

2021

China's Crimes Against Humanity Upon the Uyghur People Under the Rome Statute of the International Criminal Court

Alex Fox

Follow this and additional works at: <https://lawcommons.luc.edu/lucilr>



Part of the [International Law Commons](#)

Recommended Citation

Alex Fox *China's Crimes Against Humanity Upon the Uyghur People Under the Rome Statute of the International Criminal Court*, 17 Loy. U. Chi. Int'l L. Rev. 131 (2022).

Available at: <https://lawcommons.luc.edu/lucilr/vol17/iss2/3>

This Student Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola University Chicago International Law Review by an authorized editor of LAW eCommons. For more information, please contact law-library@luc.edu.

CHINA'S CRIMES AGAINST HUMANITY UPON THE UYGHUR PEOPLE UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

Alex Fox

Abstract

China's campaign of atrocities against its Uyghur minority is among the most pressing current human rights issues. The Chinese government has targeted Uyghurs within its borders and those who have sought refuge elsewhere; with upwards of a million Uyghurs being apprehended and confined within a network of concentration camps where many are then subjected to torture and forced labor. The conditions of these camps make the detained Uyghurs especially vulnerable to contagious disease, including COVID-19, due to the cramped cells, lack of medical resources and generally dire conditions. China has also pressured numerous other governments to repatriate Uyghurs who fled the country.

As the crimes against humanity and genocide continue, Uyghur advocacy groups have sought justice through the International Criminal Court ("ICC" or "Court"). While the Court ordinarily only has jurisdiction over member-States of the Rome Statute of the International Criminal Court ("Rome Statute"), it clarified in 2019 that it could extend jurisdiction to non-State Parties that committed offenses within the borders of State Parties. As China is not a State Party to the Rome Statute, it is generally not subject to the Court's jurisdiction. The Uyghur advocacy groups argue a workaround the jurisdictional issue, and rely instead upon China's repatriation of Uyghur people through unlawful arrests in and forced deportation from Cambodia and Tajikistan, both of which are State Parties to the Rome Statute.

In December 2020, the Chief Prosecutor for the Court announced the decision to withhold any investigation into the alleged crimes until further evidence is submitted. This decision allowed the Court to launch an investigation because the crimes of forcible transfer and deportation were committed at least in part on the territory of a State Party, Bangladesh. Should the Uyghur advocacy groups provide sufficient evidence, the Court could rely on its 2019 landmark decision to extend jurisdiction over the Rohingya crisis in Myanmar, a non-State Party. In the Uyghur's case, evidence of forcible transfer and deportation from Cambodia and Tajikistan could provide a similar basis for the International Criminal Court to extend jurisdiction over China. Without the Court's involvement, the Uyghurs have few alternative means of justice.

Table of Contents

I. Introduction 132
 A. The Complaint Filed with the International Criminal Court .. 133
 II. Background 134
 A. History of the Majority Treatment of the Uyghur Minority .. 135
 B. Counter-Terrorism Policies 136
 C. The Detention of Uyghurs and COVID-19..... 137
 D. Deportation of Uyghur Minority Members from Cambodia
 and Tajikistan..... 138
 III. Discussion 139
 A. The Scope of the Rome Statute of the International Criminal
 Court 139
 1. Structure..... 139
 2. Subject-Matter and Territorial Jurisdiction 139
 B. ICC Investigation into Myanmar's Alleged Crimes Against
 Rohingya Population 142
 IV. Analysis 144
 A. Application of the ICC's Rohingya Decision to the Uyghur
 Crisis..... 144
 B. The OTP December 2020 Decision on the Uyghur Crisis.... 145
 V. Proposal 146
 A. The OTP's Decision and its Impact on the Uyghur People .. 146
 B. Alternative Means of Justice for the Uyghur People 147
 VI. Conclusion..... 148

I. Introduction

The Chinese Communist Party has launched a targeted campaign against the Uyghur¹ population and members of other Turkic Muslim minority groups within Xinjiang, China as well as those who had already fled persecution; forcing them back into Xinjiang.² Survivors, human rights organizations, journalists, scholars and states have documented countless human rights abuses against the Uyghur people including: coercive population control methods, forced labor, arbitrary detention in internment camps, torture, physical and sexual abuse, mass surveillance, family separation, and repression of cultural and religious expression.³ The Chinese government has attempted to justify these alleged abuses under the pre-

¹ The Editors of Encyclopedia Britannica, *Uighur*, ENCYCLOPEDIA BRITANNICA (2020), <https://www.britannica.com/topic/Uighur> (last visited Dec 3, 2020). Uyghur can also be spelled as Weiwu'er, Uygur or Uighur.

² U.S. Department of State, *The Chinese Communist Party's Human Rights Abuses in Xinjiang*, <https://www.state.gov/ccpabuses> (last visited Oct. 9, 2020); Emily Rauhala, *New Evidence Emerges of China Forcing Muslims into 'Reeducation' Camps*, THE WASH. POST (Aug. 10, 2018), https://www.washingtonpost.com/world/asia_pacific/new-evidence-emerges-that-china-is-forcing-muslims-into-reeducation-camps/2018/08/10/1d6d2f64-8dce-11e8-9b0d-749fb254bc3d_story.html.

³ *Id.*

China's Crimes Against Humanity

text of fighting against ethnic separatism, religious extremism and violent terrorism;⁴ however, many human rights organizations have found this insufficient.

A. The Complaint Filed with the International Criminal Court

On July 6, 2020, the East Turkistan Government in Exile and the East Turkistan National Awakening Movement jointly submitted a complaint to the Office of the Prosecutor (“OTP”) at the International Criminal Court (“ICC” or “Court”) against the Chinese government, alleging that Chinese officials engaged in crimes against humanity and genocide against the Uyghur minority of China.⁵ The complaint identifies over thirty Chinese officials who were allegedly involved in this campaign, including President Xi Jinping, public governors and top officials of the People’s Liberation Army.⁶ Their alleged crimes, which are all detailed in the complaint, include forced sterilization, forcible transfer and separation of children from their families, organ harvesting and other repressive measures.⁷

The ICC, established by the Rome Statute of the International Criminal Court (“The Rome Statute”), is mandated to end impunity for the perpetrators of genocide, crimes against humanity, war crimes, and crimes of aggression.⁸ State Parties to the Rome Statute are subject to its jurisdiction;⁹ however, the United Nations Security Council may refer cases alleging crimes against humanity to the ICC from non-State Parties, thereby granting jurisdiction for that specific case.¹⁰ China is not a party to the ICC, and it therefore not subject to the Courts jurisdiction.¹¹ Additionally, China is one of the five permanent members of the UNSC, and as such, has the power to veto any “substantive” resolution or referral to the ICC.¹² Due to this limitation, Uyghur advocacy groups and attorneys have at-

⁴ *Id.*; Austin Ramzy & Chris Buckley, ‘Absolutely No Mercy’: Leaked Files Expose How China Organized Mass Detentions of Muslims, THE N.Y. TIMES (Nov. 16, 2019), <https://www.nytimes.com/interactive/2019/11/16/world/asia/china-xinjiang-documents.html>.

⁵ Press Release, Etge, *Uyghur Genocide and Crimes Against Humanity: Credible Evidence submitted to ICC for the first time asking for investigation of Chinese officials East Turkistan Government in Exile*, <https://east-turkistan.net/press-release-uyghur-genocide-and-crimes-against-humanity-credible-evidence-submitted-to-icc-for-the-first-time-asking-for-investigation-of-chinese-officials/> (last visited Sep. 12, 2020) [hereinafter Press Release].

⁶ *Id.*

⁷ *Id.*

⁸ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

⁹ *Id.*

¹⁰ Louise Arbour, *The Relationship Between the ICC and the UN Security Council*, 20 Global Governance: A Review of Multilateralism and International Organizations 195–201, 195 (2014); Jess Kyle, *The New Legal Reality: Peace, Punishment, and Security Council Referrals to the ICC*, 25 Transnat’l L. & Contemp. Probs. 109, 109–10 (2015).

¹¹ Dan Zhu, *The Complementarity Regime of the International Criminal Court: Concerns of China*, 41 U. PA. J. Int’l L. 177 (2019) [hereinafter Zhu]; Michael P. Scharf, *The ICC’s Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 LAW AND CONTEMP. PROBS. 67–118, 68, 76 (2001).

¹² *The UN Security Council*, COUNCIL ON FOREIGN RELATIONS (Sept. 16, 2020), <https://www.cfr.org/background/un-security-council>.

tempted to bring the case under the ICC's jurisdiction through other means. They found their workaround when the ICC clarified in 2018 and 2019 that the Court may exercise jurisdiction over international crimes against humanity when part of the criminal conduct takes place on the territory of a signatory party.¹³ The complaint argued that the deportation of Uyghur people from Tajikistan and Cambodia into Xinjiang, where they were then detained and subjected to international crimes, provided a basis for the Court's jurisdiction because both Tajikistan and Cambodia are signatories to the Rome Statute.¹⁴

On December 14, 2020, the OTP Chief prosecutor, Fatou Bensouda, announced the Court's decision not to pursue an investigation of the crimes alleged in the complaint.¹⁵ Bensouda stated that the office found "no basis to proceed at this time" due to insufficient evidence showing that Chinese officials had committed crimes over which the court had jurisdiction, noting that the alleged abuses had "been committed solely by nationals of China within the territory of China."¹⁶ The decision did not exclude the possibility that the Uyghur groups present more evidence of the alleged crimes, upon which the OTP could decide to launch an investigation.¹⁷

This comment will address the ICC's decision and jurisdiction over China and the Uyghur crisis. Part II briefly summarizes the historical and recent treatment of Uyghur people in China. Part III focuses on the jurisdiction of the ICC and its landmark decision in the case of the Rohingya crisis in Myanmar. Part IV addresses the basis for the Court's jurisdiction over China based on the Rohingya decision. Finally, part V discusses the implications of the Court's dismissal of the Uyghur complaint and provides alternative means by which the Uyghur people may seek justice.

II. Background

China often considers itself to be a "culturally homogenous nation-state" composed of the Han-Chinese ethnic majority,¹⁸ disregarding its numerous ethnic minorities who generally inhabit regions of China that were incorporated into

¹³ Press Release, INT'L CRIM. CT., ICC Pre-Trial Chamber I rules that the Court may exercise jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh (Sept. 6, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=PR1403> [hereinafter *ICC Pre-Trial Chamber Press Release*]; *Q&A: The International Criminal Court and the United States*, Human Rights Watch (Sept. 2, 2020), <https://www.hrw.org/news/2020/09/02/qa-international-criminal-court-and-united-states>.

¹⁴ Press Release, *supra* at note 5.

¹⁵ *How the Court Works*, INT'L CRIM. CT., <https://www.icc-cpi.int/about/how-the-court-works> (last visited Oct. 9, 2020) [hereinafter *How the Court Works*]; The Off. of the Prosecutor, *Report on Preliminary Examination Activities 2020*, 18-20, <https://www.icc-cpi.int/itemsDocuments/2020-PE/2020-pe-report-eng.pdf> (Dec. 14, 2020). [hereinafter *Report on Preliminary Examination Activities 2020*].

¹⁶ *Id.*

¹⁷ Javier C. Hernández, *I.C.C. Won't Investigate China's Detention of Muslims*, THE N.Y. TIMES (Dec. 15, 2020), <https://www.nytimes.com/2020/12/15/world/asia/icc-china-uyghur-muslim.html>.

¹⁸ Michael Clarke, *Ethnic Separatism in the People's Republic of China History, Causes and Contemporary Challenges*, 12 EUR. J. OF E. ASIAN STUD. 109-133, 110 (2013); Barry Sautman, *Scaling Back Minority Rights: The Debate about China's Ethnic Policies*, 46 STAN. J. INT'L L. 51, 53-4 (2010).

China's Crimes Against Humanity

Chinese territory in the seventeenth and eighteenth centuries.¹⁹ One of these ethnic minorities, the Uyghurs, is a largely Muslim Turkic ethnic group who have lived in the far northwest region of modern China for centuries.²⁰ Official figures released by Chinese authorities place the population of Uyghurs within the Xinjiang region to be just over 11 million, comprising approximately half of the total regional population.²¹ In 1945 the Uyghur minority attempted to secede from China and establish the East Turkestan Republic;²² however, the People's Liberation Army, the military force of the Chinese Communist Party ("CCP"), regained control over the Xinjiang region after WWII.²³ In 1955, the Xinjiang Uyghur Autonomous Region ("XUAR") was established and eventually recognized under the Law of the People's Republic of China on Regional National Autonomy in 1984.²⁴ Despite its name, the Uyghur people residing in the XUAR are far from autonomous.

A. History of the Majority Treatment of the Uyghur Minority

Under the rule of Mao Zedong, the country was focused on reducing the economic and social divide in the Marxist-Leninist class struggle between the Han majority and ethnic minorities, including the Uyghurs.²⁵ The government introduced work programs such as the Xinjiang Production and Construction Corps ("XPCC"), which used "military manpower for economic and infrastructural development" and the Great Leap Forward strategy, targeting minorities "so as to achieve their assimilation with the Han."²⁶ Mao's successor, Deng Xiaoping, led the CCP to encourage Han migration into these regions in order to dilute the population of the ethnic minority located there.²⁷ Under Hu Jintao, as a response to the rising fear of terrorism following the September 11, 2001 attacks,²⁸ China

¹⁹ MORRIS ROSSABI, *A HISTORY OF CHINA* 371 (John Willey & Sons, Inc., 2014); Peter C. Perdue, *Military Mobilization in Seventeenth and Eighteenth-Century China, Russia, and Mongolia*, 30 *MOD. ASIAN STUD.* 757-793, 761 (1996).

²⁰ Ciara Finnegan, *The Uyghur Minority in China: A Case Study of Cultural Genocide, Minority Rights and the Insufficiency of the International Legal Framework in Preventing State-Imposed Extinction*, 9 *Laws - Maynooth University* 1, 6 (2020).

²¹ BBC News, *The Uighurs and the Chinese state: A long history of discord* (Mar. 26, 2020), <https://www.bbc.com/news/world-asia-china-22278037>; Lindsay Maizland, *China's Repression of Uighurs in Xinjiang*, Council on Foreign Relations (Mar. 1, 2020), <https://www.cfr.org/backgrounder/chinas-repression-uighurs-xinjiang>.

²² Matthew D. Moneyhon, *China's Great Western Development Project in Xinjiang: Economic Palliative, or Political Trojan Horse*, 31 *DENV. J. INT'L L. & POL'Y* 491, 498 (2003).

²³ Bai Guimei, *The International Covenant on Civil and Political Rights and the Chinese Law on the Protection of the Rights of Minority Nationalities*, 3 *CHINESE J.L. OF INT'L L.* 441, 450-453 (2004) (explaining post WWII, China experienced a shift in political control including the rise of the Chinese communist party, CCP, and the establishment of XUAR).

²⁴ *Id.*

²⁵ Clarke, *supra* note 18, at 121.

²⁶ *Id.* at 119.

²⁷ *Id.* at 121.; Angel Difan Chu, *The "Clash of Civilizations" Between Muslims and the Han Within China*, NATO ASS'N OF CAN. (Jan. 26, 2015), <http://natoassociation.ca/the-clash-of-civilizations-between-muslims-and-the-han-within-china>

²⁸ *Id.* at 123.

China's Crimes Against Humanity

implemented its “Strike Hard”²⁹ campaign with special force in Xinjiang arguing that its efforts to quash any Uyghur separatist inclinations aligned with the United States’ worldwide “war on terror.”³⁰ The goal of the campaign was to “hit at enemy forces, purify society and educate the masses.”³¹

The CCP continued to utilize this fear under Xi Jiang to justify repressive policies against the minorities in Xinjiang,³² using a meeting with President Bush in October 2001 to rally international support for quelling Muslim separatists in Xinjiang.³³ With international backing, China broadened its systematic persecution of the Uyghur population in the following decades, enforcing mass arrests in the region, banning Muslims from observance of Ramadan,³⁴ and confining at least one million Uyghur and non-Han Muslims into internment camps.³⁵

B. Counter-Terrorism Policies

In 2015, a new National Security Law was passed by the National People’s Congress which aimed to stifle internal threats, including the activities of the Uyghur population.³⁶

Article 3 of the new National Security Law defines ‘terrorism’ in such a broad manner that activities which fall within the scope of legitimate religious practices in other jurisdictions would otherwise rendered as criminal acts under this legislation.³⁷ The National Security Law came under the scrutiny of the UN High Commissioner, Zeid Ra’ad Al Hussein, due to its lack of specificity which left “the door wide open to further restrictions of the rights and freedoms of Chinese citizens, and to even tighter control of civil society by the Chinese authorities than there is already.”³⁸

²⁹ Dana Carver Boehm, *China’s Failed War on Terror: Fanning the Flames of Uighur Separatist Violence*, 2 BERKELEY J. OF MIDDLE EASTERN & ISLAMIC L. 61–124, 63 (2009).

³⁰ *Id.* at 64.

³¹ Willy Wo-Lap Lam, *China launches ‘suppression’ campaign in Xinjiang*, CNN (Oct. 25, 2001), <https://edition.cnn.com/2001/WORLD/asiapcf/east/10/25/china.willylam/>.

³² *Id.*

³³ Robin Wright & Edwin Chen, *Bush Says China Backs War on Terror*, L.A. TIMES (Oct. 18, 2001), <https://www.latimes.com/la-101901bush-story.html>

³⁴ BBC, *China Bans Xinjiang Officials from Observing Ramadan Fast* (July 2, 2014), <https://www.bbc.com/news/world-asia-china-28123267>.

³⁵ Nick Cumming-Bruce, *U.N. Panel Confronts China over Reports that It Holds a Million Uighurs in Camps*, THE N.Y. TIMES (Aug. 10, 2018), <https://www.nytimes.com/2018/08/10/world/asia/china-xinjiang-un-uighurs.html>; Gene A. Bunin, *Xinjiang’s Hui Muslims Were Swept into Camps Alongside Uighurs*, FOREIGN POL’Y (Feb. 10, 2020, 10:29 AM), <https://foreignpolicy.com/2020/02/10/internment-detention-xinjiang-hui-muslims-swept-into-camps-alongside-uighur/>.

³⁶ National Security Law of the People’s Republic of China (promulgated by Ministry of National Defence of the People’s Republic of China, effective 1 July 2015).

³⁷ *Id.* at art 2.; Enshen Li, *China’s New Counterterrorism Legal Framework in the Post-2001 Era*, 19 NEW CRIM. L. REV. 344–381, 381 (2016).

³⁸ UN human rights chief says China’s new security law is too broad, too vague, OHCHR (July 7, 2015), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16210&LangID=E>.

C. The Detention of Uyghurs and COVID-19

A large part of the Chinese effort to maintain control over the Uyghurs and other ethnic minorities has involved “reeducation” camps,³⁹ primarily in the Xinjiang region, where people have been subject to mass arbitrary detention and torture.⁴⁰ The United States has reported that since April 2017, Chinese authorities have detained at least eight-hundred thousand, and possibly more than two million, Uyghurs and minority members in internment camps for indefinite periods of time.⁴¹ Uyghurs have been detained for a variety of reasons from attending services at mosques⁴² and having more than three children;⁴³ however, many of the detained Uyghur people have not been charged with crimes and have no ability to take legal action challenging their detentions.⁴⁴

Many human rights advocacy groups have voiced concerns over the potential impact of COVID-19 on this detained population.⁴⁵ However, with the Chinese government implemented media blackout, there is little information about the number of cases and deaths related to COVID-19 in the Xinjiang region.⁴⁶ Detention centers shown on Chinese state television appear to have dorms with six to eight beds, while previously detained people have reported overcrowded cells with as many as sixty people per cell, poor sanitary conditions and inadequate food and clothing, and mistreatment.⁴⁷ Densely populated facilities such as the Xinjiang centers, where restrictive conditions limit the detainees’ abilities to engage in social distancing or hygiene practices, have been shown to amplify the spread of infectious diseases including COVID-19.⁴⁸ While the COVID-19 pandemic’s impact on the Uyghurs and other detained people in Xinjiang is publicly

³⁹ *China: “Where are they?” Time for Answers About Mass Detentions in the Xinjiang Uighur Autonomous Region*, AMNESTY INT’L (Sept. 24, 2018), <https://www.amnesty.org/en/documents/asa17/9113/2018/en/> (last visited Mar 10, 2021).

⁴⁰ *China: Massive Crackdown in Muslim Region*, HUMAN RIGHTS WATCH (Sept. 9, 2018), <https://www.hrw.org/news/2018/09/09/china-massive-crackdown-muslim-region> (last visited Mar. 10, 2021).

⁴¹ Hearing, *Foreign Relations Subcommittee: The China Challenge, Part 3: Democracy, Human Rights, and the Rule of Law*, U.S. SENATE COMM. ON FOREIGN REL. (2018), <https://www.foreign.senate.gov/hearings/the-china-challenge-part-3-democracy-human-rights-and-the-rule-of-law-12042018> (last visited Mar. 19, 2021).

⁴² Lindsay Maizland, *China’s Repression of Uyghurs in Xinjiang*, Council on Foreign Relations (Mar. 1, 2021), <https://www.cfr.org/backgrounder/chinas-repression-uyghurs-xinjiang>.

⁴³ Austin Ramzy, *How China Tracked Detainees and Their Families*, THE N.Y. TIMES (June 18, 2020), <https://www.nytimes.com/2020/02/17/world/asia/china-reeducation-camps-leaked.html>.

⁴⁴ Maizland, *supra* note 42.

⁴⁵ *Id.*; Eeman Talha, *COVID-19 and the Plight of the Uighur Community in China*, HUMAN RIGHTS PULSE (July 14, 2020), <https://www.humanrightspulse.com/mastercontentblog/covid-19-and-the-plight-of-the-uighur-community-in-china>.

⁴⁶ *Id.* (State officials deemed the number of infected Uyghurs in the Xinjiang province a state secret).

⁴⁷ John Sudworth, *China Uighurs: A model’s video gives a rare glimpse inside internment*, BBC News (Aug. 4, 2020), <https://www.bbc.com/news/world-asia-china-53650246>.

⁴⁸ *Prevention and control of COVID-19 in prisons and other places of detention*, WORLD HEALTH ORG. (2021), <https://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/publications-and-technical-guidance/vulnerable-populations/prevention-and-control-of-covid-19-in-prisons-and-other-places-of-detention> (last visited Mar 20, 2021).

China's Crimes Against Humanity

unknown, given the information available, it is clear the virus has only exacerbated the vulnerable conditions to which these people have been subjected.

D. Deportation of Uyghur Minority Members from Cambodia and Tajikistan

Those Uyghurs who have sought asylum in, or emigrated to other countries have, on multiple occasions, been subject to forced deportation back to China.⁴⁹ The complaint filed with the ICC relied upon the deportation of Uyghur people from Cambodia and Tajikistan to establish the Court's jurisdiction; although, those are not the only countries to have unlawfully deported Uyghur refugees.⁵⁰ In 2009, the Cambodian government forced twenty Uyghur people, including two children, back to China.⁵¹ Following the deportation, then-Chinese Vice President Xi Jinping made a short visit to Cambodia with a pledge of \$1.2 billion in aid to Cambodian Prime Minister Hun Sen's government.⁵²

Turkey has historically offered refuge to the Uyghurs, and is home to one of the largest populations of Uyghur people outside of China, with Turkish officials having condemned the Uyghur internment camps in Xinjiang.⁵³ However, recent economic pressure from China has resulted in the deportation of at least four Uyghur people from Turkey via Tajikistan to China in 2019.⁵⁴ Extradition through Tajikistan was made possible through the Tajik-Chinese agreement on the mutual extradition of suspected and convicted felons, agreed upon in 2015.⁵⁵ In December 2020, China announced the ratification of an extradition treaty with Turkey for the purpose of the timely return of certain refugees and Muslim

⁴⁹ "Eradicating Ideological Viruses", HUMAN RIGHTS WATCH (2020), <https://www.hrw.org/report/2018/09/09/eradicating-ideological-viruses/chinas-campaign-repression-against-xinjiangs> [hereinafter "Eradicating Ideological Viruses"].

⁵⁰ *China: Forcibly Returned Uighur Asylum Seekers At Risk*, HUMAN RIGHTS WATCH (Dec. 22, 2009), <https://www.hrw.org/news/2009/12/22/china-forcibly-returned-uighur-asylum-seekers-risk> (last visited Nov 5, 2020).

⁵¹ Aun Chhengpor, *ICC Prosecutor Says Cambodia's Uyghur Deportation Insufficient to Initiate Investigation*, VOA (Dec. 17, 2020), <https://www.voacambodia.com/a/icc-prosecutor-says-cambodia-uyghur-deportation-insufficient-to-initiate-investigation/5703104.html>; Seth Mydans, *After Expelling Uighurs, Cambodia Approves Chinese Investments*, THE N.Y. TIMES (Dec. 21, 2009), <https://www.nytimes.com/2009/12/22/world/asia/22cambodia.html>.

⁵² *Id.*

⁵³ Joanna Kakissis, *'I Thought It Would Be Safe': Uighurs In Turkey Now Fear China's Long Arm*, NPR (Mar. 13, 2020), <https://www.npr.org/2020/03/13/800118582/i-thought-it-would-be-safe-uighurs-in-turkey-now-fear-china-s-long-arm>; Shannon Tiezzi, *Why Is Turkey Breaking Its Silence on China's Uyghurs?*, THE DIPLOMAT (Feb. 12, 2019), <https://thediplomat.com/2019/02/why-is-turkey-breaking-its-silence-on-chinas-uyghurs/>.

⁵⁴ *Uyghur Mother, Daughters Deported to China From Turkey*, RADIO FREE ASIA (Aug. 9, 2019), <https://www.rfa.org/english/news/uyghur/deportation-08092019171834.html>; Carlotta Gall, *They Built a Homeland Far From China's Grip. Now They're Afraid*, THE N.Y. TIMES (Dec. 21, 2019), <https://www.nytimes.com/2019/12/21/world/asia/xinjiang-turkey-china-muslims-fear.html>.

⁵⁵ *Tajik Lawmakers Back Tajik-Chinese Extradition Deal*, RADIO FREE EUROPE / RADIO LIBERTY (May 20, 2015), <https://www.rferl.org/a/china-tajikistan-extradition-deal/27027076.html>.

China's Crimes Against Humanity

Uyghurs suspected of “terrorism,” which will likely eliminate the need for Turkey to deport Uyghur people through Tajikistan.⁵⁶

Egypt, Bulgaria, India and the United Arab Emirates, among others, have also detained and deported Uyghur people at the request of the Chinese government.⁵⁷ In July 2017, Egyptian authorities arrested at least sixty-two Uyghurs who were living in Egypt without informing them of the grounds for their detention and denying access to lawyers and family members.⁵⁸ At least twenty were deported back to China.⁵⁹ Since 2014, Thailand has complied with the Chinese government's requests to hold and deport large groups of Uyghur people back to China.⁶⁰

III. Discussion

A. The Scope and Legality of the Rome Statute of the International Criminal Court

1. Structure

The Rome Statute is the diplomatic treaty that established the ICC in July 1998.⁶¹ Initially, one hundred states adopted the statute while China joined the United States, Iraq, Libya, Yemen, Qatar and Israel in opposition to the statute.⁶² The ICC was the first permanent international court established with the main goal of addressing the impunity of offenders who commit the most severe crimes that victimize the international community as a whole.⁶³ As of 2020, one-hundred twenty three countries are State Parties to the Rome Statute, having ratified and signed the original law, thereby agreeing to support the ICC's efforts and goals.⁶⁴

As an intergovernmental organization and tribunal, the ICC possesses treaty-making power, the right to entertain diplomatic relations, and active and passive

⁵⁶ *China announces ratification of extradition treaty with Turkey*, FRANCE 24 (Dec. 28, 2020), <https://www.france24.com/en/asia-pacific/20201228-china-announces-ratification-of-extradition-treaty-with-turkey>.

⁵⁷ “Eradicating Ideological Viruses”, *supra* note 49.

⁵⁸ Egypt: Don't Deport Uyghurs to China, Human Rights Watch (July 8, 2017), <https://www.hrw.org/news/2017/07/07/egypt-dont-deport-uyghurs-china>.

⁵⁹ “Eradicating Ideological Viruses”, *supra* note 49.

⁶⁰ Edward Wong & Poypiti Amatatham, *Ignoring Protests, Thailand Deports About 100 Uighurs Back to China*, THE N.Y. TIMES (July 9, 2015), <https://www.nytimes.com/2015/07/10/world/asia/thailand-deports-uighur-migrants-to-china.html>.

⁶¹ Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22, 22 (1999).

⁶² ICC: The U.S. and the ICCHRW (n.d.), <https://www.hrw.org/legacy/campaigns/icc/us.htm>.

⁶³ Ahmed Isau, *The International Criminal Court (ICC): Jurisdictional Basis and Status*, 6 NNAMDI AZIKIWE U. J. INT'L L. & JURIS. 34, 37 (2015).

⁶⁴ The States Parties to the Rome Statute, INT'L CRIM. CT., https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Oct. 26, 2020).

international responsibility.⁶⁵ The Rome Statute is based on a cooperative relationship at a national and international level, relying on regular contact between the Court and States.⁶⁶ The Court has responsibility over acts committed by and against nationals of member-States.⁶⁷

The Rome Statute provides that the jurisdiction of the ICC shall be complementary to States Parties' national criminal courts or tribunals' jurisdictions.⁶⁸ Under the Rome Statute's complementarity principle, the ICC is intended to be a "court of last resort", investigating and prosecuting only where national courts or tribunals are unwilling or unable to prosecute.⁶⁹ Thus, primary responsibility for prosecuting crimes of international concern falls on the national criminal courts or tribunals, while the ICC provides certain standards to be met with regards to the crimes listed in its Article 5.⁷⁰ So long as a national criminal court is able and willing to investigate and prosecute the matter which has come to the ICC's attention, the ICC does not have jurisdiction.⁷¹

Generally, international law is not bound to a system of precedent comparable to that which exists in common law systems.⁷² The ICC, or any other international tribunal, is not bound by its own previous decisions or those of other courts and tribunals.⁷³ Unique to international tribunals, Article 21 of the Rome Statute specifically provides the applicable law for the Court.⁷⁴ Under its hierarchy, the Court must first apply the Rome Statute to the case at hand.⁷⁵ Should the Rome Statute fail to address the issue, and the issue fall under the crimes outlined in Article 5, the Court must turn to the Elements of Crimes—an adopted document that elaborates on the crimes described in the Rome Statute.⁷⁶ The Court must also look to its Rules of Procedure and Evidence.⁷⁷ If the Rome Statute, the

⁶⁵ Sascha Rolf Lüder, *The legal nature of the International Criminal Court and the emergence of supranational elements in international criminal justice*, 84 REVUE INTERNATIONALE DE LA CROIX-ROUGE/INTERNATIONAL REVIEW OF THE RED CROSS, 79-80, 83 (2002).

⁶⁶ Rome Statute, *supra* note 8, at art. 86-87; *What is Complementarity? National courts, the ICC and the Struggle Against Impunity*, THE INT'L CTR. FOR TRANSITIONAL JUSTICE, <https://www.ictj.org/sites/default/files/subsites/complementarity-icc/> (last visited Jan. 2, 2021).

⁶⁷ Lüder, *supra* note 65, at 83.

⁶⁸ *How the Court Works*, *supra* note 15.

⁶⁹ Sang-Hyun Song, *The Role of the International Criminal Court in Ending Impunity and Establishing the Rule of Law*, U.N.: U.N. CHRONICLE, <https://www.un.org/en/chronicle/article/role-international-criminal-court-ending-impunity-and-establishing-rule-law> (last visited Nov. 7, 2020).

⁷⁰ *How the Court Works*, *supra* note 15.

⁷¹ *Id.*

⁷² Statute of the International Court of Justice, June 26, 1945, 59 Stat. 105, 33 U.N.T.S. 933.

⁷³ Christopher Greenwood, *What the ICC Can Learn from the Jurisprudence of Other Tribunals*, 58 HARV. INT'L LAW J. 71, 73 (2017), <https://harvardilj.org/wp-content/uploads/sites/15/Greenwood-Formatted.pdf>.

⁷⁴ Rome Statute, *supra* note 8, art. 21(1)(a).

⁷⁵ *Id.*

⁷⁶ The Elements of Crimes of the Int'l Criminal Court, U.N. Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2000).

⁷⁷ The Rules of Procedure and Evidence of the Int'l Criminal Court, U.N. Doc. PCNICC/2000/1/Add.1 (Nov. 2, 2000).

China's Crimes Against Humanity

Elements of Crimes and the Rules of Procedure and Evidence do not adequately address an issue, Article 21(1)(b) requires the Court to apply applicable treaties and principles of international law.⁷⁸ Finally, if still unresolved, the Court must turn to a third category of law, the “general principles of law derived by the Court from national laws of legal systems of the world including the national laws of States that would normally exercise jurisdiction over the crime.”⁷⁹

Relevant to Uyghur's argument that the Court extend jurisdiction over China, the Rome Statute expressly permits the Court to utilize its own prior rulings in decision making.⁸⁰ On various occasions, the ICC has also referred to decisions of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”) on substantive law.⁸¹

2. *Subject-Matter and Territorial Jurisdiction*

The definition of crimes over which the ICC has jurisdiction, reflects widely accepted international norms based on existing treaties on international humanitarian law and customary international law.⁸² Article 5(1) of the Rome Statute provides that the jurisdiction of the ICC be limited to the most serious crimes of concern to the international community as a whole.⁸³

Article 5 of the Rome Statute also grants the ICC jurisdiction over the four main crimes mentioned above: crimes of genocide, crimes against humanity, war crimes, and crimes of aggression.⁸⁴ The Rome Statute broadly defines crimes against humanity in its Article 7,⁸⁵ with crimes against humanity must be committed pursuant to a widespread or systematic attack.⁸⁶ The list of acts that constitute crimes against humanity includes extermination, enslavement and deportation or forcible transfer, amongst others.⁸⁷

Generally, the Court can only exercise jurisdiction in cases where the accused is a national of a state party, the alleged crime took place on the territory of a

⁷⁸ Rome Statute, *supra* note 8, art. 21(1)(b).

⁷⁹ *Id.* at Art. 21(1)(c); Leena Grover, *A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court*, 21 EUR. J. OF INT'L LAW 543, 550 (2010).

⁸⁰ Rome Statute, *supra* note 8, art. 21(1)(c).

⁸¹ VOLKER NERLICH, THE STATUS OF ICTY AND ICTR PRECEDENT IN PROCEEDINGS BEFORE THE ICC: THE EMERGING PRACTICE OF THE INT'L CRIM. CT. 305 (Carston Stahn & Göran Sluiter eds., 2009).

⁸² Isau, *supra* note 63, at 40.

⁸³ Rome Statute, *supra* note 8, art. 5.

⁸⁴ *Id.*

⁸⁵ U.N. United Nations Office on Genocide Prevention and the Responsibility to Protect, *Crimes Against Humanity*, <https://www.un.org/en/genocideprevention/crimes-against-humanity.shtml> (last visited Dec 9, 2020).

⁸⁶ Rome Statute, *supra* note 8, art. 7(1).

⁸⁷ *Id.* art. 7(1)(a-k) (listing the acts that constitute crimes against humanity, such as murder, extermination, enslavement, deportation or forcible transfer, severe arbitrary deprivation of liberty, torture, persecution on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, amongst other acts).

China's Crimes Against Humanity

state party, or a situation is referred to the Court by the UNSC.⁸⁸ Under specific circumstances, the ICC will exercise jurisdiction over nationals of non-party States.⁸⁹ The ICC may try nationals of non-party States in situations referred to the ICC Prosecutor by a State party⁹⁰ or by the UNSC.⁹¹ The ICC may rely on territorial jurisdiction when non-party state nationals within the territory of a Party State commit a crime enumerated in Article 5 of the Rome Statute.⁹²

B. ICC Investigation into Myanmar's Alleged Crimes Against Rohingya Population

In 2019, the ICC's Pre-Trial Chamber made a historic decision to extend jurisdiction over the Rohingya crisis in Myanmar and Bangladesh.⁹³ The Rohingya are a minority ethnic group, the majority of whom are Muslim, who have primarily resided in Myanmar's Rakhine state along the southern border of Bangladesh.⁹⁴ Despite residing in Myanmar for generations, the government in Myanmar categorizes the Rohingya people as illegal immigrants.⁹⁵ After many violent interactions between the Rohingya and majority Rakhine population, a group of Rohingya fighters calling itself the Arakan Rohingya Salvation Army ("ARSA")⁹⁶ staged attacks on border posts in 2016, killing nine border officers and four soldiers.⁹⁷ Following this attack, Myanmar's military, officially known as the Tatmadaw, launched a crackdown, involving human rights violations against the Rohingya people, including unlawful killings, arbitrary arrests, and the rape and sexual assault of women and girls.⁹⁸ The United Nations ("UN") launched an investigation into these attacks, finding that the Tatmadaw had explicitly told the Rohingya people to "Go to Bangladesh," and threatened to torch

⁸⁸ *Id.* art. 13.

⁸⁹ *Id.*

⁹⁰ *Id.* art. 13(a).

⁹¹ *Id.* art. 13(b).

⁹² *Id.* art. 12(2)(a).

⁹³ Carlos E. Gomez, *The International Criminal Court's Decision on the Rohingya Crisis: The Need for A Critical Redefinition of Trans-Border Jurisdiction to Address Human Rights*, 50 CAL. W. INT'L L.J. 177, 184–85 (2019).

⁹⁴ *Who are the Rohingya and why are they fleeing Myanmar?*, AMNESTY INT'L (Sept. 7, 2017, 3:18 PM), <https://www.amnesty.org/en/latest/news/2017/09/who-are-the-rohingya-and-why-are-they-fleeing-myanmar/>.

⁹⁵ *Id.*

⁹⁶ *The Rohingya: Tracking the history of today's refugee crisis*, NEW HUMANITARIAN (Aug. 24, 2020), <https://www.thenewhumanitarian.org/in-depth/myanmar-rohingya-refugee-crisis-humanitarian-aid-bangladesh>.

⁹⁷ *China announces ratification of extradition treaty with Turkey*, *supra* note 56.

⁹⁸ *Id.*

their homes and murder them if they failed to comply.⁹⁹ Since 2017, an estimated seven-hundred forty-five thousand Rohingya people have fled to Bangladesh.¹⁰⁰

On April 9, 2018, Chief Prosecutor Bensouda requested that the ICC's Pre-Trial Chamber assess whether the Court had jurisdiction to investigate the crimes against humanity, specifically deportation, occurring in Myanmar against the Rohingya minority.¹⁰¹ Myanmar is not a State Party to the Rome Statute; however, Bangladesh ratified the Statute in 2010.¹⁰² The ICC's limited jurisdiction presented several challenges to the court in determining whether it could assert jurisdiction over the Rohingya conflict.¹⁰³ Because the UNSC had not referred the deportation to the ICC, a State Party national had not committed the crime due to the fact Myanmar is not a State Party to the Rome Statute, and Myanmar's non-Party status prevented the court from extending its jurisdiction based on territory, the court needed to justify its jurisdiction by proving that the crime of deportation had occurred inside a State Party's territory.¹⁰⁴ The UN report was used to provide evidence that the Tatmadaw violated Article 7(1)(d) of the Rome Statute, which prohibits "deportation or forcible transfer of the population" as a crime against humanity.¹⁰⁵ Under Article 7(1)(d) Elements of the Crimes, the perpetrator must unlawfully deport to "another State" by expulsion or coercion persons lawfully present in the area from which they were driven as part of a widespread or systematic attack against the civilian population the nature of which the perpetrator was aware.¹⁰⁶

On November 14, 2019, the ICC's Pre-Trial Chamber III authorized the OTP to open an investigation of the alleged crimes committed within the ICC's jurisdiction against the Rohingya people from Myanmar.¹⁰⁷ The Chamber found that there was a reasonable basis to believe Myanmar may have committed widespread and systematic acts of violence involving the crimes against humanity of deportation across the Myanmar-Bangladesh border and persecution on the grounds of ethnicity and religion against the Rohingya population.¹⁰⁸ Conse-

⁹⁹ *Mission report of OHCHR rapid response mission to Cox's Bazar, Bangladesh*, 13-24 13-24 September 2017, RELIEF WEB (Oct. 11, 2017), <https://reliefweb.int/report/myanmar/mission-report-ohchr-rapid-response-mission-cox-s-bazar-bangladesh-13-24-september>.

¹⁰⁰ *Rohingya Refugee Crisis*, OCHA (Aug. 29, 2018), <https://www.unocha.org/rohingya-refugee-crisis>.

¹⁰¹ Application Under Regulation 46(3), Case No. ICC-RoC46(3)-01-18, Prosecution's Request for a Ruling on Jurisdiction Under Article 19(3) of the Statute, ¶ 1 (Apr. 9, 2018), [https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-RoC46\(3\)-01/18-1](https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-RoC46(3)-01/18-1) [hereinafter Prosecutor's Request].

¹⁰² *Id.*

¹⁰³ Gomez, *supra* note 93, at 186; Rome Statute, *supra* note 8, art. 5.

¹⁰⁴ *Id.* at 185-86.

¹⁰⁵ Geoff Curfman, *ICC Jurisdiction and the Rohingya Crisis in Myanmar*, JUST SECURITY (Jan. 9, 2018), <https://www.justsecurity.org/50793/icc-jurisdiction-rohingya-crisis-myanmar/> (last visited Oct 31, 2020).

¹⁰⁶ Rome Statute, *supra* note 8, art. 7(1)(d).

¹⁰⁷ Press Release, INT'L CRIM. CT., ICC judges authorize opening of an investigation into the situation in Bangladesh/Myanmar (Nov. 14, 2019), <https://www.icc-cpi.int/Pages/item.aspx?name=PR1495> (last visited Oct. 31, 2020).

¹⁰⁸ *Id.*

quently, the Pre-Trial Chamber III authorized the commencement of an investigation into crimes related to the Rohingya crisis in Myanmar.¹⁰⁹ The Chamber further found that the Court's rationale with regard to deportation could be applied to other crimes that fall within the Court's jurisdiction, giving the OTP jurisdiction to consider other crimes against humanity that may have been committed against the Rohingya, outside of the alleged deportations.¹¹⁰

The Rohingya case expanded the court's jurisdiction by allowing for a cross-border extension of the continuing crimes doctrine, which grants the ICC authority over sustained offenses that occur partly within the borders of an ICC member state, even if those offenses also take place within the territory of a non-member state.¹¹¹

IV. Analysis

A. Application of the ICC's Rohingya Decision to the Uyghur Crisis

The ICC's extension of jurisdiction over Myanmar with regards to the Rohingya crisis provides a basis for the Court to investigate China's deportation and treatment of the Uyghur people. By demonstrating that it will not prosecute these issues in its national courts, China has opened the door to ICC jurisdiction.¹¹² Although the ICC is not bound by its prior decisions, Article 21 of the Rome Statute permits the Court to utilize its prior rulings in its decision-making.¹¹³ The Uyghur advocacy groups and attorneys have argued the Court apply the Myanmar decisions reasoning to their case.¹¹⁴ While neither China nor Myanmar are signatories to the Rome Statute,¹¹⁵ the crimes committed against both religious and ethnic minorities can be prosecuted because part of the alleged crimes concern signatory countries.¹¹⁶

Both the Rohingya and the Uyghur conflicts share four characteristics central to the ICC's reasoning in its decision regarding the Rohingya crisis. These shared

¹⁰⁹ *Id.* The investigation is limited to all crimes, including any future crime, within the jurisdiction of the Court, that are allegedly committed at least in part on the territory of Bangladesh, or on the territory of any other State Party or State accepting the ICC jurisdiction, it is sufficiently linked to the situation as described in the present decision, and it was allegedly committed on or after the date of entry into force of the Rome Statute for Bangladesh or other relevant State Party.

¹¹⁰ ICC Pre-Trial Chamber Press Release, *supra* note 13.

¹¹¹ Sarah Freuden, Commentary, *Decision on the "Prosecution's Request for a Ruling on Jurisdiction Under Article 19(3) of the Statute"* (Int'l Crim. Ct.), 58 INT'L LEGAL MATERIALS, 120–159 (2019); Gomez, *supra* note 93, at 184.

¹¹² Marlise Simons, *Uighur Exiles Push for Court Case Accusing China of Genocide*, THE N. Y. TIMES (July 6, 2020), <https://www.nytimes.com/2020/07/06/world/asia/china-xinjiang-uyghur-court.html> (last visited Jan. 2, 2021); *How the Court Works*, *supra* note 15.

¹¹³ Rome Statute, *supra* note 8, art. 21(1)(c).

¹¹⁴ Simons, *supra* note 112.

¹¹⁵ The States Parties to the Rome Statute, Int'l Crim. Ct., https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Jan. 2, 2021).

¹¹⁶ Rayhan Asat, *China and Myanmar Face Uighurs and Rohingyas that are Fighting Back After Years of Oppression*, NBC UNIVERSAL NEWS GROUP (2020), <https://www.nbcnews.com/think/opinion/china-myanmar-face-uyghurs-rohingya-are-fighting-back-after-years-ncna1240259> (last visited Jan. 2, 2021).

China's Crimes Against Humanity

characteristics include: the affected party is a State Party to the Rome Statute or has accepted the ICC's jurisdiction; the crimes committed are crimes that the ICC has jurisdiction over; at least one element of the crimes committed within a State Party's territory was committed by a non-State Party; and the crime contains a trans-border element or has a trans-border effect.¹¹⁷ In the Uyghur's case, the affected parties are Tajikistan and Cambodia—both countries that have accepted ICC jurisdiction.¹¹⁸ Pursuant to Articles 5 and 7 of the Rome Statute, China's alleged crimes are those of which the ICC has jurisdiction over.¹¹⁹ At least one element of China's alleged crimes of deportation and forcible transfer took place within Tajikistan and Cambodia's territory at the request of the Chinese government.¹²⁰ Finally, as the Uyghur people were unlawfully forced across borders, China's alleged crimes contain the trans-border element needed for the Court's jurisdiction.¹²¹

The Court's Rohingya decision may also provide a basis for the Court to investigate other crimes the Chinese government has subjected Uyghurs and other minorities to. In their Rohingya decision, the Pre-Trial Chamber III found that the Court's rationale regarding the illegal deportations could be extended to other crimes that fell within the Court's jurisdiction.¹²² If the ICC were to open an investigation surrounding the forcible deportations of Uyghur people from Cambodia and Tajikistan, the Court may be able to investigate the allegations of unlawful detention, torture, physical and sexual abuse committed against the Uyghurs, amongst the other alleged crimes.

In the case Uyghur advocacy groups present sufficient evidence that demonstrates the accused Chinese officials' conduct of forcible transfers and deportations, the ICC may rely upon its Rohingya decision to extend jurisdiction to the Uyghur case before the Court.

B. The OTP December 2020 Decision on the Uyghur Crisis

On December 14, after a review of the complaint, the OTP released its decision on the Uyghur crisis and submitted evidence.¹²³ The Office determined there was no basis to open an investigation, but left the door open to launching one in the future, provided there was sufficient evidence supporting the claim of crimes committed on State Party territories.¹²⁴ The OTP has confirmed that it has re-

¹¹⁷ Gomez, *supra* note 93, at 184-87.

¹¹⁸ Isau, *supra* note 63.

¹¹⁹ Rome Statute, *supra* note 8, art. 5, 7(1); *The Chinese Communist Party's Human Rights Abuses in Xinjiang*, *supra* note 2.

¹²⁰ Press Release, *supra* note 5.

¹²¹ *Id.*

¹²² ICC Pre-Trial Chamber Press Release, *supra* note 13.

¹²³ *Report on Preliminary Examination Activities 2020*, *supra* note 15, at 18-19.

¹²⁴ *Id.* at 20.

ceived request for reconsideration pursuant to Article 15(6) on the basis of new facts or evidence.¹²⁵

In making its decision, the Office supported its decision with the *Naletilić et al.* case held at ICTY.¹²⁶ In *Naletilić*, the Trial Chamber concluded the forced removal of Bosnian Muslim civilians from their homes and subsequent transfer to a detention center failed to constitute unlawful transfer as a crime under the ICTY Statute.¹²⁷ The ICTY Trial Chamber distinguished the motive behind the detention and forcible transfer, finding that “even though the persons [. . .] were moved from one place to another against their free will [. . .] [t]hey were apprehended and arrested *in order to be detained and not in order to be transferred*.”¹²⁸ The OTP found this distinction relevant to the Uyghur’s forcible transfers on the part of China, stating that the accused Chinese officials’ conduct may have acted as a precursor to the alleged crimes committed on Chinese territory, but the conduct occurring on the Cambodian and Tajikistani territories failed to fulfil the elements of the crime of deportation under article 7(1)(d) of the Rome Statute.¹²⁹

The Uyghur advocacy groups and attorneys bringing the claim must provide further evidence showing the accused Chinese officials’ motive to forcibly transfer the Uyghur people in countries such as Cambodia and Tajikistan. The Uyghur groups must defend their claim by arguing the Chinese officials acted with the intention of deportation of the Uyghur people, and not solely with the intention of the Uyghur people’s detention.

V. Proposal

A. The OTP’s Decision and its Impact on the Uyghur People

The decision to open an investigation would allow the Court to bring charges and prosecute those responsible for the crimes committed against the Uyghur people.¹³⁰ Working in unison with international bodies and global powers, the Court could effectively end China’s brutal ongoing campaign of genocide.¹³¹ In the event the ICC declines to investigate China’s alleged crimes regarding the Uyghur and other Turkic minority groups, those detained and tortured will con-

¹²⁵ Ewelina U. Ochab, *International Criminal Court Will Not Take Further the Case of The Uyghurs*, FORBES (Dec. 15, 2020, 03:52 AM), <https://www.forbes.com/sites/ewelinaochab/2020/12/15/international-criminal-court-will-not-take-further-the-case-of-the-uyghurs/?sh=6aa503bd2fe3> (last visited Jan. 2, 2021).

¹²⁶ *Report on Preliminary Examination Activities 2020*, *supra* note 15, at 20.

¹²⁷ *Prosecutor v. Naletilić et al.*, Case No. IT-98-34-T, Judgment, ¶ 535-537 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 31, 2003) (emphasis added).

¹²⁸ *Id.*

¹²⁹ *Report on Preliminary Examination Activities 2020*, *supra* note 15, at 20.

¹³⁰ Alina Rizvi, *Uighur Crisis Highlights Flawed Structure of UN Security Council*, JURIST (2020), <https://www.jurist.org/commentary/2020/07/alina-rizvi-unscc-reform-uighurs/> (last visited Jan. 1, 2021).

¹³¹ Beth Van Schaack, *Policy Options in Response to Crimes Against Humanity and Potential Genocide in Xinjiang*, JUST SECURITY (2020), <https://www.justsecurity.org/72168/policy-options-in-response-to-crimes-against-humanity-and-potential-genocide-in-xinjiang/> (last visited Jan. 3, 2021).

China's Crimes Against Humanity

tinue to be subjected to crimes against humanity and genocide at the hands of the Chinese government with one fewer means of justice.

Upwards of a million Uyghurs have been apprehended and confined within a network of concentration camps, where many are subjected to torture and forced labor.¹³² Those not detained are under near constant surveillance and subject to collections of personal biometric data.¹³³ The Chinese government continues its effort to forcibly sterilize Uyghur women in order to permanently alter the regional demographics.¹³⁴ Journalists and advocacy groups continue to discover evidence of China's plans to build more detention centers for its non-Han ethnic groups.¹³⁵ Without the international intervention of the ICC, few global powers have the capacity and means to prosecute those responsible or effectively influence the Chinese government to end its brutal campaign against the Uyghurs.

B. Alternative Means of Justice for the Uyghur People

Any effective international response to China's treatment of the Uyghurs will require a combination of unilateral and multilateral measures. The United States and similarly situated states need to respond in coalition to this crisis. A non-exhaustive list of measures addressing the situation in Xinjiang should include economic sanctions, humanitarian assistance for victims, and enforcement of UN treaties China has ratified.¹³⁶

Providing humanitarian relief to survivors must be a priority for large, global powers and non-governmental organizations. The United States may be able to work with states bordering China and others that have granted asylum to Uyghur refugees in an effort to provide support and services to victims. Efforts must also be made to prevent the forcible deportation of Uyghurs back to China.¹³⁷ As China is a party to the 1951 Refugee Convention and continues to violate its express principle of non-refoulement, the United Nations High Commissioner for Refugees may have grounds to provide protection and humanitarian assistance to Uyghur refugees.¹³⁸

¹³² Matt Rivers, Max Foster & James Griffiths, *Disturbing video shows hundreds of blindfolded prisoners in Xinjiang*, CNN (2019), <https://www.cnn.com/2019/10/06/asia/china-xinjiang-video-intl-hnk/index.html> (last visited Jan. 2, 2021); Philip Wen & Olzhas Auezov, *Tracking China's Muslim Gulag*, REUTERS (Nov. 29, 2018), <https://www.reuters.com/investigates/special-report/muslims-camps-china/>.

¹³³ Mercy A. Kuo, *Uyghur Biodata Collection in China*, THE DIPLOMAT (Dec. 28, 2017), <https://thediplomat.com/2017/12/uyghur-biodata-collection-in-china/> (last visited Jan. 2, 2021).

¹³⁴ Lisa Reinsberg, *China's Forced Sterilization of Uyghur Women Violates Clear International Law*, JUST SECURITY (July 29, 2020), <https://www.justsecurity.org/71615/chinas-forced-sterilization-of-uyghur-women-violates-clear-international-law/> (last visited Jan. 1, 2021).

¹³⁵ Nathan Ruser, *Exploring Xinjiang's Detention System*, THE XINJIANG DATA PROJECT (2020), <https://xjdp.aspi.org.au/explainers/exploring-xinjiangs-detention-facilities/> (last visited Jan. 2, 2021).

¹³⁶ Van Schaack, *supra* note 131.

¹³⁷ *Id.*

¹³⁸ Convention Relating to the Status of Refugees, art. 33, July 28, 1951, 189 U.N.T.S. 150; States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, U.N. High Comm'r for Refugees, <https://www.unhcr.org/en-au/3b73b0d63.pdf> (last visited Jan. 2, 2021).

China's Crimes Against Humanity

China's discriminative and violent policies violate the Universal Declaration of Human Rights,¹³⁹ the International Covenant on Economic, Social and Cultural Rights,¹⁴⁰ the International Convention on the Elimination of All Forms of Racial Discrimination,¹⁴¹ and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,¹⁴² all of which China has signed and ratified.¹⁴³ While none of these treaties or conventions has an individual complaint mechanism with jurisdiction over China, China may be subject to periodic reviews by treaty bodies.¹⁴⁴ Periodic reviews, however, are not likely going to effectively address the crimes committed by the Chinese government. Without the force of the ICC, efforts addressing the Uyghur crisis may be more rooted in victim assistance and support rather than prosecution of the accused Chinese officials.

VI. Conclusion

China's on-going and brutal campaign against the Uyghur and non-Han ethnic minorities warrants international intervention. In addition to the deportations of Uyghurs, the current situation for Uyghurs in China is dire. Upwards of a million have been apprehended and confined within a network of concentration camps, where many are subjected to torture and forced labor. These detention facilities place the detainees at huge risk of contracting COVID-19, only exacerbating the vulnerable conditions Uyghur and non-Han people are facing. The evidence of the forcible transfer and deportation of Uyghur refugees from Cambodia and Tajikistan provides sufficient evidence for the ICC to extend jurisdiction over China, regardless of its State Party status. A formal investigation into the alleged crimes, in conjunction with economic sanctions and humanitarian aid, may be effective in ending the campaign.

Speaking at a virtual information event on the ICC complaint, the East Turkistan Government in Exile Prime Minister, Salih Hudayar, said, "For over 71 years China has been engaging in a campaign of colonization, genocide and occupation in East Turkistan and this is the first time in our history that we have sought to seek justice through international law and international institutions. [. . .] [W]e urge governments across the world to support our case at the ICC and recognize China's atrocities against Uyghurs and other Turkic peoples as a genocide."¹⁴⁵ The international community must come together to oppose the revival of con-

¹³⁹ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, (Dec. 10, 1948), at 71.

¹⁴⁰ Int'l Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

¹⁴¹ Int'l Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195.

¹⁴² Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

¹⁴³ Van Schaack, *supra* note 131.

¹⁴⁴ *Id.*

¹⁴⁵ Webinar: How the ICC Can Investigate and Prosecute Chinese Officials for Genocide Against Uyghurs And Other Turkic People, (East Turkistan Nat'l Awakening Movement 2020), <https://nationalawakening.org/webinar-how-the-icc-can-investigate-and-prosecute-chinese-officials-for-genocide-against-uyghurs-and-other-turkic-people/> (last visited Jan. 2, 2021).

China's Crimes Against Humanity

centration camps, forced sterilization, persecution of ethnic or religious groups, and crimes against humanity. These atrocities merit a resolute and immediate global response.

