang, Nike Remains Committed to China" (9 August 2021), online: *Alliance for American Manufacturing* <www.americanmanufacturing.org/blog/despite-accusations-that-it-benefits-from-forced-labor-in-xinjiang-nike-remains-committed-to-china/>;

are not always this direct—due to the complexity of global supply chains, clothing brands could be sourcing material from a factory using forced labour, or otherwise connected to the Chinese government's campaign against the Uyghur minority several steps down their supply chain. The implications of more indirect implication in terms of legal liability remains unclear, however, it is apparent that MNCs can no longer be able to operate without oversight, and with impunity.

3. Corporate Accountability Under International Law

The law has fundamentally been a state-centric endeavour. Domestically, states are tasked with applying their own laws, within their own borders, while international law is focused on the relationships between states: at once creating obligations on States as primary duty-bearers responsible for implementing human rights standards and constraining the actions of States who perpetrate human rights abuses.[52] As non-state actors, particularly MNCs, grow in power and influence, their acts have largely slipped through the cracks of international human rights and humanitarian legal systems. However, as transnational corporations become increasingly complicit in or responsible for human rights violations and grave breaches of international law, the international legal order is devising new mechanisms for accountability.

This section will briefly address existing international regulations for MNCs in the sphere of business and human rights and demonstrate the international legal system's inability (or

Michael Martina, "U.S. senator slams Apple, Amazon, Nike, for enabling forced labor in China", *Reuters* (10 June 2021), online: <www.reuters.com/business/retail-consumer/us-senator-slams-apple-amazon-nike-enabling-forced-labor-china-2021-06-10/>.

[52] See Frédéric Mégret, "Nature of Obligation" in Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran, eds, *International Human Rights Law*, 3d ed (Oxford: Oxford University Press, 2018).

unwillingness) to contend with the increasing need for corporate accountability for grave breaches of international law.

3.A Criminal Corporate Liability in International Courts

The exclusion of liability for legal persons under ICL was established by the International Military Tribunal at Nuremberg in *United States v. Goring*, where the Court stated "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[53] This standard has been followed by the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda as they only conferred jurisdiction over "natural persons."[54]

At the International Criminal Court (ICC), corporate legal persons are not included as being under the jurisdiction *Rome Statute*, however there is potential for individual criminal responsibility for corporate executives under Article 25.[55] Some have argued for an amendment expanding criminal liability to corporate legal persons for crimes under the *Rome Statute*, including crimes against humanity, but this is not likely to materialize in the foreseeable future. One obstacle to such an amendment is the principle of complementarity and the ICC being a court of last resort.[56] Seeing as many states do not recognize legal persons within their internal criminal law systems, the recognition of legal persons under the *Rome Statute* could be inconsistent with this principle.[57] Another issue is that the ICC has long been overstretched, with resource and capacity issues overshadowing its growing caseload.[58] Given these challenges, it

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[53] *United States et al. v Goering*, Final Judgement (30 September 1946) at 52 (International Military Tribunal at Nuremberg, Germany).

[54] *ICTY Statute*, *supra* note 45, art 6; *ICTR Statute*, *supra* note 45, art 5.

[55] See Jelena Aparac, "Which International Jurisdiction for Corporate Crimes in Armed Conflicts?" (2016 57 Harv Intl LJ 40; *Rome Statute, supra* note 17.

[56] See *ibid*.

[57] See *ibid*.

[58] See "Facing Political Attacks, Limited Budget, International Criminal Court Needs Strong Backing to Ensure Justice for Atrocity Crimes, President Tells General Assembly", *UN Press* (29 October 2018), online:

seems unlikely that a radical expansion of the ICC's mandate, unless accompanied by a similarly impressive increase in resources, will lead to a substantial shift in the landscape of international justice with regards to prosecution of corporate wrongdoing. Finally, should the ICC's jurisdiction be expanded to included non-state actors, the authority of the Court would likely be predicated on the ratification status of the country where abuses occur.[59] With several corporation-friendly countries, such as the United States and China, not having ratified the *Rome Statute* and waning legitimacy of the Court in parts of the Global South, relying on the ICC to be the end-all-be-all of international justice has its flaws.

There are two notable exceptions in ICL that have created models for its applicability to legal persons: the Special Tribunal for Lebanon and the *Draft Protocol on Amendments to the Protocol of the African Court of Justice and Human Rights (2014)*, adding a criminal chamber to the African Court of Justice and Human Rights.[60] At the Special Tribunal for Lebanon, the landmark case of *Prosecutor v. Al Khayat,* marked the first time in ICL that a hybrid tribunal held a legal person responsible for violations of international law, simultaneously charging a

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<www.un.org/press/en/2018/ga12084.doc.htm>. Anecdotally, one of the most common issues that came up in meetings during my internship was the capacity and funding of the International Criminal Court. This seemed to be something that was persistently in NGO discussions on where to apply pressure on the ICC, and how international justice should be pursued. A recent example of this is how the ICC cited "overstretched resources" for closing the investigation in Afghanistan in 2019: see "ICC: Judges Reject Afghanistan Investigation" (12 April 2021), online: *Human Rights Watch* <www.hrw.org/news/2019/04/12/icc-judges-reject-afghanistan-investigation#>.

[59] Seeing as corporations, like any non-State entity, cannot ratify international documents, this would likely be the simplest route. However, this could lead to corporations moving or incorporating in jurisdictions that have not ratified the ICC to escape the jurisdiction of the ICC.

[60] See AU, First Meeting of the Specialized Technical Committee on Justice and Legal Affairs, *Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, STC/Legal/Min/7(I) Rev 1 (May 2014) [*AU Draft Protocol*]; Andrew Clapham, "Human Rights Obligations for Non-State Actors: Where Are We Now?" in Fannie Lafontaine & François Larocque, eds, *Doing Peace the Rights Way: Essays in International Law and Relations in Honour of Louise Arbour* (Intersentia, 2019) 11.

corporation and an individual corporate executive with contempt of court and obstruction of justice, in relation to an international crime.[61] In Africa, the *AU Draft Protocol* amendment allows for the criminal prosecution of legal persons, including corporations, in the newly established criminal chamber.[62] Neither development has yielded additional significant outcomes, but both demonstrate a shift from the international community towards closing the accountability gap in corporate liability.

3.B Intergovernmental Organizations & Soft Law

Efforts from intergovernmental organizations to impose human rights obligations on MNCs at the international level have, to date, focused on the human rights obligations of states to restrain the actions of corporations domiciled within their jurisdiction. For instance, in General Comment 24 clarifying the extent to which the *International Covenant on Economic, Social and Cultural Rights* (a legally binding instrument) applies to MNCs, the Committee on Economic, Social and Cultural Rights found that it applied to States in their regulation of multinational corporations domiciled on their territory.[63] There are also a number of soft law instruments outlining responsible conduct for multinational enterprises, including the *United Nations Guiding Principles on Business and Human Rights* (UNGPs), the *Draft UN Code of Conduct on Transnational Corporations*, the *OECD Guidelines for Multinational Enterprises* and the *ILO Tripartite Declaration of Principles on Multinational Enterprises and Social Policy*.

The *United Nations Guiding Principles on Business and Human Rights*[64] are probably the most comprehensive set of

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[61] See Jaya Bordeleau-Cass, "The 'Accountability Gap': Holding Corporations Liable for International Crimes" (2019) 3 PKI Global Justice Journal 65.

[62] See *AU Draft Protocol, supra* note 60. Article 46C on Corporate Criminal Liability reads "For the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States."

[63] See Tara Van Ho, "General Comment No. 24 (2017) on State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities (CESCR)" (2019) 58:4 ILM 872.

[64] See *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework,* UNOHCHROR, 2011, HR/PUB/11/04 [UNGP].

norms detailing human rights obligations of corporations, but are limited in that they are not binding. Moreover, the UNGPs clearly convey that the primary legal obligation to respect and protect human rights lies with the state. In terms of the obligations placed on corporations, the UNGPs are clear that while its provisions outline moral ideals, legal responsibilities are found elsewhere.[65] Reinforcing the importance of national courts in this search for responsibility, Article 12 states "[t]he responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions."[66]

Despite the vast number of international sources outlining the moral and social responsibilities of corporations, the absence of a binding document creating enforceable obligations for MNCs leaves a gaping hole in international law. While the UNGPs in particular paint an idealistic picture of how corporations *should* act, counting on profit-driven and power-hungry entities to "do the right thing" is futile in a capitalist society. Drawing on Article 12 of the UNGPs, the next Section of this paper will examine how national jurisdictions have approached this issue of legal liability.

4. National Courts and International Crimes

Beginning to bridge this gap in international justice are the increasing number of lawsuits against MNCs initiated in national courts. This is mainly occurring through civil lawsuits brought against MNCs for violations committed by their subsidiaries in the Global South, with some jurisdictions chipping away at some of

[65] See Clapham, supra note 60 at 27.

[66] UNGP, *supra* note 64. See also John Ruggie, *Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie,* UNHRCOR, 17th Sess, UN Doc A/HRC/17/31 (2011); John Gerard Ruggie & John Sherman, "The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale" (2017) 28:3 Eur J Intl L 921; Michael Addo, "The Reality of the United Nations Guiding Principles on Business and Human Rights" (2014) 14:1 Hum Rts L Rev 133.

the jurisdictional technicalities that previously shielded these entities from accountability. The other principal manner in which lawsuits are brought against MNCs in foreign courts is through the exercise of universal jurisdiction. Universal jurisdiction references "the authority of national judicial systems to investigate and prosecute certain of the most serious crimes under international law no matter where they were committed, and regardless of the nationality of the suspects or their victims."[67] This is an increasingly important movement in international justice as it attributed criminal liability to MNCs in ways that ICL has otherwise been unable to do, and it was a substantial focus of the International Justice department at Human Rights Watch that I worked with over the summer.

Since many of the corporations implicated in the crimes against humanity occurring in the Xinjiang region are incorporated in one of the jurisdictions below (or have some other connection, such as a parent-subsidiarity relationship), it follows that there is a space for courts in these countries to have a role in the accountability process. This section of the paper will explore how three foreign national jurisdictions—the United States, Canada, and France—have approached the issue of MNCs domiciled within their jurisdiction being complicit in grave breaches of international law.

4.A United States

Widely considered a hegemon in international law, the United States is a major player in the conversation surrounding corporate accountability. Living up to its reputation as a jurisdiction that is fairly friendly to corporations, the U.S. has not prioritized open avenues for corporate accountability, especially not for corporations committing human rights violations abroad, either directly or through its subsidiaries. Due to the American government's own dismal human rights record and persistent resistance to the jurisdiction of international courts and bodies, including its opposition to the ICC[68] and its refusal to implement

[67] "Universal Jurisdiction" (last visited 3 December 2021), online: *Human Rights Watch* <www.hrw.org/topic/international-justice/universal-jurisdiction>.

[68] The United States' opposition to the International Criminal Court ranges from its unwillingness to ratify the Rome Statute, to direct hostilities to the Court and its officials, depending on the incumbent President/political party.

certain (binding, but practically unenforceable) International Court of Justice decisions,[69] this stance is perhaps unsurprising.

One of the potentially key bases for corporate accountability in the United States is the *Alien Tort Statute*.[70] Enacted in 1789, the statute gives jurisdiction to U.S. federal courts to hear lawsuits filed by non-U.S. citizens for violations of international law.[71] Originally used as a tool to regulate disputes regarding diplomatic relations, in the post-UDHR landscape the *Alien Tort Statute*'s potential in creating a space for non-U.S. citizens to hold American perpetrators of human rights abuses accountable was explored.[72]

However, what could have grown to be an important avenue for non-U.S. citizens to pursue justice and accountability in American courts has not lived up to its potential. A series of cases in the past few decades has restricted the applicability of the *Alien Tort Statute* to the point that it applies only in extremely limited circumstances. In *Sosa v. Álvarez-Machain et al.*, the Supreme Court of the United States limited applicability to only the most egregious human rights violations—stating that only cases regarding violations of a norm that is "specific, universal, and obligatory" should be heard by American courts.[73] The applicability of the statute was further narrowed with the cases of

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[69] See e.g. Natasha Turak "US rejects International Court of Justice ruling on Iran, continuing its isolationist charge", *CNBC* (5 October 2018), online: <www.cnbc.com/2018/10/05/us-rejects-international-court-of-justice-ruling-on-iran-continuing-its-isolationist-charge.html>; Martin Cleaver & Mark Tran, "US dismisses World Court ruling on contras", *The Guardian* (28 June 1986), online: <www.theguardian.com/world/1986/jun/28/usa.marktran>.

[70] See *Alien Tort Statute*, 28 USC § 1350 (2011) [*Alien Tort Statute*].

[71] See "The Alien Tort Statute" (last visited 4 December 2021), online: *The Center for Justice & Accountability* <cja.org/what-we-do/litigation/legal-strategy/the-alien-tort-statute/>.

[72] See *Filártiga v Peña-Irala*, 630 F (2d) 876 (2d Cir 1980) (the Court held that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties" and awarded restitution to the victims of human rights abuses at 1).

[73] *Sosa v Álvarez-Machain et al.*, 542 US 692 (2004).

Kiobel v. Royal Dutch Petroleum[74] and *Jesner v. Arab Bank*,[75] the latter holding that the "presumption against extraterritoriality applies to claims under the [*Alien Tort Statute*]" thereby excluding cases without a strong connection to the U.S., and the former excluding foreign corporate defendants from the reach of the Statute.

In the mid-1990s, the prospective of the *Alien Tort Statute* for MNC accountability was realized, and a wave of lawsuits barraged U.S.-based corporations for their complicity in human rights abuses abroad. Though two cases—*Doe v. Unocal*[76] and *Wiwa v. Shell*[77]—resulted in monetary reparations paid to victims of human rights abuses committed by corporations, there has yet to be a case that has held a corporate defendant liable at trial. The most recent case brought against a U.S. MNC using the *Alien Tort Statute* was the case of *Doe v. Nestlé S.A.*[78] In its decision, the Ninth Circuit Court of Appeal challenged existing precedent by widening the scope of ATS liability and finding that the financial support provided to purchase supplies, the facilitation of supplier inspections and the fact that financing decisions were made from the U.S. office, meant there was sufficient jurisdiction for the case to proceed under the *Alien Tort Statute*. Nestlé requested a review from the Supreme Court, stating that the reasons given were not sufficient to rebut the presumptions of extraterritoriality, and that the plaintiffs hadn't shown that they intended to perpetuate child slavery.[79] The Supreme Court

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[74] *Kiobel v Royal Dutch Petroleum Co*, 569 US 108 (2013).

[75] *Jesner v Arab Bank, Plc,* 138 S Ct 1386 (2018).

[76] See *Doe v Unocal*, 395 F (3d) 932 (9th Cir 2002) (this was a case filed by four Burmans against Unocal, and its Californian parent for violations of international human rights law).

[77] See *Wiwa v Royal Dutch Petroleum Co*, 96 Civ 8386 (KMW) (HBP), 01 Civ 1909 (KMW) (HBP), 02 Civ 7618 (KMW) (HBP) (SDNY 2009) (this was three lawsuits against Shell and its Nigerian subsidiary for complicity in human rights abuses against the Ogoni in Nigeria).

[78] See *Nestlé USA Inc v Doe et al,* 929 F (3d) 623 (2021) [*Nestlé USA Inc v Doe et al*]; "Nestlé USA v. Doe I" (last visited 2 December), online: *Ballotpedia* <ballotpedia.org/Nestl%C3%A9_USA_v._Doe_I> [Nestlé USA, *Ballotpedia*].

[79] This element of "purpose" was established in *The Presbyterian Church Of Sudan et al v Talisman Energy, Inc. And Republic Of The Sudan*, where the Second Circuit Court of Appeals established that a finding of liability required the defendant act with purpose to support offences: see *Presbyterian Church of Sudan v Talisman Energy Inc*, 244 F Supp (2d) 289 (SDNY 2003).

reversed the Ninth Court of Appeal's decision and remanded the case for further proceedings. The Court held that for domestic application of the *Alien Tort Statute*, plaintiffs must allege more domestic conduct then general corporate activity. In the case at hand, though financing decisions occurred in the U.S., most operations occurred in the Ivory Coast, making the *Alien Tort Statute* inapplicable.[80] The judgement, delivered by Justice Thomas, impeded future applicability of the statute to MNCs, save exceptionally narrow circumstances.

Between the restrictions in the applicability of the *Alien Tort Statute* and the lack of success in using the statute against MNCs, the prospect of liability for U.S. corporations complicit in crimes against humanity, or otherwise guilty of committing human rights abuses in the Xinjiang region, under the *Alien Tort Statute* is not impossible, but it is slim. For instance, non-U.S. citizens can bring suits for a number of grave human rights violations—including crimes against humanity; torture, extrajudicial killing; forced disappearance; cruel, inhuman, or degrading treatment; prolonged arbitrary detention; genocide; war crimes; slavery; and state-sponsored sexual abuse—many of which have been documented in the Xinjian region. However, claimants would need to establish a strong connection with the United States, and there remains a risk that the overwhelmingly right-wing conservative bench would continue to narrowly interpret the ATS.

Despite the closing of traditional avenues for accountability in U.S. law, one area of progress is the use of administrative law to achieve substantive human rights-based objectives. For instance, U.S.-based NGOs have been using trade laws to prevent corporations from importing goods using forced labour into the United States. On 28 August 2020, the Corporate Accountability Lab in Chicago filed a petition with U.S. Customs and Border Protection using Section 307 of the 1930 *Tariff Act*, which prohibits the importation of any product that was produced or manufactured wholly or in part by forced labor. The petition was approved on 14 September 2020 and companies were barred from importing goods into the U.S. from the Xinjiang region, if

[80] See *Nestlé USA Inc v Doe et al*, *supra* note 78; Nestlé USA, *Ballotpedia*, *supra* note 78.

those goods were produced using forced labor.[81] This is not an isolated occurrence; Section 307 is increasingly being deliberately used as a human rights tool. In 2015, Congress passed the *Trade Facilitation and Trade Enforcement Act* of 2015 that closed the "consumptive demand loophole" which provided that Section 307 did not apply if the goods being produced using forced labor were meeting a consumptive demand of the United States. There have been successes in this area: when a Withhold Release Order was authorized by Customs and Border Protection and issued against Top Glove, a rubber glove manufacturer accused of using forced labour, the importation of gloves being produced by two of its subsidiaries was blocked, despite the increased demand for these producers during the COVID-19 pandemic. Subsequently, the corporation announced that it would remediate recruitment fees and improve worker's conditions. Top Glove never explicitly stated that this was due to possible lost sales and, according to a migrant's rights group, the monetary amounts being given to workers is far less than what they are owed, but it in a country where there are so many challenges to corporate accountability, it is a start.[82]

Many countries do have similar prohibitions on the import of goods produced using forced labour, as do many trade agreements—including the *Canada-United States-Mexico Agreement* (better known as CUSMA, or NAFTA 2.0), however these provisions (though extremely necessary) are insufficient as they do not entail any direct liability for corporations who engage in these practices.[83] Blocking imports of goods producing forced

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[81] See Zeb Larson, "American Companies Are Profiting Off of Labor Camps in Xinjiang", *The Progressive Magazine* (18 September 2020), online: <progressive.org/latest/american-companies-profiting-xinjiang-larson-200918/>. Uniqlo, one of the brands mentioned in the article that had a shipment of shirts blocked at the U.S. border in May 2021 due to concerns that they violated a ban on the cotton products produced using forced labour, is also being investigated by France for their alleged role in the crimes against humanity being committed in the region.

[82] See *ibid*.

[83] See *Canada-United States-Mexico Agreement,* 30 November 2018 (last amended 10 December 2019). Article 23.6(1) of CUSMA reads: "The Parties recognize the goal of eliminating all forms of forced or compulsory labor, including forced or compulsory child labor. Accordingly, each Party shall prohibit the importation of goods into its territory from other sources produced in whole or in part by forced or compulsory labor, including forced or compulsory child labor."

labour may hurt the bottom line of companies to the extent that they alter their business practices, but this is not true for every corporation. For instance, companies like H&M—one of the most well-known brands to be named for their use of factories connected to internment camps in the Xinjiang region—has stores in seventy-four countries. The U.S. may be an important market for the retailer, but it is not solely determinative to the brand's success.

4.B Canada

In Canadian law, substantial aspects of the law surrounding liability for MNCs have evolved in the context of Canadian mining operations in Latin America. As one of the world's biggest mining superpowers, Canada is home to the parent companies of thousands of mining subsidiaries across the world.[84] Until the last decade or so, these subsidiaries were able to commit human rights and environmental violations with relatively little oversight and next to no accountability. Filling Canadian law's transnational governance gap, several notable cases took place extending Canadian jurisdiction beyond its physical territorial borders.

The case of *Angelica Choc v. Hudbay Minerals Inc,* involving a claim against a subsidiary of Canadian-based Hudbay Mineral, marked a significant shift in Canadian jurisprudence, as the court rejected the defendant's *forum non conveniens* claims and found that the company has a duty of care regarding the actions of foreign subsidiaries, giving rise to potential liability.[85] A few years later, the 2017 case of *Garcia v. Tahoe Resources Inc* confirmed that Canadian courts have jurisdiction over cases involving foreign subsidiaries where that "evidence shows a real risk that the alternate forum will not provide justice."[86] These two very recent cases have created a precedent for victims of

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[84] See Andrew Findlay, "Canadian mining companies will now face human rights charges in Canadian courts", *The Narwhal* (7 June 2019), online: <thenarwhal.ca/canadian-mining-companies-will-now-face-human-rights-charges-in-canadian-courts/>. See generally "Control the Corporations" (last visited 4 November 2021), online: *Mining Watch Canada* <miningwatch.ca/focus/control-corporations>.

[85] See *Choc v Hudbay Minerals Inc*, 2013 ONSC 1414 [*Choc*].

[86] *Garcia v Tahoe Resources Inc,* 2017 BCCA 39 at para 124 [*Tahoe Resources*].

Canadian MNCs and their subsidiaries to bring a claim in tort law, if they can demonstrate that the Canadian parent company breached their duty of care and that local courts do not offer a reasonable prospect of success.

This trend of expanding civil liability to include liability for corporations and their subsidiaries who commit violations of foreign law through tort law, can be seen across other common law jurisdictions. In the United Kingdom, two notable cases—*Lungowe v. Vedanta* and *Okpabi v. Royal Dutch Shell*—have been allowed to proceed in U.K. courts under the umbrella of the tort law of negligence.[87] In the U.K., it is the parent company's breach of the standard of care that may give way to liability. Neither of the cases have yet been heard on the merits; *Lungowe* was resolved in a private settlement[88] and *Okpabi* has been authorized to proceed, with the hearing of the case on its merits likely to occur in 2022.[89]

One of the most promising developments in Canadian law with regards to corporate accountability is the precedent set by *Nevsun v. Araya*.[90] In the 2020 case, the Supreme Court of Canada was asked to address the question of liability for Nevsun, a MNC incorporated in British Columbia, for the actions of its subsidiaries who owned controlling interested in Bisha Mine in Eritrea. Though Nevsun's subsidiaries were alleged to have violated international legal norms on slavery and forced labour, the question before the Court was one of jurisdiction. In a significant step forward for corporate accountability in Canada, the Court held that violations of customary international law can

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[87] See *Lungowe v Vedanta Resources plc,* [2019] UKSC 20 [*Lungowe*]; *Okpabi & Others v Royal Dutch Shell Plc & Another*, [2021] UKSC 3 [*Okpabi*].

[88] Like many settlements of this nature, the settlement was closed for an undisclosed amount, and there was no admission of guilt on the corporation's behalf.

[89] See *Lungowe, supra* note 87; *Okpabi*, *supra* note 87.

[90] See *Nevsun Resources Ltd v Araya,* 2020 SCC 5 [*Nevsun*]. See also Julianne Hughes Jennett & Marjun Parcasio, "Corporate Civil Liability for Breaches of Customary International Law: Supreme Court of Canada Opens Door to Common Law Claims in Nevsun v Araya" (29 March 2020), online (blog): *EJI Talk* <www.ejiltalk.org/corporate-civil-liability-for-breaches-of-customary-international-law-supreme-court-of-canada-opens-door-to-common-law-claims-in-nevsun-v-araya/>.

form the basis for a civil cause of action in Canadian courts.[91] The judgement in *Nevsun* has the potential to be revolutionary.

The creation of a broad cause of action based on violations of customary international law that can be brought by anyone, regardless of nationality, widens the scope of Canadian law in a manner that has far-reaching implications for corporate accountability. In this sense, compared to the United States, the avenues for liability under Canadian law are vast. However, there are limits to relying on civil causes of action, one being the scope of remedies. In the cases mentioned, victims were seeking monetary reparations for the harms that they had suffered—as is their right—but this also presents the risk that paying out lawsuits will become part of the cost of doing business for large MNCs, as occurred in the *Tahoe Resources* and *Nevsun* cases.[92]

Returning to the case study, though Canadian companies are active in the Xinjiang region, both in connection to fashion retailers and in the mining industry, there have been no lawsuits filed by victims of Canadian corporations in the region, to date. Similar to the United States, Canadian trade law bans the importation of goods manufactured using forced labour[93] and there are modest prohibitions on exporting certain goods to the Xinjiang region.[94] Global Affairs Canada has also issued an advisory on doing business in the region.[95] However, if a legal action against an MNC complicit in crimes against humanity in Xinjiang is commenced, there could be a reasonable prospect of success for legal liability in Canadian courts. The prohibition on

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[91] See *Nevsun, supra* note 90. See also Jennett & Parcasio, *supra* note 90.

[92] See *Choc, supra* note 85; *Tahoe Resources, supra* note 86.

[93] See David Green, "Canadian firms operate in China's Xinjiang region", *The Globe and Mail* (18 January 2021), online: <www.theglobeandmail.com/world/article-canadian-firms-operate-in-chinas-xinjiang-region>.

[94] See Ryan Patrick Jones, "Federal government moves to seal off Canadian companies from human rights violations in China", *CBC* (12 January 2021), online: <www.cbc.ca/news/politics/canada-xinjiang-forced-labour-1.5869752>.

[95] "Global Affairs Canada advisory on doing business with Xinjiang-related entities" (last modified 1 January 2021), online: *Government of Canada* <www.international.gc.ca/global-affairs-affaires-mondiales/news-nouvelles/2021/2021-01-12-xinjiang-advisory-avis.aspx?lang=eng>.

crimes against humanity is part of customary international law, so a victim of abuses would have the basis to bring a claim—if they can access Canadian courts. In *Nevsun*, the Supreme Court did not have to deal with questions of due diligence and modes of liability, including complicity, since Bisha Mine was directly owned by Nevsun's subsidiaries, but should a case be brought in the context of the violations in Xinjiang, it would present an interesting opportunity for the court to address these pressing issues.[96]

In terms of criminal responsibility, though Canada has power under universal jurisdiction through the *Crimes Against Humanity and War Crimes Act*,[97] this has not been used for corporate accountability. The wording of the act refers to individual criminal responsibility, and the strong influence of the *Rome Statute* in its conception implies that it was designed to apply in the same manner, meaning only to individuals as opposed to legal persons.[98] A counterargument could be that this act has not been used because there has not been the opportunity, but I would disagree. Not only do nearly all of the corporations on the *ASPI Report* list have subsidiaries and/or assets in Canada (for instance, H&M is a Swedish company but has subsidiaries registered in several Canadian provinces),[99] but even outside of the Xinjiang context, Canadian businesses abroad have been implicated in violations of international law since the *CAHWCA*'s inception.[100]

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[96] See *Nevsun*, *supra* note 90.

[97] See *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24 [CAHWCA].

[98] See "Scope and Application of Universal Jurisdiction in Canada (last visited 8 December 2021), online (pdf): *United Nations* <www.un.org/en/ga/sixth/75/universal_jurisdiction/canada_e.pdf>.

[99] For reference, the office registered in Toronto has a business number of 887634400.

[100] See e.g. Chris Arsenault, "Canada not walking the talk on its miners' abuses abroad, campaigners say", *Mongabay* (24 July 2020), online: <news.mongabay.com/2020/07/canada-not-walking-the-walk-on-its-miners-abuses-abroad-campaigners-say/>. This article is just one of many detailing abuses by the Canadian mining industry, with a map identifying projects spanning continents and decades.

4.C France

As a civil law jurisdiction, the French legal system operates differently than the previously discussed common law systems; cases are not led not by parties but by the *juge d'instruction*. In France, crimes under the ambit of universal jurisdiction—genocide, crimes against humanity, war crimes, torture, and crimes against cultural property—are prosecuted through *L'Office central de lutte contre les crimes contre l'humanité, les génocides et les crimes de guerre* (OCLCH).[101] The OCLCH is tasked with the initiation and oversight of investigations into alleged violations of the crimes within its jurisdiction, as well as with bringing charges when appropriate.[102] Through this office, France has used its powers under universal jurisdiction to expand its criminal law reach and pursue accountability not just for individuals, but for corporations domiciled on its territory.[103]

The prosecutor or the *juge d'instruction* can either initiate an investigation into alleged crimes under the jurisdiction of the OCLCH of their own accord, or complaints can be filed by victims or by NGOs, who can join proceedings as civil parties.[104] In order for a complaint to be filed the suspect has to reside in France, the State in which the crimes occurred needs to either have ratified the *Rome Statute* or there must be double criminality, [105] prosecutorial discretion, and subsidiarity.[106] Enabling the OCLCH

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[101] See "Universal Jurisdiction Law and Practice in France" (February 2019), online (pdf): *Open Society Justice Initiative* <www.justiceinitiative.org/uploads/b264bc4f-053f-4e52-9bb8-fccc0a52816a/universal-jurisdiction-law-and-practice-france.pdf> [*TRIAL Report*].

[102] See "L'Office central de lutte contre les crimes contre l'humanité, les génocides et les crimes de guerre (OCLCH)" (last visited 4 November 2021), online: *Ministère de l'intérieur* <www.gendarmerie.interieur.gouv.fr/notre-institution/nos-composantes/au-niveau-central/les-offices/l-office-central-de-lutte-contre-les-crimes-contre-l-humanite-les-genocides-et-les-crimes-de-guerre-oclch>.

[103] See *TRIAL Report*, *supra* note 101.

[104] See *ibid*; C proc civ, art 2 [*French Code of Civil Procedure*].

[105] Double criminality, in this case, means that the State must have criminalized ICC crimes within its jurisdiction, which China has.

[106] See *TRIAL Report, supra* note 101 (subsidiarity here means that "the prosecutor must make sure that no national or international court has asserted its jurisdiction over the case or has asked for the extradition of the suspect").

to exercise their powers of universal jurisdiction over legal persons are the 2004 amendments to the *French Criminal Code* allowing the prosecution of legal persons, including corporations, for all crimes included in the Code. Since the amendments, the OCLCH has pursued criminal charges against several MNCs domiciled in French territory accused of committing human rights violations in the Global South.[107]

In France, the *Criminal Code* allows for sanctions against legal persons including pecuniary fines, restraining measures, confiscation measures, or compliance-related measures (only for conviction related to corruption or influence peddling offenses).[108] The severity of sanctions depends on whether the offence is a felony, a misdemeanor, or a minor offence.[109] For felonies or misdemeanors, some of the restraining measures can include:

- Dissolution of the legal person, if the legal person was created with criminal intent;
- Potential permanent prohibition on exercising certain professional or corporate activity;
- Judicial supervision for up to five years;
- Closure of the facility used to make the offence;
- Debarment from public procurement for up to five years;
- Prohibition from listing securities on the stock exchange, potentially permanently;
- Prohibition on using cheques or payment cards for up to five years;
- Confiscation of goods or property used to commit the violations in question;
- Publication of the decision; or

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[107] See art 131-37—131-49 C pén (France) [*French Criminal Code*]. The articles identified (131-37 to 131-49) identify the sanctions specifically available to legal persons in the French Criminal Code.

[108] See Eric Lasry, "Corporate Liability in France", *Global Compliance News* (last visited 1 December 2021), online: <www.globalcompliancenews.com/white-collar-crime/corporate-liability-in-france/>.

[109] See *ibid*.

- Prohibition on receiving public aid or financial assistance, for up to five years.[110]

Moreover, if an individual fails to meet either legislative standards or a reasonable standard of care, there are specific circumstances in which individuals can incur personal criminal and/or civil liability separate from the liability attributed to the legal person. This is what happened in the *Lafarge* case. After a complaint was filed by the French Minister of Finance, Lafarge was charged with complicity in crimes against humanity, financing a terrorist enterprise, breaching an embargo and endangering the lives of others when they entered into negotiations with ISIS to secure permits to cross checkpoints and purchase oil. [111] Nine Lafarge executives were also charged as individuals for the same crimes. The case has not yet been heard on the merits, but the charges have been confirmed by the *Cour de Cassation* and the case should be heard sometime in 2022.[112] It is important that criminal accountability can co-exist against individuals and the legal persons. It prevents the "scape-goating" of a single corporate executive officer at the expense of accountability for the entire entity, while ensuring that the individuals most responsible are held liable for their conduct.

Another notable case being investigated by the OCLCH is the case of *Amesys,* a technology company charged with complicity in torture after providing surveillance technology to the Gaddafi regime that was directly used to commit human rights abuses, including the international crime of torture. The *Fédération internationale pour les droits humains* filed a complaint as a civil party, and the investigation is still ongoing.[113]

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[110] See Lasry, *supra* note 108.

[111] See "Lafarge / Eric Olsen and Others" (last modified 8 September 2021), online: *TRIAL International* <trialinternational.org/latest-post/lafarge-eric-olsen-and-others/>. Lower court decisions cleared several of the original charges, but all charges listed above were restored by the Cour de Cassation (the highest court in France) in September 2021.

[112] See *ibid*. Possible penalties have not been made publicly available, however, Lafarge has been ordered to give a 30 million euro security deposit, which could possibly guarantee appropriate charges are paid at trial, if convicted. It is not clear if the individuals being indicted were also ordered to pay a security deposit.

[113] "Amesys" (last modified 24 March 2021), online: *TRIAL International* <trialinternational.org/latest-post/amesys/>.

There is a parallel that can be drawn between the *Amesys* case and Massachusetts-based Thermo Fisher Scientific who was found to have sold surveillance equipment to the Chinese government, equiptment that was used to commit abuses in the context of the Strike Hard campaign. A more extensive examination is outside the scope of this paper, but the example speaks to the magnitude of corporate impunity not just in export supply chains, but also in materials imported in service of repressive governments.[114]

The French framework for corporate accountability offers the most reasonable prospect of success in holding MNCs accountable for violations in Xinjiang, with investigations already underway. After a complaint conjointly filed by Uyghur victims and a coalition of European NGOs,[115] French prosecutors opened an investigation into four fashion retailers suspected of concealing crimes against humanity in Xinjiang, including allegations of forced labor.[116] The subjects of the investigation are Uniqlo France, Inditex,[117] France's SMCP and Skechers; no charges have been filed to date.[118]

The law is slow to change—despite the French *Criminal Code* being amended over a decade ago, there has not yet been

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[114] See "Why Corporations Should Be Held Liable for China's Crimes Against Humanities in Xinjiang: Seeking Civil and Criminal Solutions" (2021) 106 Iowa L Rev 1007 at 1020.

[115] The NGOs who filed the complaint are Sherpa, Éthique NGO, and the Uyghur Institute of Europe. Sherpa, at least, has been involved in other corporate accountability cases and notably requested to join the *Lafarge* case as a civil party, but was denied status.

[116] See "France probes fashion retailers for concealing 'crimes against humanity' in Xinjiang", *Reuters* (2 July 2021), online: <www.reuters.com/world/china/france-investigate-fashion-retailers-concealing-crimes-against-humanity-xinjiang-2021-07-01/>; "Complaint against 4 textile giants for forced labour of Uyghurs: French justice opens an investigation for concealment of crimes against humanity" (last visited 1 December 2021), online: *Sherpa* <www.asso-sherpa.org/complaint-against-4-textile-giants-for-forced-labour-of-uyghurs-french-justice-opens-an-investigation-for-concealment-of-crimes-against-humanity>.

[117] Inditex owns a number of popular fashion brands, including Zara, which have subsidiaries and assets in many countries across the world (including Canada and the United States).

[118] See Elizabeth Paton, Léontine Gallois & Aurelien Breeden, "Fashion Retailers Face Inquiry Over Suspected Ties to Forced Labor in China", *The New York Times* (2 July 2021), online: <www.nytimes.com/2021/07/02/fashion/xinjiang-forced-labor-Zara-Uniqlo-Sketchers.html>.

a successful prosecution of a corporate legal person under universal jurisdiction.[119] However, these investigations present an exciting opportunity in the field of corporate accountability for those who wish to close the accountability gap. When a crime is committed, even by a legal person, justice requires accountability. Whether one believes that the purpose of criminal law sanctions is that of deterrence or safety through removal from community, there is an underlying logic to criminal prosecution that is different from that in administrative and civil sanctions, and this is reflected in the prosecution process and outcomes available to legal persons charged under the French system.

5. Analysis

The above comparative analysis shows a range of available avenues for corporate responsibility. The U.S. sits at one end of the spectrum, with both an inadequate framework for corporate accountability and a judiciary that is actively narrowing the scope of application of what could have been a powerful tool in providing reparations for victims of corporate wrongdoing abroad. In Canada, *Nevsun* is a huge step forward in corporate accountability, providing a clear cause of action for plaintiffs who are victims of legal violations that constitute a breach of customary international law, no matter their nationality, but civil accountability for grave breaches of international law has its limits. The French model, however, presents a "best case scenario"—setting the example for any other jurisdiction wishing to constrain the activities of MNCs domiciled on their territory so that they confirm with international human rights law.

Sanctions

[119] It should be noted that the prosecution of legal persons under universal jurisdiction is slightly more complex than the average criminal law cases, as it involves cross-border investigations that take time and resources. Many investigations were also commenced right before the COVID pandemic, which essentially rendered non-essential travel an impossibility for an entire year and created backlogs in the court systems.

The French *Criminal Code* allows criminal and civil processes be coupled in cases filed against legal persons, so victims can still claim reparations in the context of criminal trials, without having to undergo separate proceedings. One of the biggest advantages of the French system is the range of sanctions available to the *juge d'instruction*. A concern with civil liability cases is that the private settlements paid out to victims will become part of the cost of doing business and will not serve a proper deterrent function. The range of sanctions available in the French *Criminal Code*, including debarment from public procurement or even dissolution of a legal person, are much more severe—which I would argue is justified when discussing crimes of this nature—and therefore better suited to deterrence and norm-changing.[120]

Who Files a Complaint

In France, since the office of the prosecutor can initiate a case of their own accord, or NGOs can file complaints with the OCLCH as civil parties, the burden is not solely on plaintiffs to initiate proceedings. In civil cases, such as the common law tort cases examined above, plaintiffs must shoulder the costs of proceedings, and overcome hurdles in accessing foreign justice systems, which can be on the other side of the world. The French procedure also has the effect of simplifying court processes. Some of torts cases discussed above, including *Nevsun* and *Tahoe Resources*, spent years in court on jurisdictional issues, without being heard on the merits.[121] Since universal jurisdiction is a broad exercise of jurisdiction, the cases in France have not seen the same delays.

Victim Participation & Protection

Though trials occurring on the basis of universal jurisdiction are not occurring in the same countries in which the atrocities occurred, these trials have been spurred by strong victim movements and powered by involvement from local civil society actors. For instance, the complaint filed with the OCLCH against the clothing manufacturers in Xinjiang was submitted by Uyghur victims and backed by a coalition of NGOs, who in turn have sought to include more Uyghur voices in the investigation.[122]

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[120] See Lasry, *supra* note 108.

[121] See *Nevsun, supra* note 90; *Tahoe Resources, supra* note 86.

[122] "Complaint against 4 textile giants for forced labour of Uyghurs: French justice opens an investigation for concealment of crimes against humanity" (last

Victims are a part of this process, and their autonomy is safeguarded throughout. Moreover, because the French trials are criminal trials, there is a higher level of protections offered to victims and witnesses that are not as available in civil trials.[123] This is incredibly important in the "David and Goliath" situations where individuals go up against powerful MNCs, where there is a risk of retaliation.

Conclusion

The state-centrism of international law has made it a weak vehicle for the enforcement of international human rights law and international criminal law in the age of increasingly powerful non-state actors. Universal jurisdiction offers a powerful alternative to international courts that do not have the jurisdiction to adjudicate on issues involving non-State actors, or actors who are not a party to the *Rome Statute*.[124]

This paper largely focused on the courts, but there is also an important role for non-judicial actors and mechanisms for accountability, which include both formal institutional mechanisms, such as state legislatures, as well as civil society and citizen movements. Where there is political will, the enactment of the legislation—such as France's Sapin II and Vigilance laws,[125] or

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visited 1 December 2021), online: *Sherpa* <www.asso-sherpa.org/complaint-against-4-textile-giants-for-forced-labour-of-uyghurs-french-justice-opens-an-investigation-for-concealment-of-crimes-against-humanity>.

[123] See Trial Report, *supra* note 101.

[124] See Manuel Vergara, "Justice is Never Easy, but Universal Jurisdiction is Here to Stay" (29 June 2017), online: *TRIAL International* <trialinternational.org/latest-post/justice-is-never-easy-but-universal-jurisdiction-is-here-to-stay/>. The discussion of universal jurisdiction is becoming increasingly important in light of the internal issues facing the International Criminal Court, as well as the declining legitimacy of the Court (especially in Africa) and the risk of withdrawal (for instance, the Philippines withdrew from the Rome Statute in 2018 and several African countries have given notice that they plan on withdrawing).

[125] See Lasry, *supra* note 108. The Sapin II Law imposes an obligation to actively manage corruption risks for companies with at least 500 employees and 100 million euros in revenues, while the Vigilance Law imposes an obligation on

the U.K.'s "duty to prevent" foreign bribery legislative framework[126]—could potentially prevent harms from occurring, or at the very least provide the legal underpinnings for courts actions should violations occur. The efforts of civil society are also key in bringing light to violations committed by corporations. From environmental devastation caused by mining corporations in Ecuador,[127] to poor conditions in Nike's Indonesian factories,[128] to the case study at hand of forced labour in Xinjiang—most of the information made available to the public can be attributed to the work of NGOs and journalists. The work of civil society in corporate accountability, in publicizing violations to garner the attention required to create change cannot be understated. Moreover, efforts between civil society and the legislature are not mutually exclusive, as often the former is key in influencing the decision-making of the latter. For instance, in Canada, the Canadian Network on Corporate Accountability has been lobbying for legislation that would impose a legal obligation on Canadian MNCs to not only respect human rights and the environment, but also ensure that their subsidiaries (foreign and domestic do so as well).[129]

In a capitalist and globalized world, if international law cannot evolve to find a way to constrain the action of MNCs—many which have greater wealth and power than individual countries that *do* fall under international law's jurisdiction—its ability to prevent or provide redress for human rights abuses will be decimated. Foreign national courts have played an important role in providing justice for victims of corporations domiciled on

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certain companies to implement and publish a vigilance program designed to control the activities of subsidiaries, subcontractors and suppliers.

[126] See Gabriela Quijano, "Justice for Corporate Atrocities" (2016) 57 Harv Intl LJ 30.

[127] See Carlos Zorrilla & Cyril Mychalejko, "No Justice, No Peace: Canadian Mining in Ecuador and Impunity" (27 April 2011), online: *Upside Down World* <upsidedownworld.org/archives/ecuador/no-justice-no-peace-canadian-mining-in-ecuador-and-impunity/>.

[128] See "Nike sweatshops: inside the scandal" (last visited 5 November 2021), online: *New Idea* <www.newidea.com.au/nike-sweatshops-the-truth-about-the-nike-factory-scandal>.

[129] See "Human Rights Advocates and Legal Experts Deliver Blueprint for New International Corporate Accountability Law in Canada" (31 May 2021), online: *Amnesty International* <amnesty.ca/news/human-rights-advocates-and-legal-experts-deliver-blueprint-new-international-corporate/>.

their territories, but the above comparative study shows the shortcomings of relying on this. France provides a strong model that, I argue, other countries should replicate, but, as it stands, an individual who is a victim of an international crime perpetuated by an American company will not have the same recourses as an individual who is victim of the same crime perpetuated by a French, or even Canadian, company. The burden of international justice cannot be placed on one country alone, and a cohesive *and binding* set of international standards for corporate accountability is the only way to ensure that victims can access justice, no matter where they are.

Bibliography

INTERNATIONAL DOCUMENTS

AU, First Meeting of the Specialized Technical Committee on Justice and Legal Affairs, *Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, STC/Legal/Min/7(I) Rev 1 (May 2014).

Canada-United States-Mexico Agreement, 30 November 2018 (last amended 10 December 2019).

CESCR, *General Comment No. 24 (2017) on State Obligations Under the International Covenant on Economic, Social and Cultural Rights In The Context Of Business Activities,* adopted 10 August 2017, UN Doc E/C12/GC/24.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1485 UNTS 85 (entered into force 26 June 1987, in accordance with article 27 (1)).

Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UNOHCHROR, 2011, HR/PUB/11/04.

International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

Legally Binding Instrument to Regulate, In International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, UNHRCOR OEIGWG, 6th Sess, Annex, UN Doc A/HRC/WG.17/5/1 (2020).

Ruggie, John, *Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational*

Corporations and Other Business Enterprises, John Ruggie, UNHRCOR, 17th Sess, UN Doc A/HRC/17/31 (2011).

Statute of the International Criminal Tribunal for the Former Yugoslavia (last amended 2002), 25 May 1993.

Statute of the International Criminal Tribunal for Rwanda (last amended 2006), 8 November 1994.

Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998.

Universal Declaration of Human Rights, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948).

LEGISLATION

Alien Tort Statute, 28 USC § 1350 (2011).

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

China (People's Republic of)'s Constitution of 1982 with Amendments through 2018 (English translation accessed online at: www.constituteproject.org/constitution/China_2018.pdf?lang=en).

Crimes Against Humanity and War Crimes Act, SC 2000, c 24.

French *Code of Civil Procedure*.

French *Criminal Code*.

JURISPRUDENCE

Chevron Corp v Yaiguaje, 2018 ONCA 472.

Choc v Hudbay Minerals Inc, 2013 ONSC 1414.

Doe v Unocal, 395 F (3d) 932 (9th Cir 2002).

Filártiga v Peña-Irala 630 F (2d) 876 at 1 (2d Cir 1980).

Garcia v Tahoe Resources Inc, 2017 BCCA 39.

Jesner v Arab Bank, Plc, 138 S Ct 1386 (2018).

Kiobel v Royal Dutch Petroleum Co, 569 US 108 (2013).

Lungowe v Vedanta Resources plc, [2019] UKSC 20.

Nestlé USA Inc v Doe et al, 929 F (3d) 623 (2021).

Nevsun Resources Ltd v Araya, 2020 SCC 5.

Okpabi & Others v Royal Dutch Shell Plc & Another, [2021] UKSC 3.

Presbyterian Church of Sudan v Talisman Energy Inc, 244 F Supp (2d) 289 (SDNY 2003).

R v Wholesale Travel Group Inc, [1991] 3 SCR 154, 84 DLR (4th) 161.

Sosa v Álvarez-Machain et al., 542 US 692 (2004).

United States et al. v Goering, Final Judgement (30 September 1946) at 52 (International Military Tribunal at Nuremberg, Germany).

Wiwa v Royal Dutch Petroleum Co, 96 Civ 8386 (KMW) (HBP), 01 Civ 1909 (KMW) (HBP), 02 Civ 7618 (KMW) (HBP) (SDNY 2009).

SECONDARY SOURCES: JOURNAL ARTICLES

Addo, Michael, "The Reality of the United Nations Guiding Principles on Business and Human Rights" (2014) 14:1 Hum Rts L Rev 133.

Aparac, Jelena, "Which International Jurisdiction for Corporate Crimes in Armed Conflicts?" (2016 57 Harv Intl LJ 40.

Bordeleau-Cass, Jaya, "The 'Accountability Gap': Holding Corporations Liable for International Crimes" (2019) 3 PKI Global Justice Journal 65.

Dooley, Connor W, "Silencing Xinjiang: The Chinese Government's Campaign Against the Uyghurs" (2019) 48:233 Ga J Intl & Comp L 235.

Clapham, Andrew, "Human Rights Obligations for Non-State Actors: Where Are We Now?" in Fannie Lafontaine & François Larocque, eds, *Doing Peace the Rights Way: Essays in International Law and Relations in Honour of Louise Arbour* (Intersentia, 2019) 11.

Quijano, Gabriela, "Justice for Corporate Atrocities" (2016) 57 Harv Intl LJ 30.

Ruggie, John Gerard & John Sherman, "The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale" (2017) 28:3 Eur J Intl L 921.

Scheffer, David, "Corporate Liability under the Rome Statute" (2016) 57:2 Harv Intl LJ 35.

Van Ho, Tara, "General Comment No. 24 (2017) on State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities (CESCR)" (2019) 58:4 ILM 872.

"Why Corporations Should Be Held Liable for China's Crimes Against Humanities in Xinjiang: Seeking Civil and Criminal Solutions" (2021) 106 Iowa L Rev 1007.

Zenz, Adrian, " 'Wash Brains, Cleanse Hearts': Evidence from Chinese Government Documents about the Nature and Extent of Xinjiang's Extrajudicial Internment Campaign" (2019) 7:11 J Political Risk 1.

SECONDARY SOURCES: BOOKS

Aksenova, Marina, *Complicity in International Criminal Law* (Oxford: Hart, 2016).

Chinkin, Christine, "Sources" in Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran, eds, *International Human Rights Law*, 3rd ed (Oxford University Press, 2018).

Khoury, Pamela & David White, *Corporate Human Rights Violations: Global Prospects for Legal Action* (New York: Routledge, 2017).

Mégret, Frédéric, "Nature of Obligation" in Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran, eds, *International Human Rights Law*, 3d ed (Oxford: Oxford University Press, 2018).

Michalowski, Sabine "Due Diligence and Complicity: A Relationship in Need of Clarification" in Surya Deva & David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press, 2013).

Ruggie, John Gerard, *Just Business*, 1st ed (New York: W.W. Norton, 2013).

SECONDARY SOURCES: ONLINE & NEWS SOURCES

"Amesys" (last modified 24 March 2021), online: *TRIAL International* <trialinternational.org/latest-post/amesys/>.

Arsenault, Chris, "Canada not walking the talk on its miners' abuses abroad, campaigners say", *Mongabay* (24 July 2020), online: <news.mongabay.com/2020/07/canada-not-walking-the-walk-on-its-miners-abuses-abroad-campaigners-say/>.

" 'Break Their Lineage, Break Their Roots': China's Crimes against Humanity Targeting Uyghurs and Other Turkic Muslims" (19 April 2021), online (pdf): *Human Rights Watch* <www.hrw.org/report/2021/04/19/break-their-lineage-break-their-roots/chinas-crimes-against-humanity-targeting#>.

Brotherton-Bunch, Elizabeth, "Despite Accusations That It Benefits From Forced Labor in Xinjiang, Nike Remains Committed to China" (9 August 2021), online: *Alliance for American Manufacturing* <www.americanmanufacturing.org/blog/despite-accusations-that-it-benefits-from-forced-labor-in-xinjiang-nike-remains-committed-to-china/>.

Buckley, Chris & Austin Ramzy, "China's Detention Camps for Muslims Turn to Forced Labor", *The New York Times* (16 December 2018), online: <www.nytimes.com/2018/12/16/world/asia/xinjiang-china-forced-labor-camps-uighurs.html>.

"Complaint against 4 textile giants for forced labour of Uyghurs: French justice opens an investigation for concealment of crimes against humanity" (last visited 1 December 2021), online: *Sherpa* <www.asso-sherpa.org/complaint-against-4-textile-giants-for-forced-labour-of-uyghurs-french-justice-opens-an-investigation-for-concealment-of-crimes-against-humanity>.

"China: 83 major brands implicated in report on forced labour of ethnic minorities from Xinjiang assigned to factories across provinces; Includes company responses" (last visited 4 December 2021), online: *Business & Human Rights Resource Center* <www.business-humanrights.org/en/latest-news/china-83-major-brands-implicated-in-report-on-forced-labour-of-ethnic-minorities-from-xinjiang-assigned-to-factories-across-provinces-includes-company-responses/>.

"China continues its labour abuse practices against Uighurs: UN", *Al Jazeera* (11 February 2022), online: <www.aljazeera.com/economy/2022/2/11/china-continues-its-labour-abuse-practices-against-uighurs-un>.

"China: Draconian repression of Muslims in Xinjiang amounts to crimes against humanity" (10 June 2021), online: *Amnesty International* <www.amnesty.org/en/latest/press-release/2021/06/china-draconian-repression-of-muslims-in-xinjiang-amounts-to-crimes-against-humanity/>.

Cleaver, Martin & Mark Tran, "US dismisses World Court ruling on contras", *The Guardian* (28 June 1986), online: <www.theguardian.com/world/1986/jun/28/usa.marktran>.

"Complaint against 4 textile giants for forced labour of Uyghurs: French justice opens an investigation for concealment of crimes against humanity" (last visited 1 December 2021), online: *Sherpa* <www.asso-sherpa.org/complaint-against-4-textile-giants-for-forced-labour-of-uyghurs-french-justice-opens-an-investigation-for-concealment-of-crimes-against-humanity>.

"Control the Corporations" (last visited 4 November 2021), online: *Mining Watch Canada* <miningwatch.ca/focus/control-corporations>.

"Corporate Complicity & Legal Accountability: Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes" (2008), online (pdf): *International Commission of Jurists* <www.icj.org/wp-content/uploads/2012/06/Vol.1-Corporate-legal-accountability-thematic-report-2008.pdf>.

"Facing Political Attacks, Limited Budget, International Criminal Court Needs Strong Backing to Ensure Justice for Atrocity Crimes, President Tells General Assembly", *UN Press* (29 October 2018), online: <www.un.org/press/en/2018/ga12084.doc.htm>.

"France probes fashion retailers for concealing 'crimes against humanity' in Xinjiang" (2 July 2021), online: *Reuters* <www.reuters.com/world/china/france-investigate-fashion-retailers-concealing-crimes-against-humanity-xinjiang-2021-07-01/>.

Findlay, Andrew, "Canadian mining companies will now face human rights charges in Canadian courts", *The Narwahl* (7 June 2019), online: <thenarwhal.ca/canadian-mining-companies-will-now-face-human-rights-charges-in-canadian-courts/>.

"Global Affairs Canada advisory on doing business with Xinjiang-related entities" (last modified 1 January 2021), online: *Government of Canada* <www.international.gc.ca/global-affairs-

affaires-mondiales/news-nouvelles/2021/2021-01-12-xinjiang-advisory-avis.aspx?lang=eng>.

Green, David, "Canadian firms operate in China's Xinjiang region", *The Globe and Mail* (18 January 2021), online: <www.theglobeandmail.com/world/article-canadian-firms-operate-in-chinas-xinjiang-region>.

Gunter, Joel, "China has created a dystopian hellscape in Xinjiang, Amnesty report says", *BBC News* (10 June 2021), online: <www.bbc.com/news/world-asia-china-57386625>.

Hill, Matthew, David Campanale & Joel Gunter, " 'Their goal is to destroy everyone': Uighur camp detainees allege systematic rape", *BBC News* (2 February 2021), online: <www.bbc.com/news/world-asia-china-55794071>.

"Human Rights Advocates and Legal Experts Deliver Blueprint for New International Corporate Accountability Law in Canada" (31 May 2021), online: *Amnesty International* <amnesty.ca/news/human-rights-advocates-and-legal-experts-deliver-blueprint-new-international-corporate/>.

ICC: Judges Reject Afghanistan Investigation" (12 April 2021), online: *Human Rights Watch* <www.hrw.org/news/2019/04/12/icc-judges-reject-afghanistan-investigation#>.

"ICC opens trial against Mali national over Timbuktu destruction", *Al Jazeera* (14 July 2020), online: <www.aljazeera.com/news/2020/7/14/icc-opens-trial-against-mali-national-over-timbuktu-destruction>.

Jennett, Julianne Hughes & Marjun Parcasio, "Corporate Civil Liability for Breaches of Customary International Law: Supreme Court of Canada Opens Door to Common Law Claims in Nevsun v Araya" (29 March 2020), online (blog): *EJI Talk* <www.ejiltalk.org/corporate-civil-liability-for-breaches-of-customary-international-law-supreme-court-of-canada-opens-door-to-common-law-claims-in-nevsun-v-araya/>.

Jones, Ryan Patrick, "Federal government moves to seal off Canadian companies from human rights violations in China", CBC (12 January 2021), online: <www.cbc.ca/news/politics/canada-xinjiang-forced-labour-1.5869752>.

Kaşıkçı, Mehmet Volkan, "Documenting the Tragedy in Xinjiang: An Insider's View of Atajurt", *The Diplomat* (16 January 2020),

online: <thediplomat.com/2020/01/documenting-the-tragedy-in-xinjiang-an-insiders-view-of-atajurt/>.

Kwan, Rhoda, "China says it upholds human rights, opposes 'slanderous attacks' over Hong Kong, Xinjiang, Tibet", *Hong Kong Free Press* (24 February 2021), online: <hongkongfp.com/2021/02/24/china-says-it-upholds-human-rights-opposes-slanderous-attacks-over-hong-kong-xinjiang-tibet/>.

"L'Office central de lutte contre les crimes contre l'humanité, les génocides et les crimes de guerre (OCLCH)" (last visited 4 November 2021), online: *Ministère de l'intérieur* <www.gendarmerie.interieur.gouv.fr/notre-institution/nos-composantes/au-niveau-central/les-offices/l-office-central-de-lutte-contre-les-crimes-contre-l-humanite-les-genocides-et-les-crimes-de-guerre-oclch>.

"Lafarge / Eric Olsen and Others" (last modified 8 September 2021), online: *TRIAL International* <trialinternational.org/latest-post/lafarge-eric-olsen-and-others/>.

Larson, Zeb, "American Companies Are Profiting Off of Labor Camps in Xinjiang", *The Progressive Magazine* (18 September 2020), online: <progressive.org/latest/american-companies-profiting-xinjiang-larson-200918/>.

Lasry, Eric, "Corporate Liability in France", *Global Compliance News* (last visited 1 December 2021), online: <www.globalcompliancenews.com/white-collar-crime/corporate-liability-in-france/>.

Michael Martina, "U.S. senator slams Apple, Amazon, Nike, for enabling forced labor in China", *Reuters* (10 June 2021), online: <www.reuters.com/business/retail-consumer/us-senator-slams-apple-amazon-nike-enabling-forced-labor-china-2021-06-10/>.

"Nestlé USA v. Doe I" (last visited 2 December), online: Ballotpedia <ballotpedia.org/Nestl%C3%A9_USA_v._Doe_I>.

Nebehay, Stephanie, "China says door to Xinjiang 'always open', but U.N. rights boss should not prejudge", *Reuters* (2 March 2021), online: <www.reuters.com/article/us-china-rights-un-idUSKCN2AU0Z3>.

"Nike sweatshops: inside the scandal" (last visited 5 November 2021), online: *New Idea* <www.newidea.com.au/nike-sweatshops-the-truth-about-the-nike-factory-scandal>.

Ochab, Ewelina U, "Behind The Camps' Gates: Rape And Sexual Violence Against Uyghur Women", *Forbes* (3 February 2021), online: <www.forbes.com/sites/ewelinaochab/2021/02/03/behind-the-camps-gates-rape-and-sexual-violence-against-uyghur-women/?sh=d3d62a168a5b>.

O'Connell, Giavanna, "How China is Violating Human Rights Treaties and its own Constitution in Xinjiang" (19 August 2020), online: *Just Security* <www.justsecurity.org/72074/how-china-is-violating-human-rights-treaties-and-its-own-constitution-in-xinjiang/>.

Paton, Elizabeth, Léontine Gallois & Aurelien Breeden, "Fashion Retailers Face Inquiry Over Suspected Ties to Forced Labor in China" (2 July 2021), online: *The New York Times* <www.nytimes.com/2021/07/02/fashion/xinjiang-forced-labor-Zara-Uniqlo-Sketchers.html>.

Reinsberg, Lisa, "China's Forced Sterilization of Uyghur Women Violates Clear International Law" (29 July 2020), online: *Just Security* <www.justsecurity.org/71615/chinas-forced-sterilization-of-uyghur-women-violates-clear-international-law/>.

Schreurs, Fien, "Nestlé & Cargill v. Doe Series: Remedying the Corporate Accountability Gap at the ICC" (11 January 2021), online: *Just Security* <www.justsecurity.org/74035/nestle-cargill-v-doe-series-remedying-the-corporate-accountability-gap-at-the-icc/>.

Scope and Application of Universal Jurisdiction in Canada (last visited 8 December 2021), online (pdf): *United Nations* <www.un.org/en/ga/sixth/75/universal_jurisdiction/canada_e.pdf>.

Smith, Wesley J, "Nike Chooses China Profits Over Uyghur Slaves" (29 June 2021), online: *Humanize* <humanize.today/2021/06/nike-chooses-china-profits-over-uyghur-slaves/>.

"These Brands Are Still Linked to Uyghur Forced Labor. Help Stop Them Now" (15 April 2021), online: *Save Uighur* <www.saveuighur.org/these-brands-are-still-linked-to-uyghur-forced-labor-help-stop-them-now/>.

Turak, Natasha, "US rejects International Court of Justice ruling on Iran, continuing its isolationist charge", *CNBC* (5 October 2018), online: <www.cnbc.com/2018/10/05/us-rejects-international-

court-of-justice-ruling-on-iran-continuing-its-isolationist-charge.html>.

"Universal Jurisdiction" (last visited 3 December 2021), online: *Human Rights Watch* <www.hrw.org/topic/international-justice/universal-jurisdiction>.

"Universal Jurisdiction Law and Practice in France" (February 2019), online (pdf): *Open Society Justice Initiative* <www.justiceinitiative.org/uploads/b264bc4f-053f-4e52-9bb8-fccc0a52816a/universal-jurisdiction-law-and-practice-france.pdf>.

" 'Uyghur' or 'Uighur'?" (9 October 2010), online: *Radio Free Asia* <www.rfa.org/english/news/uyghur/uyghur-spelling-09062010161733.html>.

Vergara, Manuel, "Justice is Never Easy, but Universal Jurisdiction is Here to Stay" (29 June 2017), online: *TRIAL International* <trialinternational.org/latest-post/justice-is-never-easy-but-universal-jurisdiction-is-here-to-stay/>.

Xiuzhong, Vickey et al, "Uyghurs for sale" (1 March 2020), online: *Australian Strategic Policy Institute* <www.aspi.org.au/report/uyghurs-sale>.

Zorrilla, Carlos & Cyril Mychalejko, "No Justice, No Peace: Canadian Mining in Ecuador and Impunity" (27 April 2011), online: *Upside Down World* <upsidedownworld.org/archives/ecuador/no-justice-no-peace-canadian-mining-in-ecuador-and-impunity/>.