The Uyghur Tribunal

People's Justice or Show Trial?

Jaq James

CO-WEST-PRO CONSULTANCY

Working Paper
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Substantial revisions made to this working paper will be listed on this page. Minor revisions will not be listed. Feedback is encouraged from all readers.

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“Those who make you believe absurdities
can make you commit atrocities”

~ Voltaire

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1. EXECUTIVE SUMMARY

In September 2020, a people's tribunal – called the Uyghur Tribunal – was established in London with the self-appointed task of evaluating whether the government of the People's Republic of China (PRC) had engaged in "atrocities and possible genocide" against the Uyghur people (one of China's ethnic minorities, largely based in the country's Xinjiang region).[1] The Uyghur Tribunal symbolically filled a jurisdictional gap in international law: a case against PRC officials could not be brought before the United Nations' International Criminal Court as the PRC government is not a signatory of that court; and with the PRC not accepting broad compulsory jurisdiction of the United Nations' International Court of Justice (which determines breaches of state responsibilities), a case could not be brought against the PRC government before that court either.[2]

The Uyghur Tribunal's hearings were held throughout 2021. On 9 December 2021, the tribunal delivered its judgment that the PRC government had committed genocide against the Uyghur people, as well as other international law crimes.[3] The tribunal's finding received worldwide media, political and academic attention, and was perceived by segments of the international Uyghur diaspora community as validating their cause.

Anecdotally, there were laypersons who mistook the Uyghur Tribunal for a tribunal with state authority to make a legally binding decision. It was not. People's tribunals are not state courts or tribunals. The latter institutions are entrusted with legal authority by states to hand down penal sentences or fines, whereas the former are collective bodies of civil society with no legal authority whatsoever. Upon understanding this difference, laypersons may naturally question whether the exercise of holding the Uyghur Tribunal had any legitimacy, or whether it was merely an unenforceable show trial disguised as an exercise in people's justice.

[1] 'About', *Uyghur Tribunal* (Web Page) <online>.
[2] Ibid.
[3] 'Uyghur Tribunal Judgment', *Uyghur Tribunal* (Web Page, 9 December 2021) <online>.

This paper provides a framework to help readers answer this pertinent question via the following pathway: (1) a brief outline of the purpose of people's tribunals and two significant historical examples of people's tribunals; (2) establishing criteria for determining a legitimate people's tribunal; (3) establishing criteria for determining an illegitimate people's tribunal (a show trial); and (4) measuring aspects of the Uyghur Tribunal against the criteria identified in the previous two sections.

This paper attempts to side-step the standard approach of think tanks, human rights organisations and the mainstream media of instructing the public **what** to think instead of **how** to think. As such, this paper aims to provide readers with a framework on how to think about the Uyghur Tribunal as opposed to prescribing conclusions best left to each reader to form for themselves.

2. WHAT IS A PEOPLE'S TRIBUNAL?

People's tribunals are organised outside formal state and international structures. They are set up against a reality that not all actors can be brought before a court of law, and not all international law advocates have access to a competent and good-faith legal arena. Described as the "politics of impunity",[4] this reality has led to innovative forms of legal resistance by civil society groups, with people's tribunals being one of the most impactful forms.

People's tribunals cover a range of "people's issues", including "international economic policies, the rights of indigenous peoples, communal violence, psychiatric abuse, homophobia, and the treatment of migrants, refugees and asylum seekers".[5] They generally arraign state governments, international organisations and international corporations, and sometimes individuals.[6] Most people's tribunals are organised by advocacy groups or affected groups, or held in response to requests from such groups, on an ad hoc basis.[7] A people's tribunal panel is "normally composed of persons from different countries and expert in (international) law or other fields, who have been selected for the particular tribunal by the organisers".[8]

In terms of a simplified definition of an international 'people's tribunal', Byrnes and Simm (2018) offer the following: "a civil society initiative establishing a forum for a body of eminent persons and/or experts to consider allegations of violations of

[4] See Chowra Makaremi and Pardis Shafafi, 'Desire for Justice, Desire for Law: An Ethnography of People's Tribunals' (2019) 42(2) *Political and Legal Anthropology Review* 181, 181.
[5] Dianne Otto, 'Beyond Legal Justice: Some Personal Reflections on People's Tribunals, Listening and Responsibility' (2017) 5(2) *London Review of International Law* 225, 225-226.
[6] Andrew Byrnes and Gabrielle Simm, 'International People's Tribunals: Their Nature, Practice and Significance' in Andrew Byrnes and Gabrielle Simms (eds), *People's Tribunals and International Law* (Cambridge University Press, 2018) 11, 17.
[7] Ibid 34-35.
[8] Ibid 17.

specific standards of international law … in the light of documentary and other forms of evidence presented to them in formal proceedings."[9]

Whilst seen as a forum of empowerment, people's tribunals are not without its many critics. As described by Simm and Byrnes (2014):

"The activities and pronouncements of international peoples' tribunals are frequently met with puzzlement at best and derision at worst. Critics and opponents point to their lack of a formal basis in the state-sponsored international order, the respects in which they fail to replicate the full panoply of traditional judicial proceedings, tribunals composed of members who may appear to have prejudged the issues in contention, and the lack of enforceability within the international legal system or any state system of the 'verdicts' or 'judgments' of such bodies."[10]

Such criticism is not too dissimilar to that directed at war crimes tribunals for being "political, rather than legal" and at risk of "becoming mere show trials".[11] However, as Simm and Byrnes (2014) espouse:

"*Rather than simply being ignored or dismissed, international peoples' tribunals may be understood not as a form of political activism and advocacy that lacks legitimacy from a legal perspective, but as institutions that engage seriously with international legal norms. The world of international law has expanded far beyond the society of nation-states and international organizations to include a range of other actors who contribute to and draw on international law. The study of these institutions provides a window into the significance of international law for civil society, raises questions about the source of legitimacy of international law norms and 'ownership' of them,*

[9] Andrew Byrnes and Gabrielle Simm, 'International People's Tribunals: Their Nature, Practice and Significance' in Andrew Byrnes and Gabrielle Simms (eds), *People's Tribunals and International Law* (Cambridge University Press, 2018) 11, 14.
[10] Gabrielle Simm and Andrew Byrnes, 'International People's Tribunals in Asia: Political Theatre, Juridical Farce, or Meaningful Intervention?' (2014) 4 *Asian Journal of International Law* 103, 104.
[11] Gerry Simpson, *Law, War and Crime* (Polity Press, 2007) 11 and 107.

and highlights some of the gaps in and failings of the present international legal system."[12]

By way of history, the first modern people's tribunal identified in the literature is the Russell Tribunal.[13] It was organised in Sweden and Denmark in 1966-1967 by famed public intellectuals, Bertrand Russell, as well as Jean-Paul Sartre. The tribunal's self-appointed mandate was to investigate and judge on whether war crimes and crimes of aggression were committed in Vietnam by the United States and its allies, including Australia and New Zealand.

Keeping in mind that the Russell Tribunal was organised before the operation of the International Criminal Court in 2002, Sartre (1970) proffered the following justification for the people's tribunal:

"Why did we appoint ourselves? For the precise reason that no one else did it. Governments or peoples could have done it. But governments want to retain the ability to commit war crimes without running the risk of being judged; they are therefore not about to set up an international body responsible for judging them. As for the people, save in time of revolution[,] they do not appoint tribunals; therefore they could not appoint us."[14]

Sartre's comment indicates that the Russell Tribunal was not so much a tribunal of the 'people' as it was a tribunal of a few self-selected Western intellectuals. Sartre's comment does, however, demonstrate the more pertinent point that there was a

[12] Gabrielle Simm and Andrew Byrnes, 'International People's Tribunals in Asia: Political Theatre, Juridical Farce, or Meaningful Intervention?' (2014) 4 *Asian Journal of International Law* 103, 104.
[13] See, for example: Leah Bassel, 'A Promise of Listening: Migrant Justice and the London Permanent People's Tribunal' (2022) 63(4) *Race & Class* 35, 36; Gabrielle Simm and Andrew Byrnes, 'International People's Tribunals in Asia: Political Theatre, Juridical Farce, or Meaningful Intervention?' (2014) 4 *Asian Journal of International Law* 103, 104; Dianne Otto, 'Beyond Legal Justice: Some Personal Reflections on People's Tribunals, Listening and Responsibility' (2017) 5(2) *London Review of International Law* 225, 225.
[14] Jean-Paul Sarte, 'Answer and Commentary to de Gaulle's Letter Banning the Tribunal from France' in John Duffett (ed), *Against the Crime of Silence: Proceedings of the International War Crimes Tribunal* (Simon & Schuster, 1970) 29, 33.

gap in the international jurisdiction that needed to be filled on the matter of the Vietnam War.[15]

The Russell Tribunal found that the United States had violated international law and placed the violations within a broader narrative of the United States' imperialist expansion.[16] According to Simm and Byrnes (2014), the Russell Tribunal was criticised by many for being "partisan, procedurally flawed and illegitimate".[17] However, it has nevertheless been credited as the general model for the dozens of people's tribunals that proceeded over the following decades.[18] The main difference in impetus between the Russell Tribunal and subsequent people's tribunals has been described by commentators as a move "away from intellectuals and elites to a 'bottom-up' organisation involving the victims and survivors themselves, who speak their own experiences to power".[19] In other words, they have become 'people's tribunals' in the true sense of the word. One of the strongest examples of this is the Women's International War Crimes Tribunal ('Tokyo Women's Tribunal').

The Tokyo Women's Tribunal was established in 2000 for elderly Asian women who had been subjected to rape and sexual slavery in their youth by the Japanese Imperial Army during World War Two (referred to as 'comfort women'). Since the end of the war, the comfort women had no legal recourse for their pain and suffering. Between 1946 and 1948, the allied victors had established and maintained a war crimes tribunal with legal authority to put Japanese war criminals on trial – called the International Military Tribunal for the Far East ('IMTFE'). The indictments,

[15] In regard to the United States, this jurisdictional vacancy still exists today, as the United States has not accepted jurisdiction of the International Criminal Court and has rejected broad compulsory jurisdiction of the International Court of Justice.
[16] Lelio Basso, 'Summing-up of the Second Session' in Peter Limqueco and Peter Weiss (eds), *Prevent the Crime of Silence: Reports from the Sessions of the International War Crimes Tribunal Founded by Bertrand Russell* (Allen Lane, 1971) 324.
[17] Gabrielle Simm and Andrew Byrnes, 'International People's Tribunals in Asia: Political Theatre, Juridical Farce, or Meaningful Intervention?' (2014) 4 *Asian Journal of International Law* 103, 105.
[18] Ibid.
[19] Chowra Makaremi and Pardis Shafafi, 'Desire for Justice, Desire for Law: An Ethnography of People's Tribunals' (2019) 42(2) *Political and Legal Anthropology Review* 181, 182.

however, did not include the crime of rape and sexual slavery against the comfort women.

Since that time, the Japanese government had consistently rejected legal responsibility for the suffering of the comfort women, and lawsuits filed in Japanese courts by the women had also been consistently rejected.[20] The International Criminal Court was not an option at the time, as it had not come into being yet and, when it did in 2002, it had no retrospective jurisdiction.

Against this backdrop, the impetus for the Tokyo Women's Tribunal, as Dolgopol (2018) explains, was the women's "sense of injustice that no one had been made responsible for the atrocities that they had had to endure", as well as "the international community lack[ing] an understanding of the societal factors that enabled the [Japanese] military to put in place a system that could treat thousands of women in such a horrifying manner".[21] Other subsidiary goals of some of the women included the hope that "holding the Tribunal might create sufficient pressure on the [Japanese] government to change its attitude towards reparations, in particular the payment of compensation and the inclusion of materials about these events in the history books utilised in Japanese schools".[22] In other words, it was the desires and needs of the victims that set the goals for the Tokyo Women's Tribunal, not elite interests.

The Tokyo Women's Tribunal attempted to be as faithful as possible to standard legal procedures: it appointed a panel of judges who were recognised experts in international law, international criminal law and crimes of violence against women; prosecutors were appointed who were qualified lawyers within their own jurisdictions; the Japanese government was offered the opportunity to participate to give their defence (which was declined); and a Japanese *amicus curiae* ('friend of the

[20] Christine Chinkin, 'People's Tribunals: Legitimate or Rough Justice' (2006) 24(2) *Windsor Yearbook of Access to Justice* 201.
[21] Ustinia Dolgopol, 'The Tokyo Women's Tribunal: Transboundary Activists and the Use of Law's Power' in Andrew Byrnes and Gabrielle Simms (eds), *People's Tribunals and International Law* (Cambridge University Press, 2018) 84, 85.
[22] Ibid 93-94.

court') was permitted to submit anticipated legal arguments on behalf of the Japanese government in its absence, and given full consideration by the judges.[23]

Dolgopol (2018) explains that, for many of those working on the Tribunal, the "use of the language of the law was seen as a way of presenting their efforts as 'neutral', that is, this was not to be viewed as a political effort in the sense that there was a political ideology behind the Tribunal".[24] It was also believed that "a process and decision that mirrored those of a court would have a greater effect on society at large than other types of public events".[25] Dolgopol (2018) notes the fact that a group of victims who mostly had limited formal education chose a legal framework "speaks to the power of such a framework".[26]

As for evidentiary procedures, all witnesses took a public oath, and, as Dolgopol (2018) describes it, there was a view that "the material before the Tribunal had to match the quality of material that might come before a state-created body".[27] Chinkin (2006) expands on this point:

"considerable attention was given to the difficult question of evidence. The events had taken place over fifty years previously and across an entire continent. Much had been destroyed both during the war and through deliberate destruction at its end. Enormous efforts were put into the collection of historical archives from the remaining materials. These proved extensive and included testimony and writings of former Japanese military personnel, records of military and local administrators within occupied states and Japan, official records and receipts of transport movements, shipping of supplies, requisitioning of property, financial accounts relating to soldiers' pay and deductions for their use of the comfort women and

[23] Christine Chinkin, 'People's Tribunals: Legitimate or Rough Justice' (2006) 24(2) *Windsor Yearbook of Access to Justice* 201, 216-17.
[24] Ustinia Dolgopol, 'The Tokyo Women's Tribunal: Transboundary Activists and the Use of Law's Power' in Andrew Byrnes and Gabrielle Simms (eds), *People's Tribunals and International Law* (Cambridge University Press, 2018) 84, 93.
[25] Ibid 97.
[26] Ibid 101.
[27] Ibid 93.

personal memoirs and diaries. Such archives were to supplement and support the oral testimony from survivors".[28]

Another important feature of the Tokyo Women's Tribunal was its application of existing international law standards of criminal liability and state responsibility, not the creation of new international law. The legal approach taken by the tribunal was described by Chinkin (2006) as follows:

"the Tribunal was constructed as a derivative from the IMTFE, a formal international judicial forum. … The prosecution tactic was to present the claims of the comfort women as a continuation of what had been left undone at the IMTFE…. In accordance with this strategy, the accused were those who had been convicted at [the IMTFE]. This allowed the [Tokyo Women's Tribunal] to take as a matter of proved historical record their movements and presence in particular places in the context of those war crimes and crimes against humanity of which they had been found guilty. The 'add-on' charges of sexual slavery were considered under the law applicable at the time of the commission of the offences…. The only exception made to the principle that indictments be limited to those convicted by the IMTFE was with respect to Emperor Hirohito. It was considered that political reasons had prevented him from being indicted in 1945, that his status as Emperor was a matter of historical record and that as the [Tokyo] Women's Tribunal did not seek to place him in any particular theatre of war but rather to assert his superior responsibility on the basis of what he knew or should have known about the comfort women system, this earlier omission was no obstacle to the proceedings in 2000".[29]

The above two paragraphs demonstrate that, in order to retain its perceived legitimacy, the Tokyo Women's Tribunal **did not rely on oral testimony alone, but rather it was heavily supplemented with documentary evidence** and built upon prior convictions of the perpetrators.

The lengthy judgment of the Tokyo Women's Tribunal that "brought together the historical record, factual testimony and legal reasoning" was prepared over 12 months after the last day of the hearings, and was delivered in the Hague in

[28] Christine Chinkin, 'People's Tribunals: Legitimate or Rough Justice' (2006) 24(2) *Windsor Yearbook of Access to Justice* 201, 214.
[29] Ibid 215.

December 2001.[30] The tribunal had found that Emperor Hirohito and other named defendants were "guilty of rape and sexual slavery as a crime against humanity and that the government of Japan incurred responsibility under international law for its establishment and maintenance of the comfort system".[31] Yet, "[d]espite the length and legalism of its Judgment, the Tokyo Women's Tribunal was criticized as not meeting certain legal requirements".[32] Amnesty International, for example, "refused to participate on the basis that its legal framework did not meet due process requirements for a fair trial (in regard to prosecution in absentia of defendants who had been invited but had declined to appear)".[33]

Nevertheless, the Tokyo Women's Tribunal did receive institutional recognition. Cheah (2002) noted that the Philippines Supreme Court recognised the rigour of the Tokyo Women's Tribunal's judgment and was cited as background information.[34] Cheah (2002) also noted the International Labour Organization's Committee of Experts on the Application of Conventions and Recommendations (ILO-CEACR) highlighted "the procedure and legal material considered by the [Tokyo Women's Tribunal], which indicated that the ILO-CEACR viewed the tribunal's judgment as legally sound, and went on to cite the judgment in an individual observation concerning Japan's compliance with the *ILO Forced Labour Convention 1930.*[35] Other outcomes of the Tokyo Women's Tribunal, as identified by Dolgopol (2018), included: international media giving increased attention to the Japanese government's failure to offer reparations to the victims; local governments of Japan and other countries adopting resolutions about the matter; and invitations to the women to speak at

[30] Ibid 216.
[31] Ibid 214.
[32] Gabrielle Simm and Andrew Byrnes, 'International People's Tribunals in Asia: Political Theatre, Juridical Farce, or Meaningful Intervention?' (2014) 4 *Asian Journal of International Law* 103, 112.
[33] Ibid.
[34] WL Cheah, 'The Potential and Limits of Peoples' Tribunals as Legal Actors: Revisiting the Tokyo Women's Tribunal' [2022] *Transnational Legal Theory*, 1, 14.
[35] Ibid 10-11.

international gatherings.[36]

It is noted that not all people's tribunals have followed the format of the Tokyo Women's Tribunal. Some have been laxer with rules of legal and evidentiary procedure, and others have sought to reject existing laws and impose their own self-made laws.[37]

Balancing the needs of victims with the qualities of a legitimate and fair hearing is not an easy task. If a people's tribunal swings too far towards the former, it can suffer from a severe credibility deficit; if it swings too far towards the latter, people's tribunals would rarely be able to 'get off the ground'. For this reason, the next section identifies 'legitimate process criteria' for people's tribunals that balance both sides of the equation.

[36] Ustinia Dolgopol, 'The Tokyo Women's Tribunal: Transboundary Activists and the Use of Law's Power' in Andrew Byrnes and Gabrielle Simms (eds), *People's Tribunals and International Law* (Cambridge University Press, 2018) 84.
[37] See Andrew Byrnes and Gabrielle Simms (eds), *People's Tribunals and International Law* (Cambridge University Press, 2018).

3. LEGITIMATE PROCESS CRITERIA

The literature available on the topic of people's tribunals is not extensive due to the majority of international legal theorists viewing people's tribunals as suffering from a legitimacy deficit and therefore see no further need to engage with the topic.[38] There are still, nevertheless, a community of respected legal practitioners and academics who are willing to examine arguments in support of people's tribunals.

Chinkin (2006) aptly articulates the framing of the debate as follows:
"If Peoples' Tribunals are perceived, as in some sense, plugging a gap in the formal justice systems, a crucial question must be whether they can assert any legitimacy, or whether the very concept is an anarchic one lacking any authority to castigate state behaviour".[39]

In response to this framing, Chinkin (2006) and Byrnes and Simms (2013) posit that there is no greater endowment of legitimacy for the concept of people's tribunals than the Preamble of the United Nations Charter.[40] The Preamble opens with the following words:
*"**We the peoples** of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom…".*
(emphasis added).

[38] Aldo Zammit Borda and Stefan Mandelbaum, '"If I Would Stay Alive, I Would Be Their Voice": On the Legitimacy of International People's Tribunals' [2022] *The Modern Law Review* 1, 2.
[39] Christine Chinkin, 'People's Tribunals: Legitimate or Rough Justice' (2006) 24(2) *Windsor Yearbook of Access to Justice* 201, 215.
[40] Ibid 218; Andrew Byrnes and Gabrielle Simm, 'People's Tribunals, International Law and the Use of Force' (2013) 36(2) *University of New South Wales Law Journal* 711, 744.

Accordingly, in the context of international law, it can be said that the 'peoples' have an international treaty basis to "put themselves forward as rights holders and responsible for the interpretation and implementation of the principles that are necessary to make international law a living and evolving tool".[41]

Similarly, one of the most eminent supporters of the concept of people's tribunals – former justice of the High Court of Australia, Michael Kirby – acknowledges that: *"The growth of the activities of Peoples Tribunals is, in one sense, a response to the inadequacy of the institutions of the International Community. In another sense, it is an assertion of the rights of peoples themselves which are different from the rights of states and of international organisations".*[42]

Thus, the foundation for the conceptualisation of people's tribunals is accepted by some as legitimate. However, it is the form that a people's tribunal takes that determines whether claims to legitimacy extend beyond foundational conceptualisation to their execution in practice; that is, ensuring that a people's tribunal is "not a motley collection of vigilantes but a tribunal of conscience guided and inspired by the highest principles of international law and justice".[43]

On this point of highest principles, Michael Kirby, who has taken part in people's tribunals in the past, submits that, if people's tribunals are to "enjoy and deserve respect", they must "observe principles of procedural fairness (natural justice) and

[41] Simona Fraudatario and Gianni Tognoni, 'The Participation of Peoples and the Development of International Law: The Laboratory of the Permanent People's Tribunal' in Andrew Byrnes and Gabrielle Simms (eds), *People's Tribunals and International Law* (Cambridge University Press, 2018) 133, 134.
[42] Michael Kirby, 'People's Tribunals and Due Process' (Conference Paper Summary, First International Conference of People's Tribunal, 16-18 December 1994) <online>.
[43] *Kuala Lumpur War Crimes Commission v George W Bush and Anthony L Blair*, Kuala Lumpur War Crimes Tribunal, Case No 1-CP-2011, *Notes of Proceedings*, 19 November 2011, 49 [17], cited in Andrew Byrnes and Gabrielle Simm, 'People's Tribunals, International Law and the Use of Force' (2013) 36(2) *University of New South Wales Law Journal* 711, 711.

due process".[44] According to Michael Kirby, procedural fairness and due process include:

- the relevant accusation being provided to the accused "in good time with full and adequate particulars";
- an opportunity provided to the accused to attend the hearing;
- in the accused's absence, "skilled legal counsel" being appointed to represent the accused and submit evidence in support of the accused's imputed case;
- witnesses submitted to questioning and cross-examination; and
- the tribunal observing "care in the conduct of its deliberations and in the open publication of its findings and verdict".[45]

It is noted that, unlike Amnesty International's objection to the Tokyo Women's Tribunal, Kirby does not take issue with an absent accused, as long as the opportunity to be present has been provided and a competent legal representative is appointed to argue for the accused in their absence. This helps people's tribunals

[44] Michael Kirby, 'People's Tribunals and Due Process' (Conference Paper Summary, First International Conference of People's Tribunal, 16-18 December 1994) <online>.

[45] Ibid. There are commentators who submit that people's tribunals do not need to adhere to procedural and legal standards of a state court in order to retain their legitimacy: see, for example, Craig Borowiak, 'The World Tribunal on Iraq: Citizens' Tribunals and the Struggle for Accountability' (2008) 30 *New Political Science* 161 and Dianne Otto, 'Beyond Legal Justice: Some Personal Reflections on People's Tribunals, Listening and Responsibility' (2017) 5(2) *London Review of International Law* 225. For the purposes of this paper, however, Michael Kirby's criteria have been accepted due to the anticipated layperson's opinion that, if an organised group seeks to name itself a 'tribunal', such a name imputes that procedural and legal standards of a state court would be adopted as far as possible.

'get off the ground' since it would be a rare case that an accused party would be willing to subject themselves to a tribunal with no state authority.[46]

Other criteria for process legitimacy that can be identified across the literature include:

- relying on the language of international law (as the more a tribunal seeks to depart from that standard, the more their process legitimacy may suffer);[47]
- tribunal members possessing expertise and community standing (particularly appointing lawyers and current or former judges);[48]
- attempting to crowdfund tribunals to help avoid the phenomenon of 'he who pays the piper calls the tune' (also pejoratively referred to as donor's justice);[49] and
- following recognised practices in gathering and assessing credible evidence from a multiplicity of sources.[50]

[46] Andrew Byrnes and Gabrielle Simm, 'International People's Tribunals: Their Nature, Practice and Significance' in Andrew Byrnes and Gabrielle Simms (eds), *People's Tribunals and International Law* (Cambridge University Press, 2018) 11, 20.

[47] Aldo Zammit Borda and Stefan Mandelbaum, '"If I Would Stay Alive, I Would Be Their Voice": On the Legitimacy of International People's Tribunals' [2022] *The Modern Law Review* 1, 16. It is acknowledged that the language of international law is viewed by some members of the international community as a conveyor of "imperial domination, wars and interventions": see, for example, Chowra Makaremi and Pardis Shafafi, 'Desire for Justice, Desire for Law: An Ethnography of People's Tribunals' (2019) 42(2) *Political and Legal Anthropology Review* 181, 183. For the purposes of this paper, however, given that the Uyghur Tribunal was not tasked with re-writing international law, this criterion has been accepted.

[48] Andrew Byrnes and Gabrielle Simm, 'International People's Tribunals: Their Nature, Practice and Significance' in Andrew Byrnes and Gabrielle Simms (eds), *People's Tribunals and International Law* (Cambridge University Press, 2018) 11, 35.

[49] Ibid 37. See also Sara Kendall, 'Donor's Justice: Recasting International Criminal Accountability' (2011) 24 *Leiden Journal of International Law* 585.

[50] Aldo Zammit Borda and Stefan Mandelbaum, '"If I Would Stay Alive, I Would Be Their Voice": On the Legitimacy of International People's Tribunals' [2022] *The Modern Law Review* 1, 11.

Compliance with the above two sets of ‘legitimate process criteria’ can help guard against accusations of people's tribunals being mere show trials, and make their findings more persuasive in the eyes of the public. On this point, it is also useful to consult the literature on show trials to identify a set of what can be called ‘illegitimate process criteria’ that people’s tribunals should seek to avoid, outlined in the next section.

4. ILLEGITIMATE PROCESS CRITERIA

"A trial that 'automatically' vindicates the position of the Prosecutor is a show trial in the precise Stalinist sense of that expression."[51] This is the sentiment expressed across the literature on the topic of show trials. Put simply, show trials are sham legal proceedings designed to dramatise political campaigns and are therefore illegitimate.[52]

What is notably absent in the literature on people's tribunals is how to identify when international people's tribunals are actually illegitimate geopolitical devices designed to merely damage and tarnish 'enemy states'; in other words, 'show people's tribunals'. To help illuminate this matter, the most comprehensive work on the topic of show trials – in terms of establishing criteria to help identify show trials – is also the most apt source for analysing people's tribunals; that is, the 2007 *Harvard International Law Journal* article by Jeremy Peterson called 'Unpacking Show Trials: Situating the Trial of Saddam Hussein'.[53]

The characteristics Peterson (2007) identifies for show trials include:

- denying the accused the opportunity to tell their side of the story;
- denying the accused the right to counsel;
- denying the accused the opportunity to obtain exculpatory evidence;
- denying the accused the opportunity to challenge the prosecution's evidence;
- failing to limit the record to relevant evidence or failing to admit relevant evidence;
- not providing a clear definition of the crime attributed to the accused;
- lacking sufficient proof requirements; and
- diminished independence or competence of decision-makers.[54]

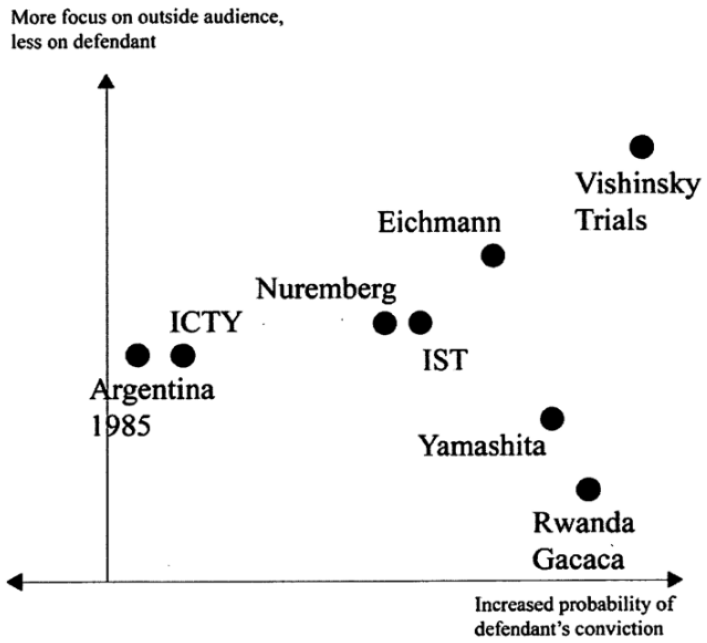
[51] Martti Koskenniemi, 'Between Impunity and Show Trials' in JA Frowein and R Wolfrum (eds), *Max Planck Yearbook of United Nations Law* (Kluwer Law International, 2002) vol 6, 1, 18.
[52] Leora Bilsky, 'Political Trials' in *International Encyclopedia of the Social and Behavioural Sciences* (2015, Elsevier) vol 18, 497, 497.
[53] Jeremy Peterson, 'Unpacking Show Trials: Situating the Trial of Saddam Hussein' (2007) 48(1) *Harvard Law Journal* 257.
[54] Ibid 269-288.

Many of these characteristics are the inverse of the legitimate characteristics of people's tribunals noted in the previous section.

Peterson (2007) ultimately boils down show trials to two elements on a gradient:

- more focus on stage-managing for the outside audience and less focus on procedural fairness for the accused (the show part); and
- probability of attributed guilt to the accused being a foregone conclusion (the reduced risk part).

If a trial lacks 'risk' (meaning there is no risk of the accused being found 'not guilty') and the 'show' is what preoccupies the participants' minds, then Peterson (2007) submits there is a lack of legitimacy.[55] To help understand the relationship between these two elements, Peterson (2007) presents the following graph which places the elements of 'show' and 'risk' on a vertical and horizonal axis, where the characteristics listed above can help determine where on the gradient a trial (or a people's tribunal) sits.[56] The further a trial is located in the top-right corner, the more likely it is to be a show trial.



[55] Ibid 260-269.
[56] Ibid Figure 2.

In the next section, aspects of the Uyghur Tribunal will be assessed against the 'legitimate process criteria' and 'illegitimate process criteria' identified in this section and the previous section. It is emphasised that the next section is not meant to be a comprehensive and exhaustive analysis of all aspects of the Uyghur Tribunal against both sets of criteria. Rather, this whole paper is a mere starting point for lay readers who wish to carry out their own research and critical reflections to judge for themselves whether the Uyghur Tribunal was a legitimate action of people's justice or a mere show trial.

5. ASPECTS OF THE UYGHUR TRIBUNAL MEASURED AGAINST 'LEGITIMATE PROCESS CRITERIA' AND 'ILLEGITIMATE PROCESS CRITERIA'

The Uyghur Tribunal was well-publicised throughout the mainstream media before, during and after its hearings. It was held in the hall of London's Church House, it was open to the public and it was streamed live on the internet. The establishment of the Uyghur Tribunal was set against the backdrop of widespread accusations from Uyghur diaspora communities that their family members in Xinjiang, or themselves (when they were in Xinjiang), had been subjected to human rights abuses by the PRC government amounting to crimes under international law. The allegations included genocide and crimes against humanity, such as torture, enslavement and arbitrary imprisonment. The diaspora communities alleged that Uyghur Muslims had been targeted by the PRC government under a false or exaggerated pretext of an Islamic terrorism and extremism problem in Xinjiang.

This paper does not attempt to prove or disprove whether Islamic terrorism and extremism was a sufficient problem in Xinjiang to warrant government intervention to begin with. Genocide, torture and crimes against humanity, being inviolable *jus cogens* norms, can never be justified as a response to terrorism. It is therefore unnecessary to undertake a proportionality assessment of the PRC government's counter-terrorism strategy for the purposes of assessing the Uyghur diaspora community's allegations of *jus cogens* violations.

It is noted that some 'legitimate process criteria' were satisfied by the Uyghur Tribunal, such as inviting the PRC government to present its case (which was not accepted) and having open hearings. Yet, it is submitted that important 'legitimate process criteria' were not satisfied. It is further submitted that some aspects of the Uyghur Tribunal met 'illegitimate process criteria', thereby delegitimising the Uyghur Tribunal by having show trial characteristics and elements. The next sub-sections

provide an outline of some of the areas where, on the face of it, the Uyghur Tribunal faltered.[57] These areas include:

- unsworn testimony;
- donor's justice;
- no defence counsel and no cross-examination;
- objectionable questions put to fact witnesses;
- questionable expert witnesses; and
- weak reasoning in the tribunal's judgment.

5.1. Unsworn Testimony

It does not appear that any of the fact witnesses or expert witnesses gave sworn testimony to the Uyghur Tribunal, such as signing a statutory declaration. This means there would have been no legal ramifications if witnesses intentionally exaggerated or lied to the tribunal. State courts would never allow unsworn testimony from witnesses. As such, this may amount to a failure to satisfy the 'legitimate process criterion' of following recognised practices in gathering and assessing the credibility of evidence through a multiplicity of sources. This brings into question whether the Uyghur Tribunal was more concerned with the presentation of witness testimony rather than its reliability, which reduces the 'risk' element and invokes the 'show' element of a show trial, identified by Peterson (2007).[58]

[57] The Uyghur Tribunal has over 60 hours of hearing footage, amongst other relevant material: 'Uyghur Tribunal', *YouTube* (Web Page) <online>. Due to the limited resources of CO-WEST-PRO Consultancy, a full and detailed analysis of all the relevant material was not able to be undertaken. The purpose of a brief outline of key aspects of the Uyghur Tribunal is to provide an example of an analytical framework for lay readers who wish to reach their own independent conclusions on the legitimacy of the Uyghur Tribunal based on their own research and reflections.

[58] Jeremy Peterson, 'Unpacking Show Trials: Situating the Trial of Saddam Hussein' (2007) 48(1) *Harvard Law Journal* 257, 260-269.

5.2. Donor's Justice

According to its website, the Uyghur Tribunal was established at the request of Dolkun Isa, the President of the World Uyghur Congress – a non-governmental organisation headquartered in Germany.[59] It is a secessionist organisation that views Xinjiang as being a separate country, called East Turkistan, occupied by the PRC government.[60] In other words, it is not an apolitical human rights organisation. While the members of the Uyghur Tribunal were volunteers, an initial funding amount of $115,000 was paid through the World Uyghur Congress to help cover the administrative costs of running the tribunal.[61] This brings into question whether the Uyghur Tribunal failed the 'legitimate process criterion' of avoiding donor's justice in that a pre-set finding in favour of the World Uyghur Congress may have been indirectly 'bought'. This is because, even though the tribunal members were volunteers and claimed that funding for the tribunal did not influence its decisions or actions,[62] they may have still felt circumstantial pressure to validate the World Uyghur Congress's position that international law crimes had been committed by the PRC government, adding further justification for the World Uyghur Congress's secessionist cause. As such, it could be said that the Uyghur Tribunal's funding arrangement failed to meet the 'legitimate process criterion' of avoiding the risk of donor's justice, which may have reduced the 'risk' element of a fair hearing – an attribute of a show trial, as identified by Peterson (2007).[63]

[59] 'Frequently Asked Questions', *Uyghur Tribunal* (Web Page) <online>.
[60] *World Uyghur Congress* (Web Page) <online>.
[61] 'Frequently Asked Questions', *Uyghur Tribunal* (Web Page) <online>.
[62] Ibid.
[63] Jeremy Peterson, 'Unpacking Show Trials: Situating the Trial of Saddam Hussein' (2007) 48(1) *Harvard Law Journal* 257, 260-269.

5.3. No Defence Counsel and No Cross-Examination

Geoffrey Nice QC, a barrister who led the prosecution of Slobodan Milosevic at the International Criminal Tribunal of Yugoslavia, was Chair of the Uyghur Tribunal. An experienced London-based lawyer, named Hamid Sabi, was appointed as 'Counsel to the Tribunal'. The tribunal had a 'Jury' made up mainly of academics in the fields of medicine, land law, finance law, anthropology, haematology and education.[64] In this respect, it is submitted that the 'legitimate process criterion' of tribunal members possessing expertise was satisfied. It is observed, however, that no defence counsel was appointed by the Uyghur Tribunal to represent the PRC government (in their chosen absence) to cross-examine witnesses and put forward their expected counter-arguments (such as no acts had been committed with genocidal intent, individual Uyghurs had been lawfully detained or any commission of human rights abuses by government personnel were isolated incidents and not widespread or systematic). It is submitted that this would have severely compromised the fact-finding process and seriously exposed it to increased risk of error. Such an omission failed the 'legitimate process criteria' of providing skilled legal counsel for the accused *in absentia* and submitting witnesses to cross-examination. This, in turn, would have reduced the 'risk' element present in a show trial, as identified by Peterson (2007).[65]

To emphasise, the reason why cross-examination by a skilled defence counsel was needed in the Uyghur Tribunal was due to the undeniable political shadow cast over it – some of the fact witnesses may have been supporters for seceding Xinjiang from China and some of the expert witnesses' ideological opposition to communism and the ruling Communist Party of China[66] may have induced a 'means justifies the ends' calculation to exaggerate or misrepresent human rights abuse claims against the PRC government. In fact, it was even acknowledged by the Uyghur Tribunal, itself, that

[64] 'Who We Are', *Uyghur Tribunal* (Web Page) <online>.
[65] Jeremy Peterson, 'Unpacking Show Trials: Situating the Trial of Saddam Hussein' (2007) 48(1) *Harvard Law Journal* 257, 260-269.
[66] See, for example, expert witness, Dr Adrian Zenz, who is a Senior Fellow and Director in China Studies of the 'Victims of Communism Memorial Foundation': 'China Studies', Victims of Communism Memorial Foundation (Web Page) <online>.

"[l]oyalty to a cause, or to others seen as victims, may encourage overstatement of events and desire for other – even unstated or unrevealed – benefits such as presence by being a witness in a country in which asylum might be sought and this could lead to people making overstated or false allegations of suffering".[67] As such, it was essential that the international and state law position on cross-examination be borne at the forefront of the minds of the Uyghur Tribunal. For example, the European Court of Human Rights has declared that "[e]xperience shows that the reliability of evidence, including evidence which appears cogent and convincing, may look very different when subjected to a searching examination".[68] As another example, Justice Wigmore in *United States v Salerno* has stated that cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth".[69]

It is noted that the Uyghur Tribunal acknowledged that "[w]ithout cross examination by an 'opposing party' it may be easier for a witness to lie."[70] Yet, the Uyghur Tribunal went on to discount this acknowledgement by stating that "there should be no presumption of disbelief in what people say about facts, providing caution is exercised wherever there is a reason for doubting some piece of evidence".[71] The glaring problem with this rhetorical statement is that it dismisses the international and state law positions on cross-examination, thus leaving the Uyghur Tribunal's acknowledgment of a major shortcoming in their procedure unresolved.

What compounds the peculiarity of the Uyghur Tribunal's unresolved acknowledgment is that it further acknowledges that "'[c]ross-examination' of witnesses may be valuable in eliciting untruthful or unreliable evidence", but claimed that "without a contrary case on the basis of which to cross-examine any witness[,]

[67] 'Uyghur Tribunal Judgment', *Uyghur Tribunal* (Web Page, 9 December 2021) Appendix 7, 101 <online>.
[68] *Al Khawaja and Tahery v United Kingdom*, App no 26766/05 and 22228/06 (ECtHR, 15 December 2011) para 142.
[69] J Wigmore, Evidence § 1367, 32 (J Chadbourn rev. 1974), cited in *United States v Salerno* (91-872), 505 U.S. 317 (1992).
[70] 'Uyghur Tribunal Judgment', *Uyghur Tribunal* (Web Page, 9 December 2021) Appendix 7, 101 <online>
[71] Ibid.

all that can be done, as was done, is to explore critically what a witness says".[72] In response, it is submitted that, if the Uyghur Tribunal organisers genuinely did not have the capacity to imagine a contrary case to the one presented by the witnesses, then the hearings should never have gone ahead until a skilled legal counsel with the capacity to anticipate the PRC government's case was found and recruited.

5.4. Objectional Questions Put to Fact Witnesses

There are general rules of evidence in a court of law that are common across many jurisdictions which the Uyghur Tribunal did not comply with.[73] The purpose of such rules is to increase the probability that evidence is of reliable quality. Rules relating to questions put to lay witnesses include:

- not allowing questions that **presume an unproven fact** which is not in evidence and the existence of which is in dispute, thereby risking a court later believing the truth of the presumed fact;
- not allowing questions that ask for **opinions or inferences**, especially if the opinions or inferences are not based on what the witnesses saw, heard or otherwise perceived about matters or events;
- not allowing questions that elicit **hearsay** evidence, as it cannot be tested by cross-examination and the court has no opportunity to gauge the original speaker's sincerity, perception or memory, or to resolve ambiguities or inconsistencies in the original speaker's statements (note that there are some narrow exceptions to this rule);
- not allowing questions that contain **improper characterisations** (usually similes, metaphors, analogies, colourful language or humour) which risk

[72] Ibid. As will be revealed in the next section, because the Uyghur Tribunal shunned standard rules of evidence, it cannot persuasively claim that it critically explored witnesses' testimony to a satisfactory level.
[73] For the benefit of lay readers, an easy-to-understand guide on objectionable evidence in a court of law (in the Australian context) has been written by Bernard Gross QC, 'Making and Meeting Common Evidentiary Objections in Trial', *Learned Friends* (Conference Paper) <online>.

saddling witnesses with acceptance of derogatory or exaggerated expressions as part of their testimony;[74]

- not allowing **leading** questions in examination-in-chief, as such questions can act as prompts to encourage witnesses to give answers the questioner may want;[75]
- not allowing questions relating to recounting conversations or describing events that elicit **indefinite content** (that is, not providing sufficient detail as to time, place, identity of participants, persons present, chronological sequence and exact words, so far as possible);
- not allowing **irrelevant** questions, as irrelevant evidence does not help to prove a disputed matter which is in issue; and
- not allowing questions that call for **speculation or guessing**, as witnesses cannot competently testify to facts or opinion where the foundation lies outside witnesses' direct perceptions of events.

Using the testimony of Ms Mehray Mezensof as an example, problems with questions put to her by the Uyghur Tribunal included that she was:[76]

[74] Examples of questions containing improper characterisations include: "He was attacking you like a frenzied dog, was he?" or "He was behaving like a madman, is that what you are saying?"

[75] Examination-in-chief involves a witness being questioned in court by the party that called them to appear to give testimony. It occurs before cross-examination and establishes the foundation for either the prosecution or defence's case.

[76] Ms Mehray Mezensof's oral testimony presented to the Uyghur Tribunal on 10 September 2021, *YouTube* (Web Page) <online>. Similar problems with the questioning of Ms Mezensof can be seen with the questioning of other witnesses before the Uyghur Tribunal. Readers of this paper are encouraged to do their own critical analysis of other witness testimonies against the rules of evidence set out in this sub-section, as well as a critical analysis of the logic and plausibility of each witness's testimony. It is submitted that many of the problems with the questioning of witnesses and the unchallenged problems with witness's testimonies could have been ameliorated if the Uyghur Tribunal appointed a competent defence counsel to represent the PRC government.

- encouraged to express **opinions and inferences** even though she was a lay witness, not an expert witness (for example, asking Ms Mezensof if she had formed a view as to what the PRC government's overall objective of detention was);
- encouraged to give **hearsay evidence** (for example, asking Ms Mezensof why her husband travelled to Turkey each time – of which the first time he travelled to Turkey was before he had even met Ms Mezensof – which is information that is only fully in the mind of her husband);[77]
- encouraged to make **speculative comments** (for example, asking Ms Mezensof why individuals she did not know had been re-arrested);
- encouraged to give **indefinite content** (for example, when asking Ms Mezensof about her conversations with the relations of other detainees, she was not required to describe the persons she spoke to, the exact words exchanged (so far as possible), nor the chronological sequence of what occurred);
- asked questions that **assumed unproven facts** (for example, assuming to be true Ms Mezensof's unsubstantiated comment in her written statement that "in order to meet their quota police officers started detaining Uyghurs without reason" and then proceeding to ask Ms Mezensof "who gave the quotas?" during her oral testimony); and
- encouraged to use **improper characterisations** (for example, asking Ms Mezensof if "brainwashing" members of the community was successful, while the term "brainwashing" is an unscientific term).

Additionally, it does not appear that the Uyghur Tribunal requested any documentary evidence from Ms Mezensof to support key parts of her testimony. In fact, the Uyghur Tribunal appeared to be open about not imposing on itself the requirements of corroboration.[78]

[77] It appears the Uyghur Tribunal was of the view that hearsay evidence was acceptable as long as there were no possible objections to the accuracy of the evidence: 'Uyghur Tribunal Judgment', *Uyghur Tribunal* (Web Page, 9 December 2021) Appendix 7, 99 <online>. Yet, it is noted there was no way for the tribunal to fully assess the accuracy of such hearsay evidence. As an example of conjecture, it is conceivable that Ms Mezensof's husband may have travelled to Turkey for illegal activities which he concealed from his wife. If so, this could mean that the detention of Ms Mezensof's husband was lawful, contrary to her claim.
[78] 'Uyghur Tribunal Judgment', *Uyghur Tribunal* (Web Page, 9 December 2021) Appendix 7, 98-100 <online>.

It is submitted that allowing objectionable questions and testimony, and not corroborating key parts of individual witness testimony with documentary evidence, fails the 'legitimate process criterion' of following recognised practices in gathering and assessing credible evidence from a multiplicity of sources, and satisfies the 'illegitimate process criterion' of failing to limit the record to relevant evidence and admitting relevant evidence. This, in turn, reduced the 'risk' element present in a show trial, while increasing the 'show' element, as identified by Peterson (2007).[79]

5.5. Questionable Expert Witnesses

Some witnesses were given the status of 'expert' by the Uyghur Tribunal. The granting of such status is highly significant since, when giving testimony in courts, expert witnesses can deviate from standard evidence procedures and be allowed to give opinion evidence. Fact witnesses, on the other hand, cannot give opinion evidence.

In determining suitable criteria for establishing expertise, a useful place to start is the International Criminal Court Registry webpage. It states that applicants seeking 'expert' status are required to have:

- "a minimum of 9 years relevant experience with a first level university degree, or 7 years with an advanced university degree"; and
- "high standards of professional and personal integrity".[80]

It is noted that some designated experts who were permitted to give evidence to the Uyghur Tribunal did not appear to satisfy the above requirements.[81] For example, Mr Nathan Ruser, a satellite and open-source data analyst of the Australian Strategic

[79] Jeremy Peterson, 'Unpacking Show Trials: Situating the Trial of Saddam Hussein' (2007) 48(1) *Harvard Law Journal* 257, 260-269.
[80] 'Experts', *International Criminal Court* (Web Page) <online>.
[81] It is submitted that the problem with expert witness status could have been ameliorated if the Uyghur Tribunal appointed a competent defence counsel for the PRC government to challenge the granting of such status.

Policy Institute (ASPI), only seemed to graduate with a first level university degree on 20 December 2021.[82] This would mean that, at the time Mr Ruser gave evidence to the Uyghur Tribunal, he did not hold a first level university degree. Moreover, there is no record of him having at least 9 years of relevant professional experience.

There are also occasions where Mr Ruser's professional or personal integrity has been questionable. For example, in ASPI's 'Uyghurs For Sale' report,[83] Mr Ruser claimed he identified a "former" Xinjiang vocational high school as a converted political indoctrination camp mainly based on a 2018 satellite image showing internal fences and security features. However, looking at a 2019 satellite image of the same area showed that the internal fences had been removed, indicating that the internal fences were temporary and therefore likely for construction purposes. Mr Ruser did not disclose the 2019 satellite image and the fence removal. Furthermore, Mr Ruser did not disclose that security features are common to schools in China. Moreover, Mr Ruser failed to disclose the dozens of online photographs of the purported political indoctrination camp, which showed it to be a standard vocational high school.[84]

As another example, on a previous occasion, Mr Ruser claimed on social media to be in the act of spray-painting the acronym for the East Turkistan Islamic Movement (a designated terrorist organisation by the United Nations)[85] outside a "tankie's house" (a pejorative term for people perceived as being sympathetic towards the PRC government) in order to "keep them on edge".[86] It is unclear whether Mr Ruser actually engaged in such an act or made the comment in jest. Either way, it is submitted that such a display of contempt for dissenting voices is not professional conduct.

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[82] 'Graduate Search', *Australian National University* (Web Page) <online>.
[83] Vicky Xiuzhong Xu, Danielle Cave, Dr James Leibold, Kelsey Munro and Nathan Ruser, 'Uyghurs For Sale: Re-education, Forced Labour and Surveillance Beyond Xinjiang' (Policy Brief Report No 26/2020, International Cyber Policy Centre, Australian Strategic Policy Institute, February 2020) <online>.
[84] Jaq James, 'The Australian Strategic Policy Institute's "Uyghurs For Sale" Report: Scholarly Analysis or Strategic Disinformation' (Working Paper, 1/2022, CO-WEST-PRO Consultancy, January 2022) 49-54 <online>.
[85] 'East Turkistan Islamic Movement', *United Nations Security Council* (Web Page) <online>.
[86] 'Nathan Ruser', *Twitter* (Web Page, 11 December 2020) <online>.

To be responsible for erroneous publications of data and displaying a lack of objectivity when it comes to dissenting views brings Mr Ruser's professional and personal integrity into question and therefore his status as an 'expert witness' into doubt. As such, it is submitted that, by not ensuring expert witnesses satisfied professional and personal requirements, the Uyghur Tribunal did not satisfy the 'legitimate process criterion' of following recognised practices in gathering and assessing the credibility of evidence from a multiplicity of sources. This brings into question whether the Uyghur Tribunal was more concerned with the presentation of expert witness testimony rather than its reliability, which invokes the 'show' element of a show trial, identified by Peterson (2007).[87]

5.6. Weak Reasoning in the Tribunal's Judgment

The Uyghur Tribunal's judgment was delivered on 9 December 2021, and was also published as a 64-page document.[88] It is submitted that the judgment satisfied the 'legitimate process criterion' of relying on the language of international law. Whilst some aspects of the judgment also appeared to satisfy the 'legitimate process criterion' of demonstrating care and caution in the tribunal's deliberations, it is submitted that other aspects did not. For example, the tribunal decided that the PRC government had committed the crime of genocide against the Uyghurs under article II(d) of the *Convention on the Prevention and Punishment of the Crime of Genocide* ('Genocide Convention').[89] Article II(d) states that genocide is committed by "imposing measures intended to prevent births within a group" "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group".

It is emphasised that special genocidal intent must be found before it can be said that genocide has been committed. It is this material element that makes the crime of genocide so unique. Also, an important contextual element of the crime of genocide is that each prohibited act requires that the "conduct took place in the

[87] Jeremy Peterson, 'Unpacking Show Trials: Situating the Trial of Saddam Hussein' (2007) 48(1) *Harvard Law Journal* 257, 260-269.
[88] 'Uyghur Tribunal Judgment', *Uyghur Tribunal* (Web Page, 9 December 2021) <online>.
[89] Ibid 54-56.

context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction".[90] The adjective 'manifest' means that the "pattern must be a clear one and not one of a few isolated crimes occurring over a period of years".[91]

It can be said that the Uyghur Tribunal's finding of genocide was effectively based on the fact that the PRC government had extended strict implementation of its family planning policy beyond the majority Han population to also include the minority Uyghur population since 2017, of which the Uyghur Tribunal, itself, acknowledged were previously exempt from China's strict family planning policy.[92] In other words – using the Uyghur Tribunal's *prima facie* logic – the PRC government had not only committed genocide against the Uyghur population since 2017, but also against the majority Han population over a much longer period of time.

It is submitted that the Uyghur Tribunal's reasoning for finding special genocidal intent on the part of the PRC government was weak and not well structured.[93] To a degree, this could have been due to the lack of substantial judicial guidance on how article II(d) of the Genocide Convention should be interpreted and applied.

To give some order to the unstructured approach the Uyghur Tribunal took in its evidentiary analysis on this particular issue, this section is separated into three sub-sections to help make comprehension easier for lay readers: (1) What legal sources demonstrate the PRC government does or does not possess a special genocidal intent? (2) What general policy sources demonstrate the PRC government does or does not possess a special genocidal intent? (3) What specific policy and practice sources demonstrate the PRC government does or does not possess a special genocidal intent?

[90] 'Elements of Crimes', *International Criminal Court* (2013) 3 <online>.
[91] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 4th ed, 2019) 218.
[92] Ibid 32-37.
[93] See 'Uyghur Tribunal Judgment', *Uyghur Tribunal* (Web Page, 9 December 2021) 32-37 <online>.

5.6.1. What Legal Sources Demonstrate the PRC Government Does or Does Not Possess a Special Genocidal Intent?

The first place to start in the fact-finding process is an examination of the Xinjiang government's family planning law to determine if it is a direct evidentiary source of special genocidal intent. It is noted that the Uyghur Tribunal did not reference the following key legislative document: *Regulations on Population and Family Planning of Xinjiang Uygur Autonomous Region 1982.* It is noted that the Regulations were enacted around 35 years before they began to be strictly implemented. This means that anyone wanting to suggest the Regulations were worded in a way to disguise the PRC government's special genocidal intent would need to demonstrate that such intent against the Uyghurs went back to the time that the Regulations were first enacted.

Article 3 of the Regulations states that:
"The work of planned parenthood … adheres to efforts to ***support economic development, assist the masses in wealth accumulation through hard work, and establish flourishing families****. Comprehensive measures should be taken to reduce the fertility rates,* ***improve the quality of the population and promote sustainable economic and social development****…"* (emphasis added).[94]

It is clear that article 3 shows no special intent to destroy the populations of Xinjiang, but rather to improve the living standards of people in Xinjiang through planned parenthood. Perhaps the legislated restriction of births (as opposed to reliance on incentive-based policy and education policy only) can be criticised from an individual rights perspective (in contrast to a collective rights argument), but the legislative intent cannot be characterised as being genocidal. The Uyghur Tribunal's oversight of

[94] *Regulations on Population and Family Planning of Xinjiang Uygur Autonomous Region* <online>. It is noted that similar regulations exist in other regions of China with a high ethnic minority population, such as Inner Mongolia and Guangxi: *Regulations on Population and Family Planning of Inner Mongolia Autonomous Region* <online>; *Regulations on Population and Family Planning of Guangxi Zhuang Autonomous Region* <online>. This means that anyone wanting to suggest that the Xinjiang Regulations were introduced with the special intent of committing genocide against the Uyghurs pre-emptively would also need to make the same case for the ethnic minority populations in those regions as well.

the Regulations may have been due to the tribunal failing to appoint a (competent) defence counsel for the PRC government.

5.6.2. What General Policy Sources Demonstrate the PRC Government Does or Does Not Possess a Special Genocidal Intent?

From the outset, it is noted that the United Nations accepts that international case law has associated special genocidal intent "with the existence of a State or organizational plan or policy, even if the definition of genocide in international law does not include that element".[95]

In terms of general policy evidence, the Uyghur Tribunal appeared to rely on the following to infer special genocidal intent:

- a "May 2015 Government teaching broadcast [which] noted that 'religious extremism begets re-marriages and illegal extra births'"; and
- an academic paper by a scholar called Liao Zhaoyu, which stated that "the imbalance of the ethnic minority and Han population composition in Southern Xinjiang has reached an unbelievably serious degree".[96]

It is submitted that neither of these two pieces of evidence actually demonstrate the PRC government possessed special genocidal intent. On the first point, it is noted that the tribunal's judgment did not provide further evidence that the government went beyond an observation of a correlation between polygamous marriages and unlawful births to a government policy of Uyghur population destruction. On the second point, opinions of scholars do not amount to government policy. Relying on such weak evidence may have been a result of the Uyghur Tribunal failing to appoint a (competent) defence counsel for the PRC government.

[95] 'Genocide', *United Nations Office on Genocide Prevention and the Responsibility to Protect* (Web Page) <online>.
[96] 'Uyghur Tribunal Judgment', *Uyghur Tribunal* (Web Page, 9 December 2021) 32 <online>.

5.6.3. What Specific Policy and Practice Sources Demonstrate the PRC Government Does or Does Not Possess a Special Genocidal Intent?

The alleged specific policy and practice sources covered by the Uyghur Tribunal to infer special genocidal intent included:

- statistics showing a drop in birth rates and an increase in contraceptive uptake in Xinjiang, compared to the national average;
- witness testimonies on forced abortions;
- a plan in two Xinjiang counties to sterilise a percentage of women of childbearing age;
- a systematic program of forced womb removals; and
- witness testimony on infanticide.

Each of these sources are discussed in this sub-section, in addition to an important practice issue not covered by the tribunal, that is, outcomes of government policies on infant mortality rates.

5.6.3.1. A Drop in Birth Rates and Increase in Contraceptive Uptake

The Uyghur Tribunal purported that evidence of special genocidal intent included a drop in Xinjiang birth rates since 2017 and an increase in contraceptive uptake (namely, net IUD insertions) in Xinjiang between 2015 and 2018, compared to the national average.[97] It is submitted that comparing Xinjiang's statistics to the national average is, *prima facie*, a meaningless

[97] Much of the statistical analysis relied upon by the Uyghur Tribunal was carried out by Dr Adrian Zenz. For a critical analysis of Dr Zenz's statistical work, see Gareth Porter and Max Blumenthal, 'US State Department Accusation of China "Genocide" Relied on Data Abuse and Baseless Claims by Far-Right Ideologue', *The Grayzone* (18 February 2021) <online>. It is submitted that, for the reasons expounded by Porter and Blumenthal (2018), Dr Zenz should not have been granted expert witness status for the purposes of the Uyghur Tribunal.

comparison for the purposes of inferring special genocidal intent when the disparity can be accounted for by simply acknowledging that the family planning law and policies began to be implemented in Xinjiang after years of exemptions for ethnic minority populations. This is especially so when there are many reasons why birth rates and IUD insertion rates fluctuate. Examples for fluctuations could include: people postponing marriages and births due to their increased labour mobility or increased access to tertiary education facilitated by recent implementations of policies; people deciding they want fewer children based on public health or women's rights education campaigns; or people having easier access to contraception.

Such alternative explanations are important from an international law perspective. In the International Court of Justice case of *Bosnia and Herzegovina v Serbia and Montenegro*, the court noted that special genocidal intent has to be: "convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it should have to be such that it could only point to the existence of such intent".[98] Put similarly, the court also noted that: "[t]he specific intent is also to be distinguished from other reasons or motives the perpetrator may have. Great care must be taken in finding in the facts a sufficiently clear manifestation of that intent".[99] In other words, if the intent is not explicitly stated, but rather inferred, then the inference has to be the only convincing and clear one. The Uyghur Tribunal failed to demonstrate why alternative plausible explanations for a drop in birth rates should be categorically ruled out.

If the Uyghur Tribunal was to insist that birth rates and net IUD insertion rates should be considered, it is submitted that it would be more meaningful to compare statistics from when the family planning policy began to be strictly implemented in Xinjiang with statistics from when the family planning policy began to be strictly implemented for the majority Han ethnic group or other ethnic minority groups of China. If there is no significant difference between

[98] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ [373] <online>.
[99] Ibid [189].

the groups (considering all variables), then the situation cannot be said to meet the material element of special genocidal intent.

Such erroneous analysis on this issue may have been due to the Uyghur Tribunal failing to appoint a (competent) defence counsel for the PRC government.

5.6.3.2. Forced Abortions

On the matter of forced abortions, the Uyghur Tribunal stated the following: *"The Tribunal heard evidence from multiple witnesses who had been forced into abortions themselves or, as in the case of one witness, who, when working in a hospital, witnessed the forced abortion of near-term babies."*[100]

The Uyghur Tribunal found this to be relevant to proving special genocidal intent.[101] Excluding the issue of witness reliability, it is noted that the Uyghur Tribunal did not include evidence in its judgment that demonstrated: (a) the forced abortions were systematic, as opposed to isolated incidents; and (b) the abortions were linked to births under the legislative quota as opposed to over the quota, in line with the rest of the nation.[102] This means the material element of special genocidal intent and the contextual element of a manifest pattern of destruction has not been satisfied.

Such superficial analysis on this issue may have been due to the Uyghur Tribunal failing to appoint a (competent) defence counsel for the PRC government.

[100] 'Uyghur Tribunal Judgment', *Uyghur Tribunal* (Web Page, 9 December 2021) 33 <online>.
[101] Ibid 54.
[102] The strict legislative compliance aspect of this argument is not to discount the ethical stances on forced abortions.

5.6.3.3. Sterilisation of Women of Childbearing Age

Another issue the Uyghur Tribunal pointed to as demonstrating special genocidal intent was its claim that "in 2019 the authorities formulated a plan to conduct widespread sterilisation including in two counties in Hotan (in the South) intended to sterilise respectively 14.1 and 34.3% of all women of childbearing age".[103] It is noted that, earlier in its judgment, the Uyghur Tribunal equated the surgical insertion of removable IUDs to "sterilisation".[104] This, of course, is an incorrect characterisation. Sterilisation is a permanent method of contraception, such as tubal ligation or fallopian tube removal. IUD contraception, on the other hand, is a temporary method of contraception that is reversable. More importantly, the tribunal did not demonstrate in its judgment that this percentage of Xinjiang women would be forced to have IUD insertions and could not remove the IUDs at a time of their choosing. The issue ultimately comes down to consent, not quotas. This flawed premise may have been the result of the Uyghur Tribunal failing to appoint a (competent) defence counsel for the PRC government.

5.6.3.4. Forced Womb Removals

A further issue that the Uyghur Tribunal pointed to as demonstrating special genocidal intent was its claim that a "systematic programme of birth control measures had been established forcing women to endure removal against their will of wombs".[105] Two points can be made about this. First, uterus removal is far more intrusive than tubal ligation or fallopian tube removal, which leaves the matter open to speculation that witnesses claiming to have their wombs removed may have suffered from medical conditions requiring the procedure. Second, in terms of the contextual element of the crime of genocide, the Uyghur Tribunal did not adequately demonstrate how it reliably reached the conclusion that forced womb removals were a systematic

[103] 'Uyghur Tribunal Judgment', *Uyghur Tribunal* (Web Page, 9 December 2021) 33 <online>.
[104] Ibid 10.
[105] Ibid.

program, as opposed to isolated incidents, nor did it indicate in its judgment whether expert medical verification of such claims was undertaken. Such weaknesses in reasoning and evidence may have been the result of the Uyghur Tribunal failing to appoint a (competent) defence counsel for the PRC government.

5.6.3.5. Infanticide

Another issue the Uyghur Tribunal pointed to as demonstrating special genocidal intent was its claim that "a hospital employee who worked as an obstetrician [had] witnessed the killing of babies immediately after being born".[106] Needless to say, the (unsworn) word of one individual is not sufficient to substantiate such a grave allegation, nor is it sufficient to extrapolate it out to the PRC government possessing special genocidal intent forming part of a manifest pattern of destruction directed at the Uyghur population. Reliance on such weak evidence may be a result of the Uyghur Tribunal failing to appoint a (competent) defence counsel for the PRC government.

5.6.3.6. Outcomes of PRC Government Policies on Infant Mortality Rates

What was notably missing from the Uyghur Tribunal's judgment was consideration of the outcomes of government health policies on maternal and infant mortality rates in Xinjiang, which were purportedly nearly halved by 2018.[107] Such information, if true, seems to undermine any claim that the PRC government is motivated by special intent to destroy the ethnic minority

[106] Ibid 33.

[107] See discussion and weblinks in Gareth Porter and Max Blumenthal, 'US State Department Accusation of China "Genocide" Relied on Data Abuse and Baseless Claims by Far-Right Ideologue', *The Grayzone* (18 February 2021) <online>.

populations of Xinjiang. This omission may have been due to the Uyghur Tribunal failing to appoint a (competent) defence counsel for the PRC government.

5.6.4. Applying the 'Legitimate Process Criteria' and 'Illegitimate Process Criteria', and Consideration of Other Subsidiary Issues

The weak reasoning in the Uyghur Tribunal's finding of genocide, as outlined in this whole section, arguably failed to satisfy the 'legitimate process criterion' of observing care in the conduct of deliberations, while also satisfying the 'illegitimate process criterion' of failing to limit the record to relevant evidence and failing to admit relevant evidence.[108] As such, the 'risk' element of the Uyghur Tribunal was reduced, as identified by Peterson (2007).[109] The finding of a commission of genocide, based on flimsy evidence, also increased the 'show' element of the Uyghur Tribunal, as identified by Peterson (2007).[110] This is because the tribunal members would have known the sensationalism surrounding such a grave and novel finding would draw worldwide attention and outrage.

One subsidiary point to make is that, given genocide is considered the 'crime of crimes', it was incumbent upon the Uyghur Tribunal to ensure that it took the utmost care and caution in its deliberations on article II(d) of the Genocide Convention; not just for the sake of protecting the reputation of people's tribunals as a whole, but also for the sake of ensuring the crime of genocide maintains its linguistic gravity in order to continually elicit public outrage. Another subsidiary point to make is that misuse of the term 'genocide' by developed countries risks it being weaponised against other developing countries that turn to planned parenthood policies for poverty alleviation and sustainable development. This, in turn, could perpetuate economic disadvantages endured by the developing world and preserve the

[108] Jeremy Peterson, 'Unpacking Show Trials: Situating the Trial of Saddam Hussein' (2007) 48(1) *Harvard Law Journal* 257.
[109] Ibid 260-269.
[110] Ibid 260-269.

economic and social inequalities between Global North and Global South countries.[111]

[111] It is for these reasons why the United Nations Office of the High Commission for Human Rights (OHCHR) may not have entertained the allegation of genocide in its August 2022 report on Xinjiang: see United Nations Office of the High Commission for Human Rights, *OHCHR Assessment of Human Rights Concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China* (31 August 2022) <online>.

6. CONCLUSION

It was not the objective of this paper to definitively conclude whether the Uyghur Tribunal was a legitimate forum for people's justice or a mere show trial. Instead, determining the answer has been left to the reader after they have undertaken their own independent explorations and reflections. The most valuable aspect of this paper is that it provides readers with sets of criteria for assessing the legitimacy or illegitimacy of the Uyghur Tribunal.

Some readers may ultimately conclude that findings on breaches of international law that do not emanate from a state-backed court lack legitimacy, even if the 'legitimate process criteria' identified in this paper have been satisfied. This is an acceptable conclusion, in line with a majority of thinkers in the legal arena, and is the reason why people's tribunals are on the "perpetual argumentative backfoot".[112] Other readers may find that the Uyghur Tribunal failed to satisfy the 'legitimate process criteria' and succeeded in satisfying the 'illegitimate process criteria', making it a show trial to be dismissed. Others may nevertheless consider the Uyghur Tribunal to still be worthwhile theatre from the point of view of "accountability politics",[113] even though it failed the legitimacy tests. Others, still, upon carrying out their own independent explorations and reflections, may have reasons to disagree with the critiques in this paper and find redeeming features of the Uyghur Tribunal that salvage its legitimacy in their eyes, or perhaps even reject outright the need for legitimacy and illegitimacy criteria.

Whatever conclusions are reached, it is submitted that, if "we the peoples" truly value the concept of international people's tribunals, we should endeavour to ensure they comply with "the highest principles of international law and justice" in every way possible, and close off the doors to the accusation of them being a "motley collection of vigilantes". It is for this reason that it is a gross injustice when sceptics of the Uyghur Tribunal and the West's Xinjiang narrative are tarred and feathered by pejorative labels of 'genocide deniers' and 'Xinjiang denialists'. What this paper

[112] Aldo Zammit Borda and Stefan Mandelbaum, '"If I Would Stay Alive, I Would Be Their Voice": On the Legitimacy of International People's Tribunals' [2022] *The Modern Law Review* 1, 7.
[113] See Gabrielle Simm and Andrew Byrnes, 'International People's Tribunals in Asia: Political Theatre, Juridical Farce, or Meaningful Intervention?' (2014) 4 *Asian Journal of International Law* 103, 121.

demonstrates is that reaching a conclusion as to whether serious and systematic human rights abuses have occurred in Xinjiang is a complex process requiring detailed information, careful consideration and clarity of mind. Moreover, the 'rule of law' dictates that such a process starts from the premise of viewing the PRC government as 'innocent until proven guilty', with the standard of proof being 'beyond reasonable doubt' and the onus of proof being on the accusers. Anyone who is quick to weaponise people's scepticism against them and crudely push for unanimous consensus is far from a good-faith actor.

FEEDBACK & FUNDING

Feedback on this working paper is welcomed from readers. To write to the author, please go to **cowestpro.co/contact**.

The author is trialing an innovative funding model. Currently, there are no Australian government or corporate funding sources for professional pieces of work that challenge status-quo narratives that are dear to the hearts of the political class, particularly the 'China bad - West good' narrative. This means that the only source of funding for ongoing scrutineer work of the kind in this paper is financial contributions from the public.

If you appreciate the immense amount of work that has gone into this paper, you can make a financial contribution through a link that can be found at **cowestpro.co/fundraiser**. Any amount is appreciated.

Funds raised will go towards the costs of conducting a field study in China to help complete CO-WEST-PRO's first working paper, provided that permission is obtained from the Chinese government. At this stage, however, it must be noted that it is increasingly unlikely the author will be allowed entry into China in 2022; entry will more likely be granted to the author in 2023. Unused or excess funds may be used as supplementary income for the author.

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