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UNTIL THE UNITED STATES REGULATES TECH EXPORTS, IT WILL CONTINUE TO ENABLE CHINA'S SURVEILLANCE OF THE UYGHURS

*by Alexandra Haris**

INTRODUCTION

For decades, China has oppressed its Uyghur population, a mostly Muslim, Turkic-speaking ethnic group in the Xinjiang Uyghur Autonomous Region, including through acts of genocide.¹ China perpetuates genocidal acts through its policies of

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¹ When this Article refers to genocide, it means: "... killing members of [a] group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; [and] forcibly transferring children of the group to another group." Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948. There is broad consensus among human rights experts that China's actions constitute acts of genocide. See *'Eradicating Ideological Viruses': China's Campaign of Repression against Xinjiang's Muslims*, HUM. RTS. WATCH (Sept. 9, 2018), <https://www.hrw.org/report/2018/09/09/eradicating-ideological-viruses/chinas-campaign-repression-against-xinjiangs>; see also Raoul Wallenberg Centre for Human Rights, *The Uyghur Genocide: An Examination of China's Breaches of the 1948 Genocide Convention*, NEWLINES INSTITUTE (March 2021).

detaining members of the Uyghur population, which rely on U.S.-exported technologies.² Investigations conducted by human rights groups and international media indicate that the Chinese government implements U.S.-exported technology in the Xinjiang region to track and analyze individuals within the Uyghur population's movements and behavior in real time to identify persons to investigate and potentially send to internment camps.³ For example, Xinjiang's cities and villages have been split into squares of 500 people, each square equipped with a police station to regularly scan individuals' identification cards, take their photographs and fingerprints, and search their cell phones.⁴ This information is gathered and sent to a database known as the Integrated Joint Operations Platform, which creates a list of "suspicious people" to send to internment camps.⁵ In November 2019, the International Consortium of Investigative Journalists revealed classified Chinese government documents that showed in just one week in 2017, fifteen thousand members of the Uyghur population who were placed in detention centers after being flagged by the Integrated Joint Operations Platform.⁶ The surveillance state the Chinese government has created is restraining liberty and privacy, thereby, persecuting the Uyghur community.⁷

While private Chinese companies provide monitoring technology, such as facial recognition software, to the Chinese government, these

² Chris Buckley & Paul Mozur, *How China Uses High-Tech Surveillance to Subdue Minorities*, N.Y. TIMES (May 22, 2019), <https://www.nytimes.com/2019/05/22/world/asia/china-surveillance-xinjiang.html>.

³ See *id.*; see also Paul Mozur, *One Month, 500,000 Face Scans: How China is Using AI to Profile a Minority*, N.Y. TIMES (Apr. 14, 2019), <https://www.nytimes.com/2019/04/14/technology/china-surveillance-artificial-intelligence-racial-profiling.html>.

⁴ Lindsay Maizland, *China's Repression of Uyghurs in Xinjiang*, COUNS. FOREIGN REL. (March 1, 2021), <https://www.cfr.org/background/chinas-repression-uyghurs-xinjiang>.

⁵ *Id.*

⁶ *Id.*

⁷ *"Break their Lineage, Break their Roots" China's Crimes against Humanity Targeting Uyghurs and Other Turkic Muslims*, HUM. RTS. WATCH (April 19, 2021), <https://www.hrw.org/report/2021/04/19/break-their-lineage-break-their-roots/chinas-crimes-against-humanity-targeting#>.

companies import surveillance technology from U.S.-based corporations.⁸ For example, major Chinese government-owned companies—namely Hikvision and Dahua⁹—have ties to Amazon, Apple,¹⁰ Hewlett Packard, and Intel.¹¹ Through these contracts, these U.S.-based corporations profit from China's use of technology to surveil Uyghur persons.¹²

The United States has an opportunity to block U.S. corporations' roles in the Chinese government's surveillance. China does not have the capacity to develop certain technologies that U.S. companies provide, such as Intel chips that are required to power China's supercomputing centers.¹³ If the U.S. government were to legally prohibit U.S. corporations from providing this technology, China would be unable to surveil Uyghurs persons with the same level of sophistication as it currently does.¹⁴ As a State Party to the Convention on the Prevention and Punishment of the Crime of Genocide ("the Convention"),¹⁵ the United States has an obligation

⁸ Roseanne Gerin & Alim Seytoff, *US Tech Products Enable Chinese Surveillance in Xinjiang, Researchers Find*, RADIO FREE ASIA (Aug. 5, 2021), <https://www.rfa.org/english/news/uyghur/us-tech-products-08052021185345.html>.

⁹ John Honovich, *Hikvision and Dahua Sanctioned for Human Rights Abuses*, IPV.M (Oct. 7, 2019), <https://ipvm.com/reports/sanction-hikua>.

¹⁰ Brendon Hong, *Amazon Partner in China Is Making Facial-Recognition Tech to Track Uighurs*, DAILY BEAST (Nov. 13, 2020), <https://www.thedailybeast.com/dahua-amazon-partner-in-china-is-making-facial-recognition-tech-to-track-uyghurs>.

¹¹ Alex Ward, *5 Real Steps the US Could Take to Help Uyghurs in China*, VOX (Jul. 28, 2020), <https://www.vox.com/2020/7/28/21337081/china-uighurs-muslims-trump-forced-labor-help>.

¹² *EU Companies Selling Surveillance Tools to China's Human Rights Abusers*, AMNESTY INT'L (Sep. 21, 2020), <https://www.amnesty.org/en/latest/news/2020/09/eu-surveillance-sales-china-human-rights-abusers/>.

¹³ See Paul Mozur & Don Clark, *China's Surveillance State Sucks Up Data. U.S. Tech is Key to Sorting It*, N.Y. TIMES (Nov. 22, 2020), <https://www.nytimes.com/2020/11/22/technology/china-intel-nvidia-xinjiang.html> (explaining chips made by American semiconductor company Intel have been powering a Uyghur supercomputer tracking complex since 2016).

¹⁴ Ward, *supra* note 11.

¹⁵ See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

to prevent U.S. corporations' roles in perpetuating genocide against the Uyghur minority group.¹⁶ Under Article V, the United States has an obligation to enact legislation necessary to effectuate the Convention's provisions to prevent genocide.¹⁷ The United States is failing to meet this duty because it has only used verbal condemnation and limited domestic restrictions on trade with certain entities.¹⁸

I. DENUNCIATIONS AND ENTITY LIST PLACEMENTS ARE NOT ENOUGH

It is well-documented that the U.S. government knows that China continues to track, systematically incarcerate, and execute Uyghur persons.¹⁹ However, the response—diplomatic statements and actions condemning China's repression of Uyghur persons—does not fulfill its aforementioned duty under Article V of the Convention.

The United States began responding to China on this issue in 2019 when the Trump administration placed Chinese technology companies, such as Hikvision and Dahua, on the U.S. Department of Commerce's Entity List, intending to bar China from receiving U.S. technological imports.²⁰ When the

¹⁶ See *id.*, art. V. (listing the duties as "Contracting Parties undertake to enact . . . the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide of any of the other acts enumerated in article III.")

¹⁷ See *id.*

¹⁸ See *infra* note 23 (explaining how the United States placed Chinese corporations on the Entity List, which is a domestic trade restriction list, but does not prohibit U.S. citizens or companies from working with them).

¹⁹ Priyanka Boghani, *How the U.S. Has Reacted to China's Treatment of Uyghurs*, PUB. BROAD. SERV. (Nov. 10, 2020), <https://www.pbs.org/wgbh/frontline/article/us-reacted-china-treatment-uyghurs/>; see Hong, *supra* note 9. The U.S. government has also shown awareness through proposed legislation, proposing a resolution in 2020 to recognize China's actions against Uyghurs as genocidal. S. Res. 760, 116th Cong. (2020); see also Rebecca Wright, Ivan Watson, Zahid Mahmood, and Tom Booth, *'Some are just Psychopaths': Chinese Detective in Exile Reveals Extent of Torture Against Uyghurs*, CNN (Oct. 5, 2021), <https://www.cnn.com/2021/10/04/china/xinjiang-detective-torture-intl-hnk-dst/index.html>.

²⁰ *Id.*

United States placed Hikvision and Dahua on the Entity List, it demonstrated its explicit knowledge of the situation for Uyghur persons by stating that the companies were “implicated in human rights violations and abuses in China’s campaign targeting U[y]ghurs.”²¹ However, the Entity List placement was ineffective; shortly after, Dahua participated in a security trade show in Las Vegas, Nevada, and later struck a \$10 million deal with Amazon for thermal cameras.²² Following the failed attempt to sanction these private companies, the Trump administration condemned China in June 2020²³ and January 2021²⁴ in presidential statements, and Biden administration followed suit in March 2021.²⁵ That said, there has recently been a movement within U.S. Congress to pressure the government to act more forcefully.²⁶

Congress has pressured the U.S. government to bolster its export controls because previous denunciations and policies have failed to thwart Uyghur surveillance and China’s committing of genocidal acts.²⁷ As of March 2021, NBC News reported that China is “expanding and entrenching a system for mass detention”²⁸ in an effort to sterilize Uyghur women.²⁹ Additionally, through a Dahua

hack in November 2020, IPVM revealed that the company’s surveillance tactics were extremely invasive and included race-based tracking.³⁰

The United States’ limited actions toward addressing China’s treatment of the Uyghurs—minimal restrictions and public statements—violates its legal obligations under the Convention. In 1988, the United States ratified the Convention,³¹ which defines what constitutes as genocide and outlines the obligations of State Parties.³² Article V of the Convention stipulates States Parties must “enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention.”³³ Additionally, Article III(e) includes punishing “complicity in genocide,”³⁴ which is defined as whether genocide was a foreseeable result of a country’s actions.³⁵ The International Court of Justice has previously held other countries liable under Article III(e), including Serbia for its failure to prevent the Srebrenica genocide.³⁶

²¹ *Id.*

²² *Id.*

²³ Patrice Taddonio, *U.S. Enacts New Law Condemning China’s Treatment of Uyghur and Other Muslims*, PUB. BROAD. SERV. (June 18, 2020), <https://www.pbs.org/wgbh/frontline/article/u-s-enacts-new-law-condemning-chinas-treatment-of-uyghur-and-other-muslims/>.

²⁴ Boghani, *supra* note 19.

²⁵ Dareh Gregorian & Abigail Williams, *Biden Admin Sanctions Chinese Officials for Abuses Against Uyghurs*, NBC NEWS (Mar. 22, 2021), <https://www.nbcnews.com/politics/politics-news/biden-admin-announces-sanctions-against-chinese-officials-over-human-rights-n1261745>.

²⁶ Kate O’Keeffe, *House Republicans Call for Tougher Controls to Keep U.S. Tech from China*, WALL ST. J. (Oct. 25, 2021), <https://www.wsj.com/articles/house-republicans-call-for-tougher-controls-to-keep-u-s-tech-from-china-11635159601> (describing how certain lawmakers are pressuring the Commerce Department to fortify export controls to curb China’s access U.S. technology).

²⁷ *See id.*

²⁸ Gregorian, *supra* note 25.

²⁹ *Id.*

³⁰ *See Hong, supra* note 10 (explaining the tracking technology records traits such as beards, clothing, and emotional states that the company designates as “normal, anger, disgust, fear, [and] confused . . .”).

³¹ *US Ratifies Genocide Convention*, U.S. HOLOCAUST MEM’L MUSEUM, <https://www.ushmm.org/learn/timeline-of-events/after-1945/us-ratifies-genocide-convention>.

³² *See Genocide Convention, supra* note 15, art. 2 (defining genocide as “any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group”).

³³ *Id.*

³⁴ *Id.*, art. 3.

³⁵ Daniel M. Greenfield, *The Crime of Complicity in Genocide: How the International Criminal Tribunals for Rwanda and Yugoslavia Got it Wrong, and Why it Matters*, 98 J. Crim. L. & Criminology 921, 921 (2007-2008).

³⁶ *See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz v. Serb. & Mont.)*, 2007 I.C.J. (Feb. 26).

For years, the United States has foregone enacting the necessary legislation that would regulate domestic companies for their role in perpetuating genocidal acts abroad. By not doing so, the United States is ignoring its binding duty to legislatively prevent the aiding and abetting of the Uyghur genocide by prohibiting U.S. businesses from continuing to aid Chinese surveillance companies.³⁷ In some cases, the connections between U.S. businesses and Chinese surveillance companies may be clear; some Chinese companies even list U.S. businesses as partners on their websites.³⁸ In other cases, there is strong circumstantial evidence of a connection between U.S. companies and Chinese surveillance.³⁹ These associations are problematic because they are significantly advancing the Chinese government's ability to surveil Uyghur communities.⁴⁰

II. THE SOLUTION

To uphold international obligations under the Convention and to halt the United States' role in contributing to the ongoing genocide, the United States must take steps to further regulate and restrict exports on surveillance technology and software.⁴¹ China relies on technology from U.S. corporations and, without it, its surveillance program on the Uyghurs would lose their effectiveness or even collapse.⁴²

Other governing regional bodies, such as countries in the European Union (EU), have begun regulating

technological exports in the interest of international human rights, and China has felt the impact. These regulations have successfully allowed the EU to scrutinize and limit exports of specific technologies that the EU believes China will use to violate human rights.⁴³ These regulations also provide clear guidance to businesses, putting them on notice of the sanctions for illegally exporting such technology.⁴⁴ While this is a positive starting point, there remain significant gaps in this framework.⁴⁵ For instance, European companies can navigate around the regulations by receiving broad and elusive descriptions from Chinese companies about the exports' intended use.⁴⁶ Therefore, the United States must determine if the EU regulations go far enough, and develop its own, more specific regulations accordingly.

In addition to mirroring and improving on the EU's framework, the United States Department of Commerce should regulate technological exports by placing certain Chinese companies on the Department's Entity List,⁴⁷ which must include strict enforcement and use technology-neutral criteria⁴⁸ within the legislation.⁴⁹ Many administrations utilize the Entity List as a punitive measure against states perpetuating human rights abuses; most

³⁷ Lindsay Gorman & Matt Schrader, *U.S. Firms Are Helping Build China's Orwellian State*, FOREIGN POL'Y (Mar. 19, 2019), <https://foreignpolicy.com/2019/03/19/962492-orwell-china-socialcredit-surveillance/>.

³⁸ *Id.*

³⁹ China has collected blood samples of hundreds of Uyghurs, trying to use U.S. technology to convert the DNA sample into an image of the person's face. This is technology that has been developing in the United States to produce pictures of criminal suspects to aid law enforcement. Sui-Lee Wee and Paul Mozur, *China Uses DNA to Map Faces, with Help from the West*, NEW YORK TIMES (Dec. 3, 2019), <https://www.nytimes.com/2019/12/03/business/china-dna-uighurs-xinjiang.html>.

⁴⁰ *Id.*

⁴¹ Ward, *supra* note 11.

⁴² *Id.*

⁴³ See *EU to Limit Tech Exports to Hong Kong after Chinese Clampdown*, REUTERS (July 24, 2020), 2 (discussing the EU implemented regulations to support Hong Kong's autonomy because China was imposing a sweeping national security law to secure the territory).

⁴⁴ *Id.*

⁴⁵ See generally *Out of Control: Failing EU Laws for Digital Surveillance Export*, AMNESTY INT'L (Sept. 20, 2020), <https://www.amnesty.org/en/wp-content/uploads/2021/05/EU-R0125562020ENGLISH.pdf> (reporting gaps in international law framework due to narrow regulations).

⁴⁶ *Id.* at 30.

⁴⁷ This action is what republicans in U.S. Congress has been pushing for. See O'Keeffe, *supra* note 26.

⁴⁸ These criteria would not mention a specific type of technology that should be regulated, but instead focus on any technology's end use.

⁴⁹ *Entity List*, U.S. DEP'T. OF COM., BUREAU OF INDUS. & SEC., <https://www.bis.doc.gov/index.php/policy-guidance/lists-of-parties-of-concern/entity-list> (last visited Nov. 22, 2021) (explaining how companies are placed on entity lists, the review policies for entity lists, and the exceptions to the Entity List).

notably, the Trump administration placed Chinese semiconductor companies on the list by banning the export of U.S. technology to these entities unless certain conditions are met.⁵⁰

The United States should extend this blacklist to a broader list of Chinese surveillance and AI companies and should implement legislation to secure the regulation's longevity and effectiveness. Specifically, instead of basing its criteria of who should be regulated around the definition of "cyber surveillance technologies" on technical specifications, the United States should opt for a technology-neutral approach, which does not specifically regulate any type of technology and instead focuses on the export's intended end-use. Relevant considerations should include whether the technology is being used in connection with international human rights violations or designed to enable covert and non-covert surveillance of digital systems to monitor, extract, collect or analyze data. Regulation should account for the reality that many forms of technology can collect data. This type of regulation would cover a broad range of current and future technologies that pose a risk to human rights, thus allowing the United States to comply with its international obligations.

III. CONCLUSION

While the U.S. government has verbally condemned China for genocidal acts against the Uyghurs, its denunciations are meaningless if the U.S. government continues to allow U.S. companies to sell technology to China that enable atrocities against the Uyghurs.⁵¹ The United States must follow the EU's lead and be held accountable to binding international

law by implementing export regulation on these technologies.⁵² Until sales are regulated, the United States will continue to perpetuate China's atrocity crimes against the Uyghurs.

⁵⁰ Gorman & Schrader, *supra* note 37.

⁵¹ Margaret Besheet, *At UN: 39 Countries Condemn China's Abuses of Uyghurs*, VOICE OF AM. NEWS (Oct. 6, 2020), <https://www.voanews.com/east-asia-pacific/voa-news-china/un-39-countries-condemn-chinas-abuses-uyghurs>.

⁵² *EU Companies Selling Surveillance Tools to China's Human Rights Abusers*, AMNESTY INT'L (Sep. 21, 2020), <https://www.amnesty.org/en/latest/news/2020/09/eu-surveillance-sales-china-human-rights-abusers/>.

KNOWINGLY BENEFITTING: BLOCKING RELIEF FOR DRC CHILD COBALT MINERS

*by Austin Clements**

John Doe I v. Apple, Inc., a recently decided¹ class action lawsuit in the District Court for the District of Columbia, sought to hold multinational corporations liable for labor abuses that exist within the cobalt supply chain in consumer electronics products.² Extractive industries in the Democratic Republic of Congo (DRC) are a prevalent site of human rights abuses and exploitation and, in many ways, are a relic of the DRC's colonial past.³ Artisanal mining in the country has led to increasingly dangerous working conditions for miners and a rise in the use of child labor to mine cobalt for electronics, such as cell phones, electric cars, and laptops.⁴ Artisanal

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¹ While this article was being written, this case was dismissed in the D.C. District. See *John Doe I et al. v. Apple, Inc.*, No. 1:19-cv-03737 (D.D.C. Nov. 2, 2021). A timely appeal has been filed with the D.C. Circuit Court.

² Amended Complaint at 1-2, *Jane Doe I v. Apple Inc.*, No. 1:19-03737 (D.D.C. June 6, 2020) [hereinafter Amended Complaint].

³ Accord GEORGES NZONGOLA-NTALAJA, *THE CONGO: FROM LEOPOLD TO KABILA* (2002); JASON K. STEARNS, *DANCING IN THE GLORY OF MONSTERS: THE COLLAPSE OF THE CONGO AND THE GREAT WAR OF AFRICA* (2011); ADAM HOCHSCHILD, *KING LEOPOLD'S GHOST: A STORY OF GREED, TERROR AND HEROISM IN COLONIAL AFRICA* (1998) (accounting historical exploitation of the mineral, human, and other natural resources by colonial powers that transitioned from foreign colonial state control to foreign private corporate ownership.)

⁴ *Is My Phone Powered by Child Labour?*, AMNESTY INT'L, <https://www.amnesty.org/en/latest/campaigns/2016/06/drc-cobalt-child-labour/> (last visited Dec. 1, 2021).

mining is informal mining that is carried out using primitive tools in largely unsupervised zones without safety equipment.⁵ Often in these zones, tunnel collapses and child labor are rampant.⁶ However, the plaintiffs fell short of proving the burden required under U.S. law to show that they could recover damages from the defendants, which begs the question of whether plaintiffs can recover at all from U.S. based corporations for supply chain abuses committed abroad.

In *John Doe I*, the plaintiffs filed a claim against five tech giants—Alphabet, Apple, Dell, Microsoft, and Tesla—for violations under the Trafficking Victims Protection Reauthorization Act (TVPRA).⁷ The plaintiffs alleged that the companies knowingly benefitted from participation in a venture, which engaged in child labor, thus violating the plaintiffs' rights.⁸ For a claim under the TVPRA to prevail, the plaintiffs must prove: (a) the companies knew or should have known child labor was being used; (b) with this knowledge defendants continued to participate in a venture; (c) the defendants *knowingly benefitted* from the participation in the venture; and (d) the child plaintiffs were subjected to child labor.⁹ The corporate defendants acquired cobalt from Glencore and Umicore and Huayou Cobalt, which operate mines and artisanal mining zones (AMZs) in the DRC.¹⁰ The plaintiffs allege that in the AMZs they were injured as children, which squares the fundamental legal question of whether a U.S.-based corporation be held liable for human rights abuses that occur in its opaque supply chain right in the middle of the plaintiffs' claim.

⁵ *John Doe I v. Apple, Inc.*, No. 1:19-cv-03737, *2 (D.D.C. Nov. 2, 2021).

⁶ *Id.*

⁷ Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (codified as amended in scattered sections of 8, 18, and 22 U.S.C.).

⁸ Amended Complaint at 4.

⁹ *John Doe I v. Apple, Inc.*, No. 1:19-cv-03737, at *20.

¹⁰ *Our evolving approach to ASM: a plan for co-existence and transformation*, GLENCORE (Aug. 24, 2020), <https://www.glencore.com/media-and-insights/insights/our-evolving-approach-to-artisanal-small-scale-mining>.