

Making Xinjiang Sanctions Work

Policy Brief No. 3 – Legal considerations

Based on *Making Xinjiang Sanctions Work*, July 2022¹

Can economic sanctions address Xinjiang forced labour? The Xinjiang Sanctions research project seeks to answer this question. Drawing on 3 original datasets containing over 12,000 datapoints, confidential interviews and a year of research, this Policy Brief series summarises key findings from the research. For further analysis, and the references and authorities supporting the statements in these Policy Briefs, see the project's main research study at www.xinjiangsanctions.info.

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Key research findings

- While the Chinese government argues that its policies in Xinjiang are legal, Xinjiang sanctions are based on the premise that they – or their effects – are illegal.
- Some analysts have concluded that the policies implemented in Xinjiang in recent years have produced crimes against humanity, or even genocide.
- There are strong indications that China's policies in relation to employment of minority workers in and from Xinjiang are giving rise to violations of China's commitments under:
 - the 1998 ILO Declaration on Fundamental Principles and Rights at Work
 - the 1926 Slavery Convention
 - the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons ('Palermo Protocol')
 - the ILO Discrimination (Employment and Occupation) Convention No. 111 of 1958 (C111)
 - the ILO Employment Policy Convention No. 122 of 1964 (C122)
- Exactly which violations arise in which cases will require effective fact-finding and due diligence.
- There are signs that both the VSETC and Poverty Alleviation through Labour Transfers programme have generated forced labour, as that concept is defined in relevant ILO Conventions.
- China has committed to ratify and implement these ILO Conventions. Until then, there may be limits on holding

China to those standards, especially through trade measures, given fine print in the 1998 ILO Declaration on Fundamental Principles and Rights at Work.

- China is, however, also a party to the 1926 Slavery Convention, and there is evidence to suggest that the VSETC programme may have violated China's commitments under that Convention. The VSETC programme may have produced state-backed enslavement like that considered in post-World War II trials, and UN inquiries into North Korea and Eritrea.
- Meanwhile, the Poverty Alleviation through Labour Transfers programme may violate China's commitment, under Article 5 of the 1926 Slavery Convention, to put an end to the practice of compulsory labour.
- China's Xinjiang policies may also be in violation of the UN Protocol on Trafficking in Persons, as well as the ILO Discrimination (Employment and Occupation) Convention No. 111 of 1958 (C111), and the ILO Employment Policy Convention No. 122 of 1964 (C122). An ILO Committee of Experts has recently expressed deep concern regarding conformity of China's labour management policies in Xinjiang with these 2 ILO Conventions.
- Framing Xinjiang sanctions in terms of 'forced labour' may, however, constrain responses in a number of ways.
- First, until China's ratification of C29 and C105 is complete, its obligations to ensure respect for the international prohibition on forced labour may be limited to an obligation of conduct, not result.
- Second, framing concerns in terms of 'forced labour' (and employment discrimination) may work *against* the claim that states are entitled to take unilateral trade measures. The interpretation of the GATT that prevails in trade dispute resolution circles suggests that enforcement of labour standards should be handled through the ILO.
- However, there may be several good reasons to frame concerns in Xinjiang in terms of slavery, enslavement and human trafficking, and possibly genocide. These include:
 - accessing a larger set of GATT provisions to underpin unilateral trade measures, including Articles XX(a) (public morals) and XXI (security);
 - shifting the focus of remediation from coercion in the workplace to the larger context of state coercion; and
 - accessing additional dispute resolution channels (the UN Secretary-General, ICJ and PCIA, and the Conference of the Parties for the UN TOC Convention).

Why is this important?

- Effective sanctions strategy depends on clear signalling of the behaviour or policy that must be changed, and what must be done to 'cure' the underlying problem.
- A clear legal characterisation of the underlying violations that must be cured can help with both effective signalling and effective targeting. Clarity about what *exactly* is wrong with China's Xinjiang policies will help send a clear signal about what needs to be cured in order for sanctions to be terminated or lifted.
- Such clarity also helps with identification of the individuals and entities responsible for the conduct in question – and thus clarifies the audience or target for the signal in question.
- Different normative frameworks also open up different remedial avenues, ranging from ILO Committees to the

¹ James Cockayne, *Making Xinjiang Sanctions Work: Addressing forced labour through coercive trade and finance measures* (Nottingham: University of Nottingham, 2022).

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UN Secretary-General and the International Court of Justice.

- In some cases, reliance on certain norms may shut down certain remedial avenues. While many countries argue that China's Xinjiang policies violate ILO standards on forced labour, for example, it is questionable whether the normative framework around forced labour provides the basis for enforcement through trade measures such as import bans.
- The exact basis for justifying import bans under international trade law remains unclear. Developing countries may resist the idea that trade barriers can be used to enforce labour standards, since that proposition has been rejected repeatedly in intergovernmental negotiations over the last 75 years.
- There is considerable uncertainty about whether Xinjiang sanctions that restrict trade will survive a challenge through existing trade dispute mechanisms, given *how* they have been adopted, and the lack of clarity on which GATT provision they are based on.
- Trade measures may therefore be on a firmer footing if they are justified through reference to normative frameworks other than forced labour standards, such as the 1926 Slavery Convention.

Research overview

While the Chinese government argues its policies in Xinjiang are legal, Xinjiang sanctions are based on a premise that they – or their effects – are illegal. Some analysts have concluded that, taken together, the policies implemented in Xinjiang in recent years have produced crimes against humanity, or even genocide. This is based on evidence of physical and sexual assault, forced sterilisation, enforced disappearance, torture, and violations of rights to privacy, family life and religious freedom, as well as assessments of the purpose of these policies.

Forced labour

A more common accusation is that the treatment of Uyghur and other minority workers constitutes 'forced labour'. The concept of 'forced labour' is well delineated in international law, notably in the International Labour Organization's Forced Labour Convention No. 29 of 1930 (C29) and the Abolition of Forced Labour Convention No. 105 of 1957 (C105). China has recently signalled it will ratify both.

These Conventions define forced labour as all work or service which is exacted from any person under the threat of a penalty and for which the person has not offered himself or herself voluntarily. They prohibit use of forced labour for a variety of reasons, including political coercion, education, punishment for dissenting political views, economic development and racial or religious discrimination. The ILO assesses the presence of forced labour using 11 indicators. Several analysts, including in the US Department of Labor and US Customs and Border Protection, have concluded that these indicators are present in Xinjiang.

As an ILO Member, China may be subject to these standards even before it formally ratifies these Conventions, because they were incorporated into the 1998 ILO Declaration on Fundamental Principles and Rights at Work. However, the fine print in the Declaration may also limit the application of these standards, requiring China only to take measures to respect, promote and realise the prohibition on forced labour, as well as taking trade measures off the table as a means of enforcing these standards (Article 5).

The 1926 Slavery Convention

China has been party to the 1926 Slavery Convention since 1937. This commits China to bringing about the complete abolition of slavery, including the exercise of any or all of the powers attaching to the right of ownership. The relevant test is not whether chattel slavery is permitted in China (it clearly is not), but whether these powers are exercised *de facto*.

Relevant jurisprudence has made clear that in the present day, this involves the control exercised over a person that significantly restricts or deprives them of their individual liberty, with intent to exploit through use, management, profit, transfer or disposal of a person. This is usually achieved through violence, deception or coercion, and can involve the use of social and political power to intimidate and coerce. There is evidence supporting the conclusion that in some cases people held in the VSETC system are being treated in a manner that could meet this test. Notably, however, it is the state itself – rather than private 'employers' – that is exercising the requisite control. There are several precedents for characterising large-scale state-backed prison-industrial complexes as "state-backed enslavement", including cases following World War II, and UN inquiries on North Korea and Eritrea. This may be another such case. Meanwhile, the Poverty Alleviation through Labour Transfers programme may violate China's commitment under Article 5 of the 1926 Slavery Convention to put an end to the practice of compulsory labour.

Moreover, framing sanctions in terms of China's commitments under the 1926 Slavery Convention may create scope for involving the UN Secretary-General (Article 7) or international courts and arbitral bodies (Article 8).

Other relevant norms

Evidence also points to the possibility that both the VSETC and Poverty Alleviation through Labour Transfers programmes have produced outcomes that violate China's commitments under the UN Protocol on Trafficking in Persons. This would need to be assessed on a case-by-case basis. Where that was the case, China would have an obligation to punish such activities.

The ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR) has recently expressed "deep concern" about whether China's labour management policies in Xinjiang conform with China's commitments under the ILO Discrimination (Employment and Occupation) Convention No. 111 of 1958 (C111), and the ILO Employment Policy Convention No. 122 of 1964 (C122). The CEACR expressed specific concern about the racial profiling involved in the VSETC system and its segregation of minority workers from others, calling for reform of the VSETC system so that it focuses on vocational training, not counter-extremism.

The CEACR also rejected China's characterisation of these policies as furthering 'poverty alleviation', noting that "at the heart of the sustainable reduction of poverty lies the active enhancement of individual and collective capabilities, autonomy and agency that find their expression in the full recognition of the identity of ethnic minorities and their capability to freely and without any threat or fear choose rural or urban livelihoods and employment". The CEACR has called for a number of remedial measures to bring these workforce management policies in line with China's ILO Convention commitments.

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Trade law

There is a long history, stretching back to the post-World War II era, of countries agreeing not to use trade measures to seek to enforce labour standards. The entry of China into the WTO system occurred in the context of this agreement being tested and affirmed several times. Developing countries remain resistant to industrialised nations using trade measures to enforce labour standards. When the US recently moved to have forced labour issues considered in WTO negotiations on fisheries trade, China, supported by other countries including India and Russia, blocked the move.

The precise justification under international trade law for import measures restricting imports made with forced labour remains unclear.

Canada relied on GATT Article XX(e), creating an exception to equal treatment rules for “the products of forced labour”, when it adopted a new forced labour import ban. It is unclear whether this would apply to products connected to both the VSETC system *and* Poverty Alleviation through Labour Transfers, since this provision of GATT has not been tested in international dispute resolution.

Another justification for trade measures might be found if state support for forced labour constitutes illegal dumping. But such measures would need to follow an investigation as mandated by GATT, and could only be temporary.

Other justifications also imply certain restrictions on how trade measures are adopted and implemented. These relate to GATT Article XX(b) (human life or health) and Article XX(a) (public morals). To rely on such justifications, countries adopting trade measures will need to consult with affected parties and explore other solutions before turning to bans as a necessary solution.

Another possibility may be to justify import bans under GATT Article XXI (security). Recent decisions by dispute resolution bodies relating to invocation of this provision in disputes between Russia and Ukraine, and Saudi Arabia and Qatar, leave open the possibility of invoking this provision in the context of an international emergency such as the violation of the peremptory norm against slavery, or an ongoing genocide. Nevertheless, framing trade bans as a response to *forced labour* is less likely to be justified under Article XXI.

Figure 1. Norms and remedies that could underpin Xinjiang sanctions

Norms and remedies that could underpin Xinjiang sanctions

Norm	Application to Xinjiang workforce management policies				Remedial considerations		
	Labour standards	Slavery	Human trafficking	Genocide, CAgH	Instrument	Remedy sought	Other considerations
International criminal law		Genocide Crime against humanity of enslavement			ICJ Universal jurisdiction	Prosecution Reparations	
ILO C29 and C105	Prohibition on forced labour				ILO mechanisms	Cessation of forced labour	China in process of ratifying.
1998 Declaration on Fundamental Principles and Rights at Work	Promote and realise the principle of elimination of forced or compulsory labour				ILO mechanisms	Cessation of policies promoting forced or compulsory labour	Art. 5 admonition against invocation for protectionist trade purposes
1926 Slavery Convention		Art 2(b) complete abolition of slavery. Art. 5 remuneration and non-transfer of compulsory labour			Art 7 UNSG communication role Art 8 ICJ/PCIA dispute settlement	Rectification of VSETC to conform with Art 2 Rectification of Poverty Alleviation through Labour Transfers to conform with Art 5	China party since 1937
Peremptory norms of international law		Prohibition of slavery		Prohibition of genocide	State cooperation, cessation of aid, ICJ	Cessation of violation of peremptory norm	Enforceable erga omnes. See ILC 2022.
Palermo Protocol			Obligation to prevent and punish		UN TOC Convention of Parties ICJ	Cessation of trafficking Punishment	Depends on demonstration of intent ('purpose of exploitation')
ILO C111 and C122	C111 Art 2 – Non-discrimination in employment C122 Art 1 – Freely chosen employment					Rectify VSETC system to address segregation, focus on vocational training, public access to training centres, address biases against minority lifestyles Ensure participation of affected workers in design of employment policies	Additional details of remedial steps provided in CEACR report (ILO 2022).
GATT Art. XX(a) (public morals)					Public moral outrage at production based on violations	Import ban	Procedural requirements
GATT Art. XX(e) (prison labour)		Forced labour				Import ban	Cited by Canada in WTO notification
GATT Art. XXI (security)		Prohibition on slavery as an essential security interest		Prevention of genocide, CAgH as an essential security interest	Restrictive trade measures	Cessation of conduct identified	Unclear whether 'emergency in international relations' present

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