Applying International Law Solutions to the Xinjiang Crisis

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I. INTRODUCTION

China's mass repression of ethnic minorities in its northwestern province of Xinjiang is by now a well-trodden story.[1] Since Xinjiang's incorporation into modern China in 1955, the Communist regime has

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[1] *See* Adrian Zenz, *China Didn't Want Us to Know. Now Its Own Files Are Doing the Talking*, N.Y. TIMES (Nov. 24, 2019), https://www.nytimes.com/2019/11/24/opinion/china-xinjiang-files.html [hereinafter Zenz, *China Didn't Want Us to Know*]. Zenz argues that, as pertains to the Xinjiang Crisis, "[i]n a way…we already know all that we really need to know." *Id.*

implemented repressive policies.[2] With the onset of the global war on terror,[3] the scope of Chinese repression has expanded dramatically and in recent years has taken on alarming proportions.[4] For example, according to one estimate, governmental authorities have detained hundreds of thousands of the ethnic minority population in a network of concentration camps in Xinjiang since 2016.[5] China has primarily targeted the Uyghurs—a Muslim, Turkic minority mostly residing in Xinjiang—but has also interned and abused members of other Muslim minority groups, such as Kazakhs, Kyrgyz, Tajiks, and Hui.[6] According to official documents, the purpose of internment is to "wash clean the brains" of internees by

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[2] *See* GARDNER BOVINGDON, THE UYGHURS: STRANGERS IN THEIR OWN LAND 50 (2010). Bovingdon notes that since Xinjiang's incorporation into the modern Chinese state, the "system of governance has…denied Uyghurs the freedom to make some political decisions according to their own interests." *Id.* at 40. Bovingdon goes on to note that the Communist government's policies towards minorities in Xinjiang were particularly "assimilationist and intolerant during the Cultural Revolution." *Id.* at 52.

[3] *See* Sean R. Roberts, *The Biopolitics of China's "War on Terror" and the Exclusion of the Uyghurs*, 50 CRITICAL ASIAN STUD. 232, 233 (2018). Shortly after the 9/11 attacks on the United States and the onset of the global war on terror, Chinese authorities began to cast Uyghur separatist movements as examples of Islamist terrorism. *Id*. Roberts notes that the Chinese government's "assertions about the Uyghur terrorist threat in 2001 can be interpreted as mostly a rhetorical shift in how China describes an internal 'separatist' threat it perceives amongst its Uyghur population." *Id.*

[4] BOVINGDON, *supra* note 2, at 106.

[5] *See* Adrian Zenz, *"Wash Brains, Cleanse Hearts": Evidence from Chinese Government Documents About the Nature and Extent of Xinjiang's Extrajudicial Internment Campaign*, 7 J. POL. RISK (2019), https://www.jpolrisk.com/wash-brains-cleanse-hearts/ [hereinafter Zenz, *"Wash Brains, Cleanse Hearts"*]. Zenz argues that "the claim that Xinjiang does not run any facilities that can technically be referred to as 'concentration camps' is . . . both semantically and factually problematic." *Id.* Zenz goes on to note that concentration, however, is but a "means to an end," and ultimately suggests the term "re-education camps." *Id.*; *but see* U.S. Holocaust Memorial Museum, Wash. D.C., *Concentration Camps, 1933-39*, U.S. HOLOCAUST MEMORIAL MUSEUM (June 27, 2019), https://encyclopedia.ushmm.org/content/en/article/concentration-camps-1933-39. This author adopts the United States Holocaust Memorial Museum's definition of a concentration camp: "a camp in which people are detained or confined, usually under harsh conditions and without regard to legal norms of arrest and imprisonment that are acceptable in a constitutional democracy." *Concentration Camps*, *supra* note 5. This definition accurately describes the camps in Xinjiang. *Id*. Moreover, the term "concentration camp" carries with it a moral and historical gravitas, unlike the term "re-education camp." *Id*. This paper will thus refer to Chinese camps in Xinjiang as "concentration camps" or alternatively, as "internment camps," but will not employ the term "re-education camp." *Id*.

[6] *See French Leader Urges UN-Backed Mission to China's Xinjiang Over Concerns at Uyghurs' Treatment*, RADIOFREEEUROPE/RADIOLIBERTY (Sept. 23, 2020), https://www.rferl.org/a/french-leader-urges-un-backed-mission-to-china-s-xinjiang-over-concerns-at-uyghurs-treatment/30853180.html.

mounting "assault-style re-education."[7] In other words, China attempts, through the use of concentration camps, to effect the mass assimilation of ethnic minorities and to destroy any sense of cultural distinctiveness that such citizens might feel.[8] Mass internment is but one example of the rights abuses that China has implemented in Xinjiang province.[9] For example, China has also destroyed Uyghur cultural icons, quartered Communist cadres in Uyghur homes in violation of the right to privacy, and mounted a campaign against the use and spread of the Uyghur language.[10]

Thus far, the international community has failed to constrain China's actions in Xinjiang.[11] Given China's status as an economic powerhouse, only a few countries have proven willing to risk Chinese wrath by condemning Chinese human rights abuses.[12] For example, fifteen foreign ambassadors signed a letter expressing concern about China's incarceration of Muslim minorities in 2018.[13] A year later in October 2019, the United Kingdom's permanent representative to the United Nations ("U.N.") called on China to "uphold its national laws and international obligations and commitments to respect human rights, including freedom of religion or belief, in Xinjiang and across China."[14]

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[7] Zenz, *"Wash Brains, Cleanse Hearts," supra* note 5.

[8] *See* Joanne Smith Finley, *Securitization, Insecurity and Conflict in Contemporary Xinjiang: Has PRC Counter-terrorism Evolved into State Terror?*, 38 CENT. ASIAN SURV. 1, 2–3 (2019).

[9] *Id.*

[10] *See* Bahram K. Sintash, *Demolishing Faith: The Destruction and Desecration of Uyghur Mosques and Shrines*, UYGHUR HUM. RTS. PROJECT 29 (2019), https://docs.uhrp.org/pdf/UHRP_report_Demolishing_Faith.pdf; Darren Byler, *Violent Paternalism: On the Banality of Uyghur Unfreedom*, 16 ASIA-PAC. J. 1, 11 (2018) [hereinafter Byler, *Violent Paternalism*]; Darren Byler, *The 'Patriotism' of Not Speaking Uyghur*, SUPCHINA (Jan. 2, 2019), https://supchina.com/2019/01/02/the-patriotism-of-not-speaking-uyghur.html [hereinafter Byler, *The 'Patriotism' of Not Speaking Uyghur*].

[11] *See* Matt Schiavenza, *Why Aren't More Countries Confronting China Over Xinjiang?* CHINAFILE (Jan. 14, 2020), https://www.chinafile.com/reporting-opinion/viewpoint/why-arent-more-countries-confronting-china-over-xinjiang.

[12] *See id.*

[13] Associated Press, *China Rebukes Canada and Other Diplomats for Letter on Muslim Rights*, CBC NEWS (Nov. 15, 2018), https://www.cbc.ca/news/politics/china-canada-uighurs-letter-1.4906522. According to Global Affairs Canada, the letter called on "China to release Uyghurs and other Muslims who have been detained arbitrarily and without due process…." *Id.*

[14] Karen Pierce, UK Permanent Representative to the United Nations, Joint Statement on Human Rights Violations and Abuses in Xinjiang (Oct. 29, 2019). https://www.gov.uk/government/speeches/joint-statement-on-xinjiang. Ambassador Pierce called on the Chinese government to implement eight recommendations of the UN's Committee for the Elimination of Racial Discrimination and to allow a UN mission "unfettered, meaningful access to Xinjiang." *Id.*

While multiple countries have proven willing to speak up in international fora, only the United States has paired that condemnation with concrete legal action.[15] Notably, the U.S. Congress passed the Uyghur Human Rights Policy Act of 2020 ("Uyghur Act"), which directs "United States resources to address human rights violations and abuses" in Xinjiang.[16] The Uyghur Act calls on the President to impose sanctions on foreign persons whom the President determines to be responsible for human rights abuses in Xinjiang.[17] Apart from voiced condemnation and bilateral pressure, however, there has not yet emerged a coordinated international campaign to hold Beijing legally responsible for its actions in Xinjiang despite the array of unused tools that exist under international law.[18]

There are promising signs that certain human rights organizations are beginning to employ international legal tools against China.[19] In July 2020, for example, the East Turkistan Government in Exile ("ETGE") and the East Turkistan National Awakening Movement ("ETNAM"), two Uyghur representative groups, filed a complaint with the Office of the Prosecutor at the International Criminal Court ("ICC").[20] The complaint accused China of having committed genocide and crimes against humanity.[21] Although the ICC decided in December 2020 not to proceed

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[15] Patrick Wintour, *Uighurs Could be Allowed to Seek Genocide Ruling Against China in UK*, GUARDIAN (Sept. 29, 2020, 7:37 AM), https://www.theguardian.com/world/2020/sep/29/uk-courts-could-be-given-power-to-rule-that-uighurs-are-facing-genocide. In addition, British parliamentarians have proposed that no "trade bill regulations be allowed to come into effect if a high court judge makes a preliminary determination that a party to the relevant trade agreement is committing genocide." *Id.* Yet only the United States has thus far adopted legal tools in a bilateral attempt to constrain Chinese action. *Id.*

[16] Uyghur Human Rights Policy Act of 2020 § 2, 22 U.S.C. § 6901 (2020).

[17] *Id.* at § 6(a)–(b).

[18] *See* Helen Davidson, *World is Legally Obliged to Pressure China on Uighurs, Leading Lawyers Say*, GUARDIAN (July 22, 2020, 2:27 AM), https://www.theguardian.com/world/2020/jul/22/world-is-legally-obliged-to-pressure-china-on-uighurs-leading-lawyers-say. The continued absence of such an international campaign can be inferred from calls from the Bar Human Rights Committee of England and Wales for governments around the world to take "action on China's alleged abuse of Uighur and other Turkic minorities." *Id.*

[19] *See* Press Release, East Turkestan National Awakening Movement, Uyghur Genocide and Crimes Against Humanity: Credible Evidence Submitted to ICC for the First Time Asking for Investigation of Chinese Officials (July 6, 2020), https://nationalawakening.org/press-release-uyghur-genocide-and-crimes-against-humanity-credible-evidence-submitted-to-icc-for-the-first-time-asking-for-investigation-of-chinese-officials/ [hereinafter Press Release, East Turkestan National Awakening Movement].

[20] *Id.*

[21] *Id.*

with an investigation of Chinese atrocities in Xinjiang, ETGE and ETNAM's complaint is a sign, according to one commentator, of the "growing pressure over Xinjiang and the determination of…activists to hold Beijing to account."[22]

This paper evaluates the available legal tools that the international community should use to respond to Chinese depredations in Xinjiang. Part II evaluates which legal words or phrases ("legal terms") best describe China's actions in Xinjiang. Matching China's actions with specific legal terms is important as certain terms can result in affirmative rights and duties on the part of states and the international community, and thereby illuminate the available legal tools. Part II separates legal terms into two categories of utility—moderate and high—with utility defined as the likelihood that a term will give rise to a legal remedy. The moderate utility category comprises the legal terms "genocide," "cultural genocide," and "violations of various international human rights treaties." The high utility category comprises the legal terms "crimes against humanity" and "forced labor." The high utility legal terms describe prohibited acts that have attained *jus cogens* status under international law, meaning that they are non-derogable and thus bind all members of the international community.[23]

Part III will then identify three means of recourse under international law, tailoring those solutions to the legal terms that this paper argues has the highest utility. These means of recourse are: 1) suit before the International Criminal Court, 2) suit before the International Court of Justice, and 3) suit before a third-party national court exercising universal jurisdiction. Given the International Criminal Court's recent decision not to pursue an investigation into the Xinjiang crisis,[24] this paper argues that rights organizations and the international community should prioritize the latter two options: an International Court of Justice ("ICJ") advisory opinion and the exercise of universal jurisdiction. Part IV offers a brief call to action.

II. LEGAL CATEGORIZATION OF ABUSES IN XINJIANG

How should the international community characterize China's atrocities in Xinjiang? Some scholars who have covered Xinjiang characterize China's actions according to non-legal frameworks and terms.[25] For example, one scholar applies the term "state terror" to Xinjiang,

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[22] James Griffiths, *China Avoids ICC Prosecution Over Xinjiang for Now, But Pressure is Growing*, CNN (Dec. 14, 2020), https://www.cnn.com/2020/12/14/china/china-xinjiang-icc-biden-intl-hnk/index.html.

[23] *See* Sondre Torp Helmerson, *The Prohibition of the Use of Force as Jus Cogens: Explaining Apparent Derogations*, 61 NETH. INT'L L. REV. 167, 168 (2014).

[24] Griffiths, *supra* note 22.

[25] *See, e.g.*, Finley, *supra* note 8, at 15; Dibyesh Anand, *Colonization with Chinese Characteristics: Politics of (In)security in Xinjiang and Tibet*, 38 CENT. ASIAN SURV. 129, 136 (2019); Roberts, *supra* note 3, at 251.

writing that, "[S]tate counter-terrorism becomes terrorism 'when it fails to distinguish between the innocent and the guilty, it is highly disproportionate, and it aims to terrify or intimidate the wider population or a particular community into submission.'" [26] Another commentator casts Chinese actions in Xinjiang as "modern colonialism," noting that "since the formation of the People's Republic of China in 1949, colonialist paternalism has marked the Chinese communist approach to Xinjiang and Tibet."[27] A third scholar argues that China has "shifted from a focus on targeting dangerous Uyghurs to one that seeks to control the entire ethnic group as a virtual biological threat to the body of society."[28]

Other scholars have matched China's actions with individual legal terms. [29] However, no sources appear to provide a systematic legal accounting of atrocities in Xinjiang. The Congressional-Executive Commission on China comes the closest to a comprehensive legal analysis. [30] Further, a recent report by the Asia Pacific Centre for the Responsibility to Protect provides detailed legal analysis, but focuses only on genocide and crimes against humanity rather than dealing with the full gamut of potentially applicable legal terms.[31] Yet a comprehensive legal analysis is still needed; such an analysis will allow prosecutors and the international community to move the discussion from analysis to solution.[32] If a Chinese action constitutes a crime or violation of law, the relevant laws and treaties can give rise to specific remedies.[33]

This section fills the broader gap in the literature by matching atrocities in Xinjiang with relevant international law terms and divides those

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[26] Finley, *supra* note 8, at 15.

[27] Anand, *supra* note 25, at 136.

[28] Roberts, *supra* note 3, at 251.

[29] *See generally 2019 Annual Report*, CONG.-EXEC. COMM'N ON CHINA (2019), https://www.cecc.gov/sites/chinacommission.house.gov/files/documents/2019AR_XINJIANG.pdf; *Genocide and Crimes Against Humanity in Xinjiang? Applying the Legal Tests*, ASIA-PACIFIC CTR.—RESP. TO PROTECT (Nov. 2020), https://r2pasiapacific.org/files/5818/app [hereinafter *Genocide and Crimes Against Humanity in Xinjiang?*].

[30] *See generally 2019 Annual Report*, *supra* note 29. The Congressional-Executive Commission on China is an independent agency with a mandate to monitor rule of law issues in China. *Frequently Asked Questions*, CONG.-EXEC. COMM'N ON CHINA, https://www.cecc.gov/about/frequently-asked-questions (last visited Nov. 13, 2020). The Commission is overseen by nine Senators, nine Members of the House of Representatives, and five senior Executive branch officials. *Id.*

[31] *See generally Genocide and Crimes Against Humanity in Xinjiang?*, *supra* note 29.

[32] *See generally* DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW (2nd ed. 2006).

[33] *See generally id.*

legal terms into two categories: a moderate utility category and a high utility category.[34] The moderate utility category comprises the legal terms genocide, cultural genocide, and violations of international human rights treaties.[35] These terms are labeled "moderate utility" because they are useful in characterizing Chinese acts as legal violations, but are less likely than the terms in the high utility category to give rise to a clear legal remedy.[36] An international tribunal may be unwilling to label Chinese actions as genocide and a finding that China has committed cultural genocide or violated human rights treaties is unlikely to give rise to a clear legal solution.[37] The high utility category comprises the legal labels of crimes against humanity and forced labor.[38] These terms are labeled "high utility" because, as prohibitions carrying *jus cogens* status, they give rise to clear legal remedies.[39] In addition, the prohibitions on certain constituent crimes against humanity have attained *jus cogens* status.[40] Of the crimes against humanity analyzed in Part II, the prohibitions on torture and apartheid—but not the prohibition on forced sterilization—have attained *jus cogens* status.[41]

A. *Terms of Moderate Utility*

1. Genocide: A Term of Moderate Utility

Genocide is popularly referred to as the crime of crimes.[42] The 1948 Genocide Convention defines genocide as the commission of certain acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group."[43] Since Dr. Adrian Zenz released his findings on mass sterilization in Xinjiang,[44] a host of analysts and public intellectuals

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[34] *See infra* Section II.A.

[35] *See infra id.*

[36] *See infra id.*

[37] *See infra id.*

[38] *See infra* Section II.B.

[39] *See infra id.*

[40] *See infra id.*

[41] *See infra id.*

[42] *See* William A. Schabas, *National Courts Finally Begin to Prosecute Genocide, the 'Crime of Crimes*,' 1 J. INT'L CRIM. JUST. 39, 39, 43 (2003).

[43] Convention on the Prevention and Punishment of the Crime of Genocide art. II, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

[44] Adrian Zenz, *Sterilizations, IUDs, and Mandatory Birth Control: The CCP's Campaign to Suppress Uyghur Birthrates in Xinjiang*, JAMESTOWN FOUND. 2 (2020), https://jamestown.org/wp-content/uploads/2020/06/Zenz-Internment-Sterilizations-and-IUDs-UPDATED-July-21-Rev2.pdf [hereinafter Zenz, *Sterilizations, IUDs, and*

have made the case that Chinese acts in Xinjiang constitute genocide.[45] A court, however, may be less likely to come to that conclusion.[46] For a legally cognizable claim of genocide, there must exist not only a genocidal act, but also genocidal intent.[47] It may be difficult to prove genocidal intent in the Xinjiang context, given the high bar that international tribunals have articulated for such a finding.[48]

Article II of the Genocide Convention lists five genocidal acts.[49] For a court to find that an accused has committed genocide, the accused must commit one of the genocidal acts and also demonstrate genocidal intent.[50] Genocidal intent is the intent to "destroy, in whole or in part, a national, ethnical, racial or religious group, as such."[51] The Chinese government has arguably committed two of the five genocidal acts: the government has caused "serious bodily or mental harm to members of the group" in

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Mandatory Birth Control]. Dr. Zenz, a leading expert on the Xinjiang crisis, has closely documented the scope and nature of China's human rights abuses in Xinjiang. *Adrian Zenz*, JAMESTOWN FOUND., https://jamestown.org/analyst/adrian-zenz.html.

[45] *See, e.g.*, Editorial Board, *What's Happening in Xinjiang is Genocide,* WASH. POST (July 6, 2020, 10:22 AM), https://www.washingtonpost.com/opinions/global-opinions/whats-happening-in-xinjiang-is-genocide/2020/07/06/cde3f9da-bfaa-11ea-9fdd-b7ac6b051dc8_story.html.; Rayhan Asat & Yonah Diamond, *The World's Most Technologically Sophisticated Genocide is Happening in Xinjiang*, FOREIGN POL'Y (July 15, 2020, 3:38 PM), https://foreignpolicy.com/2020/07/15/uighur-genocide-xinjiang-china-surveillance-sterilization/.

[46] *See* Janine Natalya Clark, *Elucidating the Dolus Specialis*: *An Analysis of ICTY Jurisprudence on Genocidal Intent*, 26 CRIM. L. F. 497, 499–500 (2015).

[47] *Id.* Clark notes that a perpetrator of genocide "must have had the special intent (*dolus specialis*) to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such." *Id.*

[48] *See, e.g.*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Judgment, 2015 I.C.J. 3, ¶ 407 (Feb. 3); Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb.), Judgment, 2007 I.C.J. 43, ¶ 373 (Feb. 26); *see also Genocide and Crimes Against Humanity in Xinjiang?*, *supra* note 29, at 14 (noting that despite evidence that China has committed genocidal acts, it is "less clear…whether the requisite [genocidal] intent can be proven on existing evidence).

[49] Genocide Convention, *supra* note 43, art. II. The five acts listed in Article II are: killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, and forcibly transferring children of the group to another group. *Id*. art. II(a)–(e).

[50] Clark, *supra* note 46, at 500.

[51] *Id.*

violation of Article II(b)[52] and imposed "measures intended to prevent births within the group" in violation of Article II(d).[53]

China's actions likely fulfill Article II(b) of the Genocide Convention, which covers "serious bodily or mental harm."[54] One scholar notes that serious bodily or mental harm need not necessarily be "permanent and irremediable."[55] The International Criminal Tribunal for Rwanda ("ICTR")[56] defined serious bodily or mental harm as "acts of torture, be they bodily or mental, inhumane or degrading treatment, or persecution."[57] The Preparatory Committee of the International Criminal Court similarly asserts that "serious bodily or mental harm may include, but is not limited to, acts of torture, rape, sexual violence or inhuman or degrading treatment."[58] In the Xinjiang context, rights organizations and international observers have established that Chinese authorities have subjected those interned within the concentration camp system to torture, as well as inhuman and degrading treatment.[59] For example, one survivor of the camp system notes that "she was shocked with a stun gun to the head for spending more than the allotted two minutes in the toilet," which would constitute inhuman and degrading treatment or punishment.[60] A further analysis of

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[52] *See 2019 Annual Report*, *supra* note 29, at 6*; see also* Genocide Convention, *supra* note 43, art. II(b).

[53] *See* Zenz, *Sterilizations, IUDs, and Mandatory Birth Control*, *supra* note 44, at 2–3*; see also* Genocide Convention, supra note 43, art. II(d).

[54] *See, e.g.*, Nathan Vanderklippe, '*I Felt Like a Slave:' Inside China's Complex System of Incarceration and Control of Minorities*, GLOBE & MAIL (Mar. 31, 2019), https://www.theglobeandmail.com/world/article-i-felt-like-a-slave-inside-chinas-complex-system-of-incarceration/; Maya Wang, *More Evidence of China's Horrific Abuses in Xinjiang*, HUM. RTS. WATCH (Feb. 20, 2020, 1:32 PM), https://www.hrw.org/news/2020/02/20/more-evidence-chinas-horrific-abuses-xinjiang; Genocide Convention, *supra* note 43, art. II(b).

[55] WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIMES OF CRIMES 162 (2000).

[56] The UN Security Council established the International Criminal Tribunal for Rwanda to prosecute "those allegedly responsible for the 1994 Rwandan Genocide." *See* Michael P. Scharf, *Statute of the International Criminal Tribunal for Rwanda*, UNITED NATIONS OFF. LEGAL AFF., https://legal.un.org/avl/ha/ictr/ictr.html (last visited Nov. 13, 2020).

[57] Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 504 (Sept. 2, 1998).

[58] SCHABAS, *supra* note 55, at 164. The Preparatory Committee, also known as the Preparatory Commission, was established to "prepare proposals for practical arrangements for the establishment and coming into operation of the Court." *Preparatory Commission for the International Criminal Court*, UNITED NATIONS OFF. LEGAL AFF., https://legal.un.org/icc/prepcomm/prepfra.htm (last visited Nov. 13, 2020).

[59] *See, e.g.*, Vanderklippe, *supra* note 54; Wang, *supra* note 54.

[60] *See* Vanderklippe, *supra* note 54.

how China has committed torture will be provided in Part II(B)(1) of this article.[61] Therefore, China's actions have violated, and continue to violate, Article II(b) of the Genocide Convention because they cause both physical trauma and mental harm.[62]

In addition, China has violated Article II(d) of the Genocide Convention, which requires that measures "…be intended to prevent births within the group," i.e. undertaken with substantial knowledge and certainty that prevention of births will proximately occur.[63] Article II(d) is not a difficult clause to meet since all that needs to be shown for this act is the "imposition of…measures" to prevent births; "it need not be proven that [such measures] have actually succeeded."[64]

In a June 2020 report, Dr. Zenz provided information on the sheer extent of China's campaign of mass sterilization in Xinjiang.[65] Drawing on a range of Chinese government sources, Dr. Zenz argued that Uyghur population growth rates have declined precipitously with growth rates falling by 84 percent in the two largest Uyghur prefectures between 2015 and 2018.[66] By 2019, Chinese government officials "planned to subject at least 80 percent of women of childbearing age in the rural southern four minority prefectures [of Xinjiang] to intrusive birth prevention surgeries."[67] In 2020, one Uyghur region saw an "unprecedented near-zero birth rate target."[68] Such statistics are a direct result of the Chinese government's "campaign of mass female sterilization in rural Uyghur regions."[69] Governmental documents indicate a campaign to sterilize "rural minority women with three or more children, as well as some with two children."[70] Tellingly, the population growth rates in the Han Chinese-majority regions in Xinjiang tend to be significantly higher than in rural Uyghur regions.[71]

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[61] *See* discussion *infra* at Sections II.B.1.i, II.B.1.iii.

[62] Genocide Convention, *supra* note 43, art. II(b).

[63] SCHABAS, *supra* note 55, at 174.

[64] *Id.* at 173.

[65] *See* Zenz, *Sterilizations, IUDs, and Mandatory Birth Control*, *supra* note 44, at 2–3.

[66] *Id.* at 2.

[67] *Id.* at 3.

[68] *Id.* at 2.

[69] *Id.*

[70] *Id.*

[71] *Id.* at 3. The Han form China's main and dominant ethnic group but constitute a minority in Xinjiang itself. *See* David Tobin, *China Once Celebrated Its Diversity. How Has It Come to Embrace Ethnic Nationalism?* GUARDIAN (Dec. 5, 2020, 7:00 AM), https://www.theguardian.com/commentisfree/2020/dec/05/china-celebrated-diversity-

Dr. Zenz's statistics demonstrate that China has imposed measures intended to prevent Uyghur births and has consequently violated Article II(d).[72]

For an international tribunal to issue a finding that a perpetrator has committed genocide under the Genocide Convention, the accused must also display a special intent to commit genocide in addition to the acts outlined in Article II(b) and II(d).[73] International tribunals in the past have set a very high bar for a finding of genocidal intent.[74] For example, in *Croatia v. Serbia* (2015), the International Court of Justice ("ICJ") held that Croatia had to establish the "existence of a pattern of conduct from which the only reasonable conclusion to be drawn is an intent of the Serb authorities to destroy that substantial part of the group."[75] Similarly, the ICJ held in *Bosnia and Herzegovina v. Serbia and Montenegro* (2007) that:

> The *dolus specialis*, the specific intent to destroy the group in whole or in part, 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 would have to be such that it could only point to the existence of such intent.[76]

Following the requirements from those cases, one scholar notes that the prosecution would have to prove three things to prove genocidal intent: 1) the offender's intent to destroy the group, 2) the offender's intent to destroy the group in whole or in part, and 3) the offender's intent to destroy a group that is defined by nationality, race, ethnicity, or religion.[77] Intent is

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embrace-ethnic-nationalism-uighurs-dehumanised.html; *see also* BOVINGDON, *supra* note 2, at 103–04, for a discussion of Han-Uyghur relations. Bovingdon suggests that many Uyghurs consider themselves to be "fundamentally distinct from Hans" and contends that Uyghurs "are not part of the Chinese nation but constitute a nation unto themselves." BOVINGDON, *supra* note 2, at 104. Finally, it should be noted that the Han are often colloquially referred to as Chinese. *See* Monika Chansoria, *Han-Exclusive Vision of Chinese History, Texts*, SUNDAY GUARDIAN LIVE (Oct. 13, 2018, 5:26 PM), https://www.sundayguardianlive.com/opinion/han-exclusive-vision-chinese-history-texts#:~:text=Han%20people%20(Hanren)%20or%20Chinese,between%20%E2%80%9Cus%20and%20them%E2%80%9D.html.

[72] Zenz, *Sterilizations, IUDs, and Mandatory Birth Control*, *supra* note 44, at 20–21.

[73] *See* Clark, *supra* note 46, at 500.

[74] *See, e.g.*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Judgment, 2015 I.C.J. 3, ¶ 407 (Feb. 3); Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb.), Judgment, 2007 I.C.J. 43, ¶ 373 (Feb. 26).

[75] *Croat. v. Serb.*, 2015 I.C.J. at ¶ 407.

[76] *Bosn. & Herz. v. Serb.*, 2007 I.C.J. at ¶ 373.

[77] SCHABAS, *supra* note 55, at 228.

"normally proven as a deduction from the material act."[78] Where genocide involves the destruction of a large number of members of a group, the logical deduction will be more obvious.[79] Intent should be distinguished from motive, as the International Commission of Inquiry on Darfur[80] pointed out when it stated, "From the viewpoint of criminal law, what matters is not the motive, but rather whether or not there exists the requisite special intent to destroy a group."[81] Previous courts have ruled that "intent to destroy", within the meaning of the previous three requirements, must be intent of physical destruction, not cultural or spiritual, destruction.[82] The International Criminal Tribunal for Rwanda in *Prosecutor v. Akayesu* (1998), for example, treated the "intent to destroy" quite literally[83] and emphasized a statement by one Hutu who declared, "I will have peace when there will be no longer a Tutsi in Rwanda."[84] The court, in other words, pointed to evidence of intent to commit physical, not cultural or spiritual, destruction.[85]

Thus, the bar for the intent element of court-recognized genocide is relatively high, especially in the ICJ's jurisprudence.[86] Based on precedent, a majority of an international tribunal would potentially be unwilling to label China's atrocities in Xinjiang as genocide.[87] Additionally, China may argue that their campaign of forced sterilization does not indicate an intent to destroy the Uyghurs in whole or in part, but instead represents a re-imposition of historic birth control policies in response to Uyghur

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[78] *Id.* at 234.

[79] *Id.*

[80] The UN Security Council authorized then Secretary General Kofi Annan to establish the International Commission, which was to investigate reports of international law violations in Darfur. *See Sudan: Report of the International Commission of Inquiry on Darfur to the UN Secretary-General*, RELIEFWEB (Jan. 25, 2005), https://reliefweb.int/report/sudan/sudan-report-international-commission-inquiry-darfur-un-secretary-general. These international law violations stemmed from the outbreak of violence between the Sudanese government and various rebel groups. *Id.*

[81] Int'l Comm'n of Inquiry on Darfur, Rep. of the Int'l Comm'n of Inquiry on Darfur to the U.N. Secretary-General Pursuant to S.C. Res. 1564, ¶ 493 (Sept. 18, 2004).

[82] SCHABAS, *supra* note 55, at 229.

[83] Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 504 (Sept. 2, 1998).

[84] *Id.* at ¶ 168.

[85] *See id.*

[86] *See, e.g.*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Judgment, 2015 I.C.J. 3, ¶ 407 (Feb. 3); Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb.), Judgment, 2007 I.C.J. 43, ¶ 373 (Feb. 26).

[87] *See, e.g.*, *Croat. v. Serb.*, 2015 I.C.J. at ¶ 407; *Bosn. & Herz. v. Serb.*, 2007 I.C.J. at ¶ 373.

population growth.[88] The prosecution could respond by pointing out the magnitude of the drop in Uyghur population figures, but the point is that a finding of genocidal intent is far from clear-cut.[89] Since the bar for declaring genocidal intent is relatively high under international law, human rights activists would do well to accuse China of multiple crimes under international law by appending a claim of genocide alongside claims that allege the commission of crimes against humanity and forced labor. [90] Although the Chinese government has committed genocidal acts, genocidal intent is less easy to demonstrate in the Xinjiang context, thus rendering the term "genocide" one of only moderate utility.[91]

2. Cultural Genocide: A Term of Moderate Utility

Another term that experts have sought to apply to Xinjiang is "cultural genocide."[92] A typical op-ed concludes that Chinese authorities "want to stamp out the predominantly Muslim Uyghurs' cultural and religious roots and replace them with loyalty to the party."[93] But from a legal perspective, is cultural genocide a useful term giving rise to a legal remedy, or does it remain, at most, a rhetorical tool?

The international community has never been able to articulate a common, legally recognized definition of cultural genocide.[94] Notably, there is no "Cultural Genocide Convention."[95] Furthermore, the previously cited 1948 Genocide Convention does not explicitly employ the term "cultural genocide."[96] Some scholars have argued that the "original conceptualization of the crime of genocide, as presented by Raphael Lemkin, put cultural genocide centre stage."[97] In his book, *Axis Rule in*

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[88] *See What did China's One-Child Policy Mean for Minorities?* GLOB.-IS-ASIAN (Nov. 11, 2019), https://lkyspp.nus.edu.sg/gia/article/what-did-china's-one-child-policy-mean-for-minorities. The Communist government introduced the infamous One-Child Policy in 1980, but allowed minorities in 26 provinces to have an additional child. *See id.*

[89] *See id.*

[90] *See, e.g.*, *Croat. v. Serb*, 2015 I.C.J. at ¶ 407; *Bosn. & Herz. v. Serb.*, 2007 I.C.J. at ¶ 373.

[91] *See, e.g.*, Vanderklippe, *supra* note 54; Wang, *supra* note 54.

[92] Matthias von Hein, *Opinion: Beijing's Cultural Genocide in Xinjiang*, DEUTSCHE WELLE (Nov. 25, 2019), https://www.dw.com/en/opinion-beijings-cultural-genocide-in-xinjiang/a-51407530.

[93] *Id.*

[94] *See* Genocide Convention, *supra* note 43. Notably, the Genocide Convention does not set forth a definition of cultural genocide. *Id.*

[95] *See id.*

[96] *See id.*

[97] Leora Bilsky & Rachel Klagsbrun, *The Return of Cultural Genocide?*, 29 EUR. J. INT'L L. 373, 374 (2018).

Occupied Europe, Raphael Lemkin—the lawyer who coined the term "genocide"—listed cultural genocide as a "type of genocide," noting that "[i]n order to prevent the expression of the national spirit" the Nazis had implemented "rigid control of all cultural activities."[98] Lemkin wrote that Nazi measures rendered "national creative activities in the cultural and artistic field" and deprived the population of "inspiration from the existing cultural and artistic values."[99] As the International Criminal Tribunal for the former Yugoslavia ("ICTY")[100] noted in *Prosecutor v. Krstic* (2001), the drafters of the convention "expressly rejected" the notion of cultural genocide, as it was "considered too vague and too removed from the physical or biological destruction that motivated the Convention."[101] The Danish Delegate on the Sixth Committee of the General Assembly[102] remarked that, "It would show a lack of logic and of a sense of proportion to include in the same convention both mass murders in gas chambers and the closing of libraries."[103] At first glance then, it would seem that cultural genocide is a legally meaningless term excluded from the scope of the Genocide Convention, and that cultural genocide, at best, represents a rhetorical tool that commentators can use to associate state actions with the ultimate crime—genocide.[104]

Even though the U.N. never agreed upon a definition of cultural genocide, the U.N. Working Group on Indigenous Populations ("Working Group")[105] articulated a definition in its first *Draft Declaration on the*

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[98] RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS 84 (1944).

[99] *Id.*

[100] The ICTY was a "United Nations court of law that dealt with war crimes that took place during the conflicts in the Balkans in the 1990s." *See About the ICTY*, INT'L CRIM. TRIBUNAL FORMER YUGOSLAVIA, https://www.icty.org/en/about (last visited Nov. 13, 2020).

[101] Prosecutor v. Radislav Krstic, Case No. IT-98-33-T, Trial Judgment, ¶ 576 (Aug. 2, 2001).

[102] For an explanation of the Sixth Committee's work, see Jayme Herschkopf & Julie Hunter, Genocide Reinterpreted: An Analysis of the Genocide Convention's Potential Application to Canada's Indian Residential School System (Apr. 2011) (unpublished paper, Yale Law School) (on file with the Yale University Library system). https://law.yale.edu/sites/default/files/area/center/schell/canadian_trc_paper_final.pdf. The Sixth Committee of the General Assembly took the final vote on "whether or not to include cultural genocide in the final Genocide Convention." *Id.* at 14.

[103] HIRAD ABTAHI & PHILIPPA WEBB, THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES 1508 (2008).

[104] *See* Genocide Convention, *supra* note 43.

[105] The Working Group, established by the U.N. Economic and Social Council, is charged with, among other objectives, giving "attention to the evolution of international standards concerning indigenous rights." *Mandate of the Working Group on Indigenous*

Rights of Indigenous Peoples.[106] The Working Group's definition was not ultimately adopted in a human rights convention and is tailored to the plight of indigenous peoples.[107] Thus, it does not apply as a matter of law to the Xinjiang crisis.[108] Yet the draft language represents the closest thing the international community has to a formal definition of cultural genocide and thus provides a useful set of criteria with which to evaluate Chinese atrocities.[109] The Working Group defines cultural genocide as:

> a) Any action which has the aim or effect of depriving [people] of their integrity as distinct peoples, or of their cultural values or ethnic identities; b) Any action which has the aim or effect of dispossessing them of their lands, territories, or resources; c) Any form of population transfer which has the aim or effect of violating or undermining any of their rights; d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative, or other measures; e) Any form of propaganda directed against them.[110]

Under the Working Group's draft definition, China's atrocities in Xinjiang arguably constitute cultural genocide.[111] Chinese initiatives, such as the One Family Campaign, have seen communist party cadres move into Uyghur households as part of a "homestay" program, with the aim of enacting "a process of colonial eradication of unwanted difference."[112] The homestay program alone would meet subsection A of the Working Group definition because it has the aim or effect of depriving the Uyghur people of their integrity as distinct people, or of their cultural values or ethnic

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Populations, UNITED NATIONS HUM. RTS. OFF. HIGH COMMISSIONER, https://www.ohchr.org/EN/Issues/IPeoples/Pages/MandateWGIP.aspx (last visited Nov. 13, 2020).

[106] Annexed to the Report of the Working Group on Indigenous Populations on its Eleventh Session, UNCHROR, 45th Sess., Annex 1, Agenda Item 14, UN Doc E/CN.4/Sub.2/1993/29 (1993) [hereinafter Working Group].

[107] *See id.*

[108] *See id.*

[109] *See id.*

[110] *Id.*

[111] *See id.*

[112] Darren Byler, *China's Government has Ordered a Million Citizens to Occupy Uighur Homes. Here's What They Think They're Doing*, CHINAFILE (Oct. 24, 2018), https://www.chinafile.com/reporting-opinion/postcard/million-citizens-occupy-uighur-homes-xinjiang. As Byler notes elsewhere, the "United as One Family" campaign has focused on placing Chinese civil servants and party cadres in the homes of Uyghurs "whose family members had been imprisoned or killed by the police." Byler, *Violent Paternalism*, *supra* note 10, at 11.

identities, through eradication of cultural difference.[113] The destruction of Uyghur cultural symbols and icons would fulfill subsection B of the Working Group definition by dispossessing Uyghurs of their "resources."[114] As documented by the Uyghur Human Rights Project, Chinese authorities have razed mosques and shrines across Xinjiang.[115] Uyghurs have also been "forced to remove any traditionally Islamic architectural elements such as mihrabs from their private homes . . . "[116] The mass internment of Uyghurs might be cast as a "form of population transfer," which fulfills the requirements set out in subsection C of the Working Group definition.[117] The Chinese government's campaign against the Uyghur language would fulfill subsection D of the definition, which focuses on government-led assimilation and integration.[118] In late 2018, a Communist Party Deputy Secretary publicly warned state employees not to speak Uyghur in public.[119] Such restrictions extend beyond government employees.[120] Chinese authorities have regularly targeted those Uyghur intellectuals who have pursued the "promotion and preservation of the Uyghur language."[121] One commentator has concluded that "Uyghur 'patriotism' now requires the active disavowal of the Uyghur way of life."[122] Subsection E, which covers "any form of propaganda,"[123] is also met because Chinese authorities have long relied on propaganda to spread the tenets of Chairman Xi Jinping, both within and outside of Xinjiang's internment camps.[124] In sum, Chinese atrocities in Xinjiang meet multiple sub-sections of the Working Group's

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[113] Byler, *Violent Paternalism*, *supra* note 10, at 11*; see also* Working Group, *supra* note 106.

[114] Working Group, *supra* note 106.

[115] *See* Sintash, *supra* note 10, at 29. The Uyghur Human Rights Project is an advocacy group that publishes reports "to defend Uyghurs' civil, political, social, cultural, and economic rights according to international human rights standards." *About Us,* UYGHUR HUM. RTS. PROJECT, https://uhrp.org/about (last visited Nov. 13, 2020).

[116] Sintash, *supra* note 10, at 29.

[117] Zenz, *China Didn't Want Us to Know*, *supra* note 1; *see* Working Group, *supra* note 106.

[118] Christian Shepherd, *Fear and Oppression in Xinjiang; China's War on Uighur Culture*, FIN. TIMES (Sept. 12, 2019), https://www.ft.com/content/48508182-d426-11e9-8367-807ebd53ab77; *see* Working Group, *supra* note 106.

[119] Byler, *The 'Patriotism' of Not Speaking Uyghur*, *supra* note 10.

[120] Shepherd, *supra* note 118.

[121] *Id.*

[122] Byler, *The 'Patriotism' of Not Speaking Uyghur*, *supra* note 10.

[123] Working Group, *supra* note 106.

[124] *The Colourful Propaganda of Xinjiang,* BBC NEWS (Jan. 12, 2015), https://www.bbc.com/news/world-asia-china-30722268.

definition of cultural genocide even if that definition was originally intended for indigenous populations and has yet to be adopted.[125]

Given the lack of an internationally recognized definition, does the term "cultural genocide" have any weight under international law? Several scholars have argued that aspects of cultural genocide are recognized under international law.[126] Certain acts of cultural genocide may qualify, for example, "as a crime against humanity."[127] In addition, one scholar concedes that Article II(e) of the Genocide Convention "is regarded by experts as the only remnant of cultural genocide."[128] Another has argued that the ICTY has "helped to resurrect . . . the legally moribund concept of cultural genocide" by holding that "physical and cultural acts and motivations not explicitly stated in the statute" could be used to prove the specific intent behind genocide.[129] Thus, while the international community has not agreed upon a common definition of cultural genocide, the term retains legal value.[130] According to the above authors, acts that could be described as cultural genocide can give rise to a legal remedy as crimes against humanity or genocide, even if courts refuse to employ the term "cultural genocide."[131]

Although this section of the paper has argued that "cultural genocide" is far from a legally meaningless term, the term is only of moderate utility.[132] This is because the prohibition on cultural genocide does not represent a peremptory norm of international law.[133] While individual acts of cultural genocide may violate other peremptory norms, the term "cultural genocide" does not itself give rise to a direct legal remedy.[134]

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[125] *See* Working Group, *supra* note 106.

[126] *See, e.g.*, Payam Akhavan, *Cultural Genocide: Legal Label or Mourning Metaphor?*, 62 MCGILL L.J. 243, 248 (2016); Bilsky & Klagsbrun, *supra* note 97, at 390; Kristina Hon, *Bringing Cultural Genocide in by the Backdoor: Victim Participation at the ICC*, 43 SETON HALL. L. REV. 359, 379 (2013).

[127] Akhavan, *supra* note 126, at 248.

[128] Bilsky & Klagsbrun, *supra* note 97, at 390; *see* Genocide Convention, *supra* note 43, art. II(e) (establishing that the forcible transfer of "children of the group to another group" is a genocidal act).

[129] Hon, *supra* note 126, at 379.

[130] *See* Akhavan, *supra* note 126; Bilsky & Klagsbrun, *supra* note 97; Hon, *supra* note 126.

[131] *See* Akhavan, *supra* note 126; Bilsky & Klagsbrun, *supra* note 97; Hon, *supra* note 126.

[132] *See* Akhavan, *supra* note 126, at 256.

[133] *See id.*

[134] *See id.*

3. Violative of Human Rights Treaties: A Term of Moderate Utility

China has violated and continues to violate multiple human rights treaties to which it is a party.[135] This section will briefly delineate the ways the Chinese government has violated human rights treaties but will not provide an article-by-article analysis of each human rights treaty. As discussed later, China's government has closed off any adjudication or arbitration remedy that the human rights treaties might provide through its signing statements. Viewing the Xinjiang atrocities through the lens of international human rights treaties is thus only of moderate utility, since the treaty violations do not in and of themselves result in a direct legal remedy.

The human rights treaties[136] to which China is a state party and that this section will cover are: 1) the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), [137] 2) the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"),[138] 3) the International Covenant on Economic, Social, and Cultural Rights ("ICESCR"),[139] 4) the Convention on the Rights of the Child ("CRC"),[140] and 5) the Convention on the Rights of Persons with Disabilities ("CRPD").[141]

First, Chinese actions in Xinjiang violate CEDAW.[142] CEDAW calls on States Parties to "grant women equal rights" and to prevent acts that

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[135] *See* Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]; Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3 [hereinafter CRPD]; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter CERD]; Giavanna O'Connell, *How China is Violating Human Rights Treaties and its Own Constitution in Xinjiang*, JUST SEC. (Aug. 19, 2020), https://www.justsecurity.org/72074/how-china-is-violating-human-rights-treaties-and-its-own-constitution-in-xinjiang.html.

[136] Along with the human rights treaties listed, China is also party to the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, but China's commission of torture will be demonstrated fully in Part II(B5) of the article and will not be examined here. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1(1), Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture].

[137] CEDAW, *supra* note 135.

[138] CERD, *supra* note 135.

[139] ICESCR, *supra* note 135.

[140] CRC, *supra* note 135.

[141] CRPD, *supra* note 135.

[142] *See* CEDAW, *supra* note 135; Zenz, *Sterilizations, IUDs, and Mandatory Birth Control*, *supra* note 44, at 2–3.

constitute discrimination against women.[143] In the case of Xinjiang, China has not only failed to prevent discrimination against women, but has arguably partaken in that discrimination itself.[144] For example, government actions, such as enforced sterilization, violate the spirit of the convention.[145] The fact that minority women, but not men, face sterilization, demonstrates that Chinese women in Xinjiang are not "free and equal in dignity and rights."[146] Moreover, one commentator has argued that, "By taking children from Uyghur women and placing them in orphanages, China may . . . be violating CEDAW, which recognizes the social value of maternity."[147] Indeed, Article 5 of CEDAW stresses a "proper understanding of maternity as a social function."[148]

Second, Chinese actions in Xinjiang violate CERD.[149] Article I of CERD defines racial discrimination as "any distinction, exclusion, restriction, or preference based on race, color, descent, or national or ethnic origin, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms . . .. "[150] By effecting the mass internment of ethnic minorities, China has exhibited ethnic discrimination and prevented those minorities from enjoying the fundamental freedoms accorded to them under international law.[151] By cracking down on Uyghur language rights, while simultaneously mandating that Uyghurs speak Mandarin Chinese, China has also exhibited a preference for one ethnic group over another.[152]

Third, the Chinese government has violated ICESCR.[153] Article I declares that all peoples have the "right to self-determination" through the

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[143] CEDAW, *supra* note 135, preamble.

[144] *See* Zenz, *Sterilizations, IUDs, and Mandatory Birth Control*, *supra* note 44, at 2–3.

[145] CEDAW, *supra* note 135, preamble.

[146] *See* Zenz, *Sterilizations, IUDs, and Mandatory Birth Control*, *supra* note 44, at 2–3; CEDAW, *supra* note 135, preamble.

[147] Hilary Hurd, *China's Human Rights Abuses Against Uighurs in Xinjiang*, LAWFARE (Oct. 9, 2018, 8:00 AM), https://www.lawfareblog.com/chinas-human-rights-abuses-against-uighurs-xinjiang.

[148] CEDAW, *supra* note 135, art. 5.

[149] *See* CERD, *supra* note 135; Zenz, *China Didn't Want Us to Know*, *supra* note 1.

[150] CEDAW, *supra* note 135, art. 1.

[151] *See* Zenz, *China Didn't Want Us to Know*, *supra* note 1.

[152] *See* Shepherd, *supra* note 118.

[153] *See* ICESCR, *supra* note 135; Martin Scheinin, *Catalans May Not Have the Right to Unilateral Secession-But They Do Possess the Right to Present Such a Claim*, IACL-AIDC BLOG (Oct. 20, 2017), https://blog-iacl-aidc.org/test-3/2018/5/25/catalans-

ability to "freely determine their political status and freely pursue their economic, social, and cultural development."[154] Self-determination does not necessarily mean that peoples have a right to unilateral secession—that is, the right to break away from a State's territory to form an independent state.[155] Instead, it means that China has denied ethnic minorities in Xinjiang the rights of self-determination afforded them under international law.[156] Namely, the right to pursue "economic, social, and cultural development."[157] As Bovingdon notes, China's rule of Xinjiang has resulted in a "series of policies that Uyghurs would not have chosen had they been able to govern themselves."[158] Moreover, China has arguably instituted apartheid in Xinjiang by creating and maintaining a regime wherein Uyghurs and other minority ethnic groups are systematically oppressed.[159] A system of apartheid violates Article I of the ICESCR by preventing certain peoples from enjoying rights of self-determination.[160]

Fourth, China has violated the CRC.[161] Article 5 of the CRC declares that "State Parties shall respect the responsibilities, rights and duties of parents."[162] Article 8 compels State Parties to "respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference."[163] Human Rights Watch has argued that China has violated the CRC by taking children and placing them "in child welfare institutions and boarding schools without consent."[164] By separating minority children from their parents and by assimilating those children into government-defined notions of what it means to be Chinese, the Chinese government has evidenced

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may-not-have-the-right-to-unilateral-secession-but-they-do-possess-the-right-to-present-such-a-claim [hereinafter Martin Scheinin, *Catalans*].

[154] *See* ICESCR, *supra* note 135, art. 1.

[155] *See* Martin Scheinin, *Catalans*, *supra* note 153.

[156] ICESCR, *supra* note 135, art. 1; *see* BOVINGDON, *supra* note 2, at 79.

[157] ICESCR, *supra* note 135, art. 1; *see* BOVINGDON, *supra* note 2, at 79.

[158] BOVINGDON, *supra* note 2, at 79.

[159] *See* discussion *infra* at Section II.B.1.ii.

[160] ICESCR, *supra* note 135. art. 1.

[161] *See* CRC, *supra* note 135; *China: Xinjiang Children Separated from Families*, HUM. RTS. WATCH (Sept. 15, 2019, 8:00 PM), https://www.hrw.org/news/2019/09/15/china-xinjiang-children-separated-families.

[162] CRC, *supra* note 135, art. 5.

[163] *Id.* art. 8.

[164] *China: Xinjiang Children Separated From Families*, *supra* note 161. Human Rights Watch is a nonprofit, nongovernmental human rights organization that "investigates and reports on abuses happening in all corners of the world." *About Us*, HUM. RTS. WATCH, https://www.hrw.org/about/about-us (last visited Nov. 13, 2020).

complete disregard for the values and responsibilities enumerated in the CRC. [165]

Lastly, China has likely violated CRPD even though this contention is more difficult to prove.[166] CRPD aims to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities…."[167] China has traditionally positioned itself as a protector of people with disabilities.[168] For example, Premier Li Keqiang has urged "enhancing the vocational skills of people with disabilities."[169] In 2012, however, Human Rights Watch listed accusations that "persons with disabilities [were] working in abusive or exploitive conditions."[170] At the time, the Chinese press also reported challenges faced by eleven workers, most of whom had mental disabilities, at a factory in Toksun County in Xinjiang.[171] Given past accusations that Chinese factories have employed "workers with learning disabilities as slave labour," it is possible—though by no means certain—that China may currently be employing ethnic minority members who also suffer from disabilities in forced labor, thereby violating CRPD.[172]

Despite having ratified and likely violated the aforementioned five human rights treaties, China has closed itself off to international adjudication.[173] In signing CEDAW and CERD, China has issued signing statements blocking arbitration and referral to the International Court of

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[165] *See id.*

[166] *See* CRPD, *supra* note 135; Michael Ashley Stein, *China and Disability Rights*, 33 LOY. L.A. INT'L & COMP. L. REV. 7, 7–8 (2010).

[167] *See* CRPD, *supra* note 135, art. 1.

[168] Stein, *China and Disability Rights*, *supra* note 166, at 7–8.

[169] *Chinese Premier Stresses Vocational Training for People with Disabilities*, XINHUA (Oct. 27, 2019, 10:19 PM), http://www.xinhuanet.com/english/2019-10/27/c_138507718.htm.

[170] *China: Submission to the UN Committee on the Rights of Persons with Disabilities,* HUM. RTS. WATCH (Apr. 12, 2012, 12:00 AM), https://www.hrw.org/news/2012/04/12/china-submission-un-committee-rights-persons-disabilities.

[171] *Id.*

[172] Tania Branigan, *Chinese Agency 'Sold Disabled Workers into Slave Labour'*, GUARDIAN (Dec. 14, 2010, 10:59 AM), https://www.theguardian.com/world/2010/dec/14/china-disabled-workers-slave-labour-claim; *see* CRPD, *supra* note 135.

[173] Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, 123 (Reservations and Declarations Made Upon Signature by People's Republic of China) [hereinafter Chinese Reservations to CEDAW]; International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 (Reservations and Declarations Made Upon Signature by People's Republic of China) [hereinafter Chinese Reservations to CERD].

Justice.[174] Furthermore, the ICESCR, CRC, or CRPD do not give rise to the same arbitration or adjudication rights as the former conventions.[175] Nevertheless, many of China's actions or omissions that violate the various human rights conventions may independently constitute *jus cogens* prohibitions or constituent crimes against humanity and thereby indirectly give rise to a legal remedy.[176] Apartheid, for example, which would violate the ICESCR, also constitutes a constituent crime against humanity and a *jus cogens* prohibition.[177] Yet because the human rights treaties do not give rise to a direct legal remedy, they remain a term of moderate utility to a just resolution.[178]

B. *Terms of High Utility*

There are two high-utility terms that apply to China's atrocities in Xinjiang.[179] These terms are "crimes against humanity" and "forced labor."[180] The first term—crimes against humanity—is an umbrella term in that it comprises multiple crimes.[181] The Rome Statute, which is the foundational document for the International Criminal Court, clearly defines crimes against humanity and provides a direct legal remedy.[182] Other experts already established that Chinese atrocities constitute the crimes against humanity of imprisonment or other severe deprivation of physical liberty, persecution, and enforced disappearance.[183] Parts II(B)(1)(i)-(iii) demonstrate that Chinese actions in Xinjiang also constitute the specific

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[174] Chinese Reservations to CEDAW, *supra* note 173; Chinese Reservations to CERD, *supra* note 173.

[175] *See* CRC, *supra* note 135; CRPD, *supra* note 135; ICESCR, *supra* note 135.

[176] *See* ICESCR, *supra* note 135, art. 1; Rome Statute of the International Criminal Court art. 7(2)(h), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; Thomas Kleinlein, *Jus Cogens Re-examined: Value Formalism in International Law*, 28 EUROPEAN J. INT'L L. 295, 307 (2017).

[177] *See* ICESCR, *supra* note 135, art. 1; Rome Statute, art. 7(1)(j); Kleinlein, *supra* note 176, at 307.

[178] *See* Chinese Reservations to CEDAW, *supra* note 173; Chinese Reservations to CERD, *supra* note 173; CRC, *supra* note 135; CRPD, *supra* note 135; ICESCR, *supra* note 135.

[179] *See* Rome Statute, art. 7(1); Convention Concerning Forced or Compulsory Labor art. 2(1), June 28, 1930, 39 U.N.T.S. 55 [hereinafter Forced Labor Convention].

[180] *See* Rome Statute, art. 7(1); Forced Labor Convention, *supra* note 179.

[181] *See 2019 Annual Report, supra* note 29, at 6.

[182] *See* Rome Statute, arts. 5, 7(1).

[183] *See 2019 Annual Report, supra* note 29, at 6*; see also Genocide and Crimes Against Humanity in Xinjiang?*, *supra* note 29, at 5–13. The latter report indirectly reinforces the Congressional-Executive China Commission's findings by supplying additional legal reasoning for the imprisonment, persecution, and enforced disappearance claims. *Genocide and Crimes Against Humanity in Xinjiang?*, *supra* note 29, at 5, 7–9.

crimes against humanity of forced sterilization, apartheid, and torture.[184] The prohibition on crimes against humanity, in addition to being codified in the Rome Statute, also represents a *jus cogens* norm, which means that it binds all members of the international community and permits no derogation.[185] The second term—forced labor—is defined and prohibited by the Forced Labor Convention.[186] This term constitutes a *jus cogens* norm, and thus binds the international community.[187] Part II(B)(2) will demonstrate that China's government is guilty of perpetuating a system of forced labor.[188] Both the prohibitions on crimes against humanity and forced labor are cast as high utility terms since they have attained *jus cogens* status and thereby provide a clear path to a remedy.[189]

1. Crimes Against Humanity: A Term of High Utility

The prohibition on crimes against humanity is enshrined in the Rome Statute of the International Criminal Court ("Rome Statute") and has also attained *jus cogens* status.[190] The definition of crimes against humanity set forth in Article 7 of the Rome Statute serves as a useful starting point.[191] This definition is at least partially reflective of customary international law and thus carries ramifications even for those countries—namely China—that remain non-parties to the Statute.[192] The Article 7 definition articulates

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[184] *See* discussion *infra* at Section II.B.1.iii.

[185] Nevsun Res. Ltd. v. Araya, 2020 S.C.C. 5, para. 83, 100 (Can.).

[186] *See* Forced Labor Convention, *supra* note 179, art. 2(1); *Araya*, 2020 S.C.C. 5 at para. 102.

[187] Forced Labor Convention, *supra* note 179, art. 2(1); *Araya*, 2020 S.C.C. 5 at para. 102.

[188] *See* discussion *infra* at Section II.B.2.

[189] *Araya*, 2020 S.C.C. 5 at para. 100, 102.

[190] *See* Rome Statute, arts. 5, 7(1). The Rome Statute is the "ICC's founding treaty" and addresses questions ranging from court procedures and the ICC's structure to the crimes over which the ICC has jurisdiction. *The ICC Rome Statute is 20*, INT'L CRIM. CT., (July 2018) https://www.icc-cpi.int/romestatute20*; see also Araya*, 2020 S.C.C. 5 at para. 100, 102.

[191] Rome Statute, art. 7(1).

[192] *See* ROBERT DUBLER SC & MATTHEW KALYK, CRIMES AGAINST HUMANITY IN THE 21ST CENTURY: LAW, PRACTICE AND THREATS TO INTERNATIONAL PEACE AND SECURITY 638, 745 (2018). The authors reach three "broad conclusions . . . as to the essential features of a crime against humanity as a matter of current international customary law." *Id.* at 636. First, the authors conclude that a "minimal level of scale and seriousness" must be met. *Id*. Second, the authors conclude that the crimes need to be "'collective' in nature." *Id*. Third, the authors conclude that "there must be some link between the 'attack' and the 'policy.'" *Id*. The authors go on to contrast crimes against humanity under customary international law with crimes against humanity as defined by the ICC, both as pertains to the chapeau elements and to the underlying crimes. *Id*. at 638–958.

two elements: a chapeau and a list of individual acts that constitute crimes against humanity.[193] The chapeau, or introductory phrase, contains a broad articulation of crimes against humanity.[194] Contained in Article 7(1) of the Rome Statute, the chapeau states that crimes against humanity must be "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[195] The next element—the *actus reus*—encompasses the remainder of Article 7(1) by listing the following individual acts that constitute crimes against humanity if the chapeau is satisfied:

> a) murder; b) extermination; c) enslavement; d) deportation or forcible transfer of population; e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; f) torture; g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; i) enforced disappearance of persons; j) the crime of apartheid; k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.[196]

Even if China committed the individual acts listed under Article 7(1), the totality of those acts must conform to the conditions set out in the chapeau in order to constitute crimes against humanity.[197] Before delving into the individual acts in Article 7(1) of the Rome Statute, it is thus necessary to focus on Article 7's chapeau to determine whether these acts qualify as crimes against humanity.[198] Three key requirements follow from the chapeau: 1) the "disjunctive widespread or systematic test," 2) "the

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[193] Rome Statute, art 7.

[194] *Id.* art. 7(1).

[195] *Id.*

[196] *Id.*

[197] DUBLER & KALYK, *supra* note 192, at 638.

[198] *See* Rome Statute, art 7(1).

'civilian population' element as to the object of the attack," and 3) "a special mental requirement."[199]

To satisfy the chapeau's first prong, an attack must be either widespread or systematic.[200] The purpose of such a requirement is "to ensure that single, isolated, or random acts do not constitute crimes against humanity."[201] Leaked government documents indicate that China's atrocities in Xinjiang can fulfill both the widespread and systematic tests.[202] "Widespread" implies that "an act be carried out on a large scale and [involve] a high number of victims."[203] The ICC established in *Prosecutor v. Katanga & Njudjolo* (2008) that the term "widespread" can refer to a "large geographical area" or a "small geographical area."[204] The critical factor is that the attack be "directed against a large number of civilians."[205] Based on leaked government documents, it is estimated that the number of those interned range from a minimum of 900,000 up to 1.8 million—or around 15.4 percent of "Xinjiang's Turkic and Hui ethnic minority groups."[206] Although the ICC did not establish a specific numerical threshold, the number of interned ethnic minorities in Xinjiang is high enough to pass the widespread prong.[207]

In addition to satisfying the chapeau's widespread test, China's actions can also satisfy the systematic test.[208] The systematic test involves a more qualitative analysis and requires that the "act be carried out as a result of methodical planning."[209] In *Prosecutor v. Akayesu* (1998), the International Criminal Tribunal for Rwanda specified that the term "systematic" could be defined as "thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public

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[199] Kai Ambos, *Crimes Against Humanity and the International Criminal Court*, *in* 1 FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY 279, 283 (Leila Sadat ed., 2011).

[200] *Id.*

[201] *Id.* at 284–85.

[202] Austin Ramzy & Chris Buckley, *'Absolutely No Mercy': Leaked Files Expose How China Organized Mass Detentions of Muslims*, N.Y. TIMES (Nov. 16, 2019), https://www.nytimes.com/interactive/2019/11/16/world/asia/china-xinjiang-documents.html.

[203] Ambos, *supra* note 199, at 284.

[204] Prosecutor v. Katanga, No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, ¶ 395 (Sept. 30, 2008).

[205] *Id.*

[206] Zenz, *"Wash Brains, Cleanse Hearts" supra* note 5.

[207] *See id.*; *Katanga*, ICC-01/04-01/07-717 at ¶ 395.

[208] Ambos, *supra* note 199, at 284–85.

[209] *Id.* at 284.

or private resources."[210] Although Chinese governmental documents often employ cryptic language, the picture that emerges from a holistic reading of all the leaked documents indicates that China's government thoroughly planned and organized its actions in Xinjiang.[211] For example, China has articulated a common policy and has employed substantial resources, leveraging the efforts of both governmental officials and the Xinjiang Production and Construction Corps, a quasi-military organization, to implement its policy in Xinjiang.[212] China's actions are also thoroughly organized.[213] For example, among the leaked China Cables was a detailed "telegram" that instructed camp personnel on "how to prevent escapes, how to maintain total secrecy about the camps' existence, [and] methods of forced indoctrination . . .. "[214] Thus, China's actions would fulfill the chapeau's systematic test.[215] In sum, China's actions are both widespread and systematic and thus fulfill the first requirement of the chapeau.[216]

China's actions would likely also meet the second element of the chapeau, which requires the civilian population be the object of attack.[217] In particular, the "middle-aged population" and those civilians "aged 30 to 54" are over-represented in the internment camps.[218] Although China has sought to characterize interned civilians as violent extremists or terrorists, ordinary civilians are being arrested for trivial or non-existent breaches of the law.[219]

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[210] Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 580 (Sept. 2, 1998).

[211] Ramzy & Buckley, *supra* note 202.

[212] *Id.* As Ramzy and Buckley detail, President Xi Jinping and Xinjiang Provincial Secretary Chen Quanguo have both elucidated China's Xinjiang policy in a series of speeches. *Id.*

[213] *See* Bethany Allen-Ebrahimian, *China Cables: Exposed: China's Operating Manuals for Mass Internment and Arrest by Algorithm*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Nov. 24, 2019), https://www.icij.org/investigations/china-cables/exposed-chinas-operating-manuals-for-mass-internment-and-arrest-by-algorithm.

[214] *Id.* The "China Cables" are leaked classified documents from the Chinese government that chronicled the extent of "surveillance and mass internment" in Xinjiang. Fergus Shiel, *About the China Cables Investigation*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Nov. 23, 2019), https://www.icij.org/investigations/china-cables/about-the-china-cables-investigation/. In the "China Cables" series, the International Consortium of Investigative Journalists analyzed "leaked classified Chinese government documents" and released many of those documents to the public. *Id.*

[215] *See, e.g.*, Allen-Ebrahimian, *supra* note 213; Ambos, *supra* note 199, at 284–85.

[216] *See, e.g.*, Allen-Ebrahimian, *supra* note 213; Ambos, *supra* note 199, at 283; Zenz, *"Wash Brains, Cleanse Hearts*, *" supra* note 5.

[217] *See* Ambos, *supra* note 199, at 286–88.

[218] *See* Zenz, *"Wash Brains, Cleanse Hearts," supra* note 5.

[219] Finley, *supra* note 8, at 5.

Travelling or studying abroad, displaying "insufficient patriotism," and "downloading or using Facebook or Twitter" are all activities that have resulted in internment.[220] These acts demonstrate that the government's internment campaign has focused exclusively on civilians.[221]

The third element—the knowledge condition of the chapeau—requires that the accused "must be aware that his act forms part of the collective attack."[222] In *Prosecutor v. Kunarac* (2002), the International Criminal Tribunal for the former Yugoslavia ("ICTY") stated that, "Concerning the required mens rea for crimes against humanity, the Trial Chamber correctly held that the accused must have had the intent to commit the underlying offense . . . with which he was charged."[223] If rights organizations or other plaintiffs are able to get the Xinjiang crisis in front of an international tribunal, they will have to demonstrate that the guards in the internment camps and party officials are aware of "the risk that [their] acts were part" of the larger systematic and widespread attack.[224] Given the detailed nature of the leaked China Cables, which included an "operations manual for running the mass detention camps in Xinjiang," it is likely that plaintiffs will be able to prove the requisite mens rea—i.e., that camp guards and party officials were aware of the risk that their actions were part of a larger systematic and widespread attack.[225] Therefore, the chapeau's third prong is satisfied and demonstrates that China has violated the chapeau element of the term crimes against humanity.[226]

Seeing as the chapeau's three requirements are fulfilled, Article 7(1) also requires that China commit one of the listed individual acts that constitute a crime against humanity.[227] In its 2019 report, the Congressional-Executive Committee argued that Chinese acts constituted four crimes against humanity under the Rome Statute.[228] The relevant four

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[220] *Id.*

[221] *See* Zenz, *"Wash Brains, Cleanse Hearts"*, supra note 5.

[222] Ambos, *supra* note 199, at 288; *see generally* Rome Statute, art. 7(1).

[223] Prosecutor v. Kunarac, Case No. IT-96-23 & IT-96-23/1-A, Judgment, ¶ 102 (June 12, 2002).

[224] *Id.* at ¶ 102.

[225] Allen-Ebrahimian, *supra* note 213.

[226] *See* Rome Statute, art 7.

[227] *Id*.

[228] *2019 Annual Report*, *supra* note 29, at 6. The Report argued that the "arbitrary, prolonged detention of Uyghurs, Kazakhs, Kyrgyz, Hui, and others in mass internment camps" fulfilled Article 7(1)(e), which covers "imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law." *Id.; see also* Rome Statute, art. 7(1)(e). Second, the Report argued that security personnel had subjected detainees to widespread torture, including "through the use of electric shocks," thereby

crimes against humanity of the Rome Statute addressed by the Committee are covered in Articles 7(1)(e), 7(1)(f), 7(1)(h), and 7(1)(i).[229] This paper agrees with the Committee's analysis, and will only provide additional supporting analysis on the crime of torture, given the Chinese government's persistent disavowals.[230] In addition to the violations identified by the Congressional-Executive Committee, this paper argues that China has also committed the Article 7(1) crimes against humanity of "enforced sterilization," and "apartheid."[231] Certain Article 7(1) crimes against humanity also represent *jus cogens* violations and thus can be brought as independent causes of action.[232]

i. Torture

Claims of torture are integral to international criticisms of China's actions in Xinjiang and this sub-section aims to match Chinese activities more precisely with legal definitions of torture.[233] Torture is a high-utility term because it is a constitutive crime against humanity under the Rome Statute and because the prohibition on torture has attained *jus cogens*

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fulfilling Article 7(1)(f), which covers "torture." *2019 Annual Report*, *supra* note 29, at 6*; see also* Rome Statute, art. 7(1)(f). Third, the Report argued that security personnel's enforcement of "harsh, widespread restrictions on peaceful Islamic practices on" Xinjiang residents fulfilled Article 7(1)(h), which addresses "persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender…." *2019 Annual Report*, *supra* note 29, at 6*; see also* Rome Statute, art. 7(1)(h). Finally, the Report argued that the disappearance of intellectuals from minority groups fulfilled Article 7(1)(i), which deals with the "enforced disappearance of persons." *2019 Annual Report*, *supra* note 29, at 6. *See also* Rome Statute, art. 7(1)(i).

[229] *See* Rome Statute, art. 7(1).

[230] *See* Lily Kuo, *China Denies Violating Minority Rights amid Detention Claims*, GUARDIAN (Aug. 13, 2018, 8:46 AM), https://www.theguardian.com/world/2018/aug/13/china-state-media-defend-intense-controls-xinjiang-uighurs.

[231] Rome Statute, art. 7(1)(g), (j); *see, e.g.*, Mark Munsterhjelm, *Scientists are Aiding Apartheid in China*, JUST SECURITY (June 18, 2019), https://www.justsecurity.org/64605/scientists-are-aiding-apartheid-in-china.html; Peter Stubley, *Muslim Women 'Sterilised' in China Detention Camps, Say Former Detainees*, INDEPENDENT (Aug. 12, 2019; 5:29 PM), https://www.independent.co.uk/news/world/asia/uighur-muslim-china-sterilisation-women-internment-camps-xinjiang-a9054641.html.

[232] *See* Kleinlein, *supra* note 176; *Torture*, INT'L JUST. RES. CTR., https://ijrcenter.org/thematic-research-guides/torture/#:~:text=As%20one%20of%20the%20most,action%20against%20those%20who%20torture (last visited Nov. 13, 2020).

[233] *See 2019 Annual Report*, *supra* note 29, at 6.

status.[234] Torture thus furnishes an independent cause of action, thereby giving it great utility in leading to a just resolution.[235]

In its Xinjiang report, the Congressional-Executive Commission on China argued that Chinese actions constituted torture.[236] The report noted that "security personnel subjected detainees to widespread torture, including through the use of electric shocks and shackling people in painful positions."[237] The Asia Pacific Centre for the Responsibility to Protect came to the same conclusion in its report; as examples of torture, the report referred to "waterboarding," "forcibly being drugged," and "indoctrination that drove some to suicide," among other practices.[238] Neither report, however, conducted a close analysis of the Convention Against Torture ("CAT"), which provides an internationally recognized definition of torture.[239] Given the Chinese government's repeated disavowals that it has conducted torture in the internment camps, systematic legal proof is necessary.[240]

Based on public reporting, Chinese governmental authorities in Xinjiang have committed torture within the legal meaning of the term.[241] CAT, which China ratified in 1988, defines torture as:

> . . . any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental

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[234] Nevsun Res. Ltd. v. Araya, 2020 S.C.C. 5, para. 83, 102 (Can.); *see* Rome Statute, art. 7(1)(f).

[235] *See Araya*, 2020 S.C.C. 5 at para. 102; Rome Statute, art. 7(1)(f).

[236] *2019 Annual Report*, *supra* note 29, at 6.

[237] *Id.*

[238] *Genocide and Crimes Against Humanity in Xinjiang?*, *supra* note 29, at 9.

[239] *See 2019 Annual Report*, *supra* note 29, at 6; *Genocide and Crimes Against Humanity in Xinjiang?*, *supra* note 29, at 9.

[240] *See* Kuo, *supra* note 230.

[241] *See* Charlie Campbell, *Leaked Documents Claim to Reveal Internal Protocols for China's Muslim Detention Camps*, TIME (Nov. 25, 2019, 1:15 AM), https://time.com/5738401/xinjiang-uighur-muslim-camps-china-cables/.

to lawful sanctions.[242]

Survivors of China's internment camps have publicly testified that camp authorities tortured them.[243] For example, in an interview with CNN, Sayragul Sauytbay, an ethnic Kazakh who worked in one of China's camps, described several examples of torture, including the use of "food and sleep deprivation" and "forced injections."[244] Sauytbay also testified that women were "systematically raped," and that she was, "forced to watch a woman be repeatedly assaulted."[245] Former detainee Kayrat Samarkand told NPR that Chinese guards made him "wear what they called 'iron clothes,' a suit made of metal that weighed over 50 pounds . . . .They made people wear this thing to break their spirits."[246] Mihrigul Tursun told *The Telegraph* that she was electrocuted to the point that her "whole body would shake violently and [that she] could feel the pain in [her] veins."[247] Allegations of torture are so widespread that they inspired Tomomi Shimizu, a Japanese manga artist, to write a manga depicting the plight of Mihrigal Tursun.[248] The manga depicts how Tursun was "deprived of sleep in an overcrowded cell that was lit day and night . . . and repeatedly tortured."[249] In sum, multiple camp survivors have alleged that they were tortured within the camp system.[250]

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[242] Convention Against Torture, *supra* note 136, art. 1(1).

[243] *See, e.g.*, Justin McCurry, *'What has Happened to Me': Manga Depicting Uighur Torture Hits 2.5m Views*, GUARDIAN (Nov. 25, 2019, 10:42 PM), https://www.theguardian.com/world/2019/nov/26/what-has-happened-to-me-manga-depicting-uighur-torture-hits-25m-views; Matt Rivers & Lily Lee, *Former Xinjiang Teacher Claims Brainwashing and Abuse Inside Mass Detention Centers*, CNN (May 9, 2019, 11:52 PM), https://www.cnn.com/2019/05/09/asia/xinjiang-china-kazakhstan-detention-intl/index.html; Rob Schmitz, *Ex-Detainee Describes Torture in China's Xinjiang Re-Education Camp*, NPR (Nov. 13, 2018, 5:06 AM), https://www.npr.org/2018/11/13/666287509/ex-detainee-describes-torture-in-chinas-xinjiang-re-education-camp.html; Sophia Yan, *'I Begged Them to Kill Me,' Uighur Woman Describes Torture to US Politicians*, TELEGRAPH (Nov. 28, 2018, 8:41 PM), https://www.telegraph.co.uk/news/2018/11/28/begged-kill-uighur-woman-describes-torture-us-politicians/; Zamira Rahim, *Prisoners in China's Xinjiang Concentration Camps Subjected to Gang Rape and Medical Experiments, Former Detainee Says*, INDEPENDENT (Oct. 22, 2019, 12:52 PM), https://www.independent.co.uk/news/world/asia/china-xinjiang-uighur-muslim-detention-camps-xi-jinping-persecution-a9165896.html.

[244] Rivers & Lee, *supra* note 243.

[245] Rahim, *supra* note 243.

[246] Schmitz, *supra* note 243.

[247] Yan, *supra* note 243.

[248] McCurry, *supra* note 243.

[249] *Id.*

[250] *See, e.g.*, McCurry, *supra* note 243; Rahim, *supra* note 243; Rivers & Lee, *supra* note 243; Schmitz, *supra* note 243; Yan, *supra* note 243.

The Chinese government has publicly argued that its policies in Xinjiang are necessary to "combat terrorism and extremism" in the region.[251] Article II of CAT states, however, that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."[252] Therefore, China cannot argue that a supposed threat of terrorism in Xinjiang provides an acceptable excuse for the commission of torture.[253]

Thus, the Chinese government has committed torture, a crime against humanity, in violation of both CAT and the Rome Statute.[254] Moreover, the "prohibition of torture" has attained status as a *jus cogens* or peremptory norm of general international law, giving rise to the obligation *erga omnes* (owed to and by all States) to take action against those who torture."[255] As a *jus cogens* norm, the prohibition on torture furnishes an independent cause of action.[256] Uyghurs and other Muslim minorities can argue that China has breached the prohibition against torture by pointing to the various eyewitness accounts of Chinese governmental torture.[257]

ii. Forced Sterilization

Camp survivors testify that camp authorities have implemented programs of forced sterilization, thereby committing another crime against humanity.[258] One survivor, Gulbahar Jalilova, told *France 24* that camp authorities forced interned women to "stick our arms out through a small opening in the door" to receive an injection, "we soon realized that after our injections . . . we didn't get our periods anymore."[259] Mihrigul Tursun similarly testified that she had been given "unknown drugs and

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[251] *Chinese UN Envoy Refutes U.S. Accusations over Counter-Terrorism in Xinjiang*, XINHUA (Feb. 08, 2020, 7:28 AM), http://www.xinhuanet.com/english/2020-02/08/c_138764875.htm.

[252] Convention Against Torture, *supra* note 136, art. 2.

[253] *See Chinese UN Envoy Refutes U.S. Accusations over Counter-Terrorism in Xinjiang*, *supra* note 251; Convention Against Torture, *supra* note 136, art. 2.

[254] Rome Statute, art. 7(1)(f); *see* Campbell, supra note 241.

[255] *Torture*, *supra* note 232.

[256] *See id.*

[257] *See, e.g.*, McCurry, *supra* note 243; Rahim, *supra* note 243; Rivers & Lee, *supra* note 243; Schmitz, *supra* note 243; Yan, *supra* note 243.

[258] Conor Finnegan & Victor Ordonez, *China Conducting Mass Sterilization on Muslim Minorities That Could Amount to Genocide: Report*, ABC NEWS (June 29, 2020, 3:48 PM), https://abcnews.go.com/Politics/china-conducting-mass-sterilization-muslim-minorities-amount-genocide/story?id=71519132.

[259] Stubley, *supra* note 231.

injections."[260] After fleeing to the United States, she received a medical check-up and found out that she had been sterilized.[261] Additionally, Dr. Zenz's article sheds light on the extensive nature of the government's sterilization program.[262] As Dr. Zenz notes, natural population growth rates in Xinjiang have "declined dramatically" since 2015.[263] Similarly, the Heritage Foundation has written on the extensive scope of forced sterilization, arguing, "China is destroying an ethnic minority by infringing on their personal decisions related to family planning and religious freedom."[264]

Given the extensive documentation that Dr. Zenz and other commentators have furnished on the question of forced sterilization, plaintiffs and rights organizations should have little trouble proving that the Chinese government has committed the crime against humanity of forced sterilization.[265] It should be noted, however, that the prohibition on forced sterilization does not yet constitute a *jus cogens* norm of international law and only has force when employed as part of the broader charge of crimes against humanity. [266] Therefore, forced sterilization does not furnish an independent cause of action, and has less utility than the term "torture."[267]

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[260] Shosuke Kato & Kenji Kawase, *Xinjiang: What China Shows World Vs. What Former Detainee Describes*, NIKKEI (Aug. 10, 2019, 11:01 AM), https://asia.nikkei.com/Politics/Xinjiang-What-China-shows-world-vs.-what-former-detainee-describes.

[261] *Id.*

[262] Zenz, *Sterilizations, IUDs, and Mandatory Birth Control*, *supra* note 44, at 2.

[263] *Id.*

[264] Olivia Enos & Yujin Kim, *China's Forced Sterilization of Uighur Women is Cultural Genocide*, HERITAGE FOUND. (Aug. 29, 2019), https://www.heritage.org/asia/commentary/chinas-forced-sterilization-uighur-women-cultural-genocide. The Heritage Foundation is a conservative think tank committed to the "principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense." *About Heritage*, HERITAGE FOUND., https://www.heritage.org/about-heritage/mission (last visited Nov. 13, 2020).

[265] *See, e.g.*, Enos & Kim, *supra* note 264; Zenz, *Sterilizations, IUDs, and Mandatory Birth Control*, *supra* note 44.

[266] *See* Chiara Cosentino, *Involuntary Sterilization: A Means of Torture Against Roma Women in Slovakia*, OMCT BLOG (Nov. 25, 2015), http://blog.omct.org/involuntary-sterilization-means-torture-roma-women-slovakia/ (implying that involuntary sterilization is not yet acknowledged as a violation of a norm of *jus cogens*); *but see* David Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine*, 15 DUKE J. COMP. & INT'L L. 219, 225 (2005) (arguing that the "prohibition of sexual violence in humanitarian law has emerged as one of the most fundamental standards of the international community as a norms of *jus cogens*").

[267] *See* Cosentino, *supra* note 266.

iii. Apartheid

The sum of Chinese actions in Xinjiang likely constitutes apartheid.[268] Article 7(2) of the Rome Statute defines apartheid as an "institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups."[269] It is not enough to point to an institutionalized regime of systematic oppression.[270] Article 7(2) also imposes an intent element, requiring that the perpetrator in question commit the act with the "intention of maintaining that regime."[271]

Various commentators have pointed to the existence in Xinjiang of an institutionalized regime of systematic oppression.[272] *The Economist* has accused the Han in Xinjiang of behaving "like colonial overlords," and has criticized "Xinjiang's apartheid-like system, epitomized by . . . Han enclaves."[273] One commentator similarly contends that the government targets ethnic minorities in Xinjiang "based on their racial identity" which thereby creates a system of apartheid.[274] For example, Chinese state scientists have "engaged in a long-term effort" to develop technology that will enable the state to "racially distinguish Han Chinese from Uyghurs and other minorities, so that the government can more effectively target its oppressive measures."[275] Even though there are individual examples of successful minority entrepreneurs and leaders in Xinjiang,[276] ethnic minorities as a whole occupy a position of inferiority compared to the Han.[277]

Furthermore, the state's internment program has primarily targeted Muslim minorities.[278] Those minority citizens lucky enough to live outside of the internment camps face surveillance cameras and are forced to house Han cadres.[279] The entire system is undergirded by "a formalized racism on

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[268] *See* Rome Statute, art. 7(2)(h).; Munsterhjelm, *supra* note 231.

[269] Rome Statute, art. 7(2)(h).; Munsterhjelm, *supra* note 231.

[270] *See* Rome Statute, art. 7(2)(h).; Munsterhjelm, *supra* note 231.

[271] Rome Statute, art. 7(2)(h).; Munsterhjelm, *supra* note 231.

[272] *See, e.g.*, *Dismantling China's Muslim Gulag in Xinjiang is Not Enough*, ECONOMIST (Jan. 9, 2020), https://www.economist.com/leaders/2020/01/09/dismantling-chinas-muslim-gulag-in-xinjiang-is-not-enough; Munsterhjelm, *supra* note 231.

[273] *Dismantling China's Muslim Gulag in Xinjiang is Not Enough*, *supra* note 272.

[274] Munsterhjelm, *supra* note 231.

[275] *Id.*

[276] JAMES MILLWARD, EURASIAN CROSSROADS: A HISTORY OF XINJIANG 361–65 (2007).

[277] BOVINGDON, *supra* note 2, at 79.

[278] Zenz, *"Wash Brains, Cleanse Hearts"*, *supra* note 5.

[279] Byler, *Violent Paternalism*, *supra* note 10, at 1–2.

the order of South African apartheid."[280] It should be noted, however, that Chinese authorities have occasionally sent members of the Han ethnic group to the camps too.[281]

The intent element of apartheid is critical to the Rome Statute's definition and is likely the most difficult element to demonstrate.[282] China might argue that its draconian measures are not designed to discriminate but intended to protect.[283] The government has often argued that it is lifting minorities up in Xinjiang by pursuing economic development.[284] An example of this is the attempt to transform Xinjiang's economy by launching the "西部大开发 [Open up the West Program]" at the turn of the century.[285] This alleged Western economic development program ultimately promoted unequal development.[286] Writing in 2006, one scholar argued that although the Open up the West Program promised to reduce "economic asymmetry between Xinjiang and the rest of China," the government instead promoted integration through the promotion of Han immigration, i.e. demographic assimilation.[287] One historian more broadly notes that the economic development of Xinjiang "inevitably required a massive influx of Han labor and capital" and adds that the non-Han populace increasingly "felt excluded from the economic boom taking place right in its own

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[280] Rian Thum, *What Really Happens in China's 'Re-Education' Camps*, N.Y. TIMES (May 15, 2018), https://www.nytimes.com/2018/05/15/opinion/china-re-education-camps.html.

[281] Nathan Vanderklippe, *Incarceration of Christians and Han Chinese in Xinjiang Shows Broad Reach of Forced Indoctrination Campaign*, GLOBE & MAIL (Sept. 24, 2019), https://www.theglobeandmail.com/world/article-in-xinjiang-incarceration-of-christians-and-han-chinese-shows-broad.

[282] Rome Statute, art. 7(2)(h).

[283] *See, e.g.*, *Dismantling China's Muslim Gulag in Xinjiang is Not Enough*, *supra* note 272; Munsterhjelm, *supra* note 231; Zenz, *"Wash Brains, Cleanse Hearts"*, *supra* note 5.

[284] *Facts & Figures: Xinjiang's Social, Economic Progress Over 70 Years*, XINHUA (Sept. 25, 2019), http://www.xinhuanet.com/english/2019-09/25/c_138422432.htm. It should be noted that Xinhua is a Chinese state-run press agency and thus espouses government views. *See* Louisa Lim & Julia Bergin, *Inside China's Audacious Global Propaganda Campaign*, GUARDIAN (Dec. 7, 2018, 6100 AM), https://www.theguardian.com/news/2018/dec/07/china-plan-for-global-media-dominance-propaganda-xi-jinping.

[285] Robert Vaughn Moeller, China's Campaign to Open the West: Xinjiang and the Center 2 (Nov. 21, 2006) (unpublished M.A. thesis, University of Pittsburgh) (on file with the University of Pittsburgh Library system) http://d-scholarship.pitt.edu/10141/1/moellerrv_etd2006.pdf.

[286] *Id.* at 4.

[287] *Id.* at 40.

backyard."[288] In sum, economic development in Xinjiang has strengthened, rather than reduced, existing ethnic inequalities.[289] Such evidence could be taken as indicative of an intent to commit the crime of apartheid.[290]

Even if the Chinese government did not display the intent to implement apartheid in the early 2000s, its conduct from 2016 onward has taken on a darker hue.[291] For example, President Xi has "called on the party to unleash the tools of 'dictatorship' to eradicate radical Islam in Xinjiang," despite little to no proof that Muslims present a security threat in the province.[292] Leaked government documents also reference "plans to extend restrictions on Islam to other parts of China," thus indicating that the Chinese government views Islam itself as suspect.[293] In other words, Muslim minorities arguably live a parallel yet different existence to their Han countrymen in Xinjiang.[294] They endure regular and serious government intrusions into private life and suffer from arbitrary and mass internment.[295] Given President Xi's public remarks and leaked government documents, prosecutors will likely be able to demonstrate that China has intentionally created and perpetuated a system of apartheid by pointing to evidence of widespread discrimination against Muslim minorities.[296]

Apartheid is a high-utility term.[297] As the Rome Statute makes clear, apartheid is a key example of a crime against humanity.[298] Moreover, apartheid also furnishes an independent cause of action, because the prohibition on apartheid has attained *jus cogens* status under international law.[299]

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[288] JUSTIN M. JACOBS, XINJIANG AND THE MODERN CHINESE STATE 190–91 (2016).

[289] *See Facts & Figures*, *supra* note 284.

[290] *See id.*; Rome Statute, art. 7(2)(h).

[291] *See* Andrew Jacobs, *Xinjiang Seethes Under Chinese Crackdown*, N.Y. TIMES (Jan. 2, 2016), https://www.nytimes.com/2016/01/03/world/asia/xinjiang-seethes-under-chinese-crackdown.html.

[292] *See* Ramzy & Buckley, *supra* note 202.; Roberts, *supra* note 3, at 234.

[293] Ramzy & Buckley, *supra* note 202.

[294] *See* Byler, *Violent Paternalism*, *supra* note 10, at 4.

[295] *Id.* at 1.

[296] Ramzy & Buckley, *supra* note 202.

[297] *See* Rome Statute, arts. 7(1)(j), 7(2)(h).

[298] *Id*.

[299] Kleinlein, *supra* note 176, at 307.

2. Forced Labor, as Differentiated from Enslavement: A Term of High Utility

The next high-utility term is that of "forced labor."[300] This section will demonstrate that the Chinese government's placement of "interned Uyghurs into labor-intensive sweatshops" violates the prohibition on forced labor, but not the prohibition on slavery.[301] Despite colloquial confusion of the two terms, forced labor and slavery are distinct concepts under international law.[302] The prohibition on forced labor has attained *jus cogens* status and thus gives rise to a clear legal remedy.[303]

The Rome Statute defines enslavement as the "exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children."[304] The 1926 Slavery Convention provides a nearly identical definition.[305] One legal commentator explains that "slavery is much more than forced labor," noting that while "all slavery involves forced labor . . . not all forced labor involves slavery."[306] Slavery constitutes a "complete system of ownership" and a "permanent situation."[307] Neither of these descriptors, however, applies cleanly to

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[300] Forced Labor Convention, *supra* note 179, art. 2(1).

[301] Adrian Zenz, *Xinjiang's New Slavery*, FOREIGN POL'Y (Dec. 11, 2019, 3:10 PM), https://foreignpolicy.com/2019/12/11/cotton-china-uighur-labor-xinjiang-new-slavery/ [hereinafter Zenz, *Xinjiang's New Slavery*].

[302] *What is Forced Labour, Modern Slavery and Human Trafficking*, INT'L LAB. ORG., https://www.ilo.org/global/topics/forced-labour/definition/lang--en/index.htm (last visited Nov. 13, 2020).

[303] Nevsun Res. Ltd. v. Araya, 2020 S.C.C. 5, para. 83, 102 (Can.).

[304] Rome Statute, art. 7(2)(h).

[305] *See* Slavery Convention art. 1(1), Sept. 25, 1926, 60 U.N.T.S. 253 [hereinafter Slavery Convention]. The 1926 Slavery Convention was "created under the auspices of the League of Nations and serves as the foundation for the prevention and suppression of the slave trade." *1926 Slavery Convention*, EUR. COMM'N, https://ec.europa.eu/anti-trafficking/legislation-and-case-law-international-legislation-united-nations/1926-slavery-convention_en (last visited Nov. 13, 2020). The Slavery Convention defines slavery as the "status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised." *Id.* It should also be noted that while China has not signed either the Rome Statute or the Slavery Convention, these definitions nonetheless bind China since slavery is prohibited under customary international law. *See* A. Yasmine Rassam, *International Law and Contemporary Forms of Slavery: An Economic and Social Rights-Based Approach*, 23 PENN ST. INT'L L. REV. 809, 810 (2005).

[306] Ann Jordan, *Slavery, Forced Labor, Debt Bondage, and Human Trafficking: From Conceptual Confusion to Targeted Solutions*, CTR. HUM. RTS. & HUMANITARIAN L. 2 (2011), https://www.issuelab.org/resources/15356/15356.pdf.

[307] *Id.* at 2–3.

China's forced labor system.[308] Even the Australian Strategic Policy Institute ("ASPI"), which has published the most systematic account of China's forced labor regime to date, shies away from using the legal term "enslavement."[309]

Yet in recent months, experts and press pundits have accused China of enslaving Uyghurs.[310] Aiman Mazyek, chairman of the Central Council of Muslims in Germany, has argued that China is building a "modern slave exploitation machine" in Xinjiang.[311] An opinion piece in the *Wall Street Journal* similarly argues that China is engaging in "modern slavery that distorts free trade, violates international labor standards and seriously violates human rights."[312] China's actions have also been called a "new slavery," with documentation showing how the state has placed "interned Uyghurs into labor-intensive sweatshops."[313]

While China's actions might not meet legal definitions of slavery, they certainly meet legal definitions of forced labor.[314] Under international law, enslavement and forced labor are distinct categories.[315] Although the Rome Statute lists enslavement as an example of a crime against humanity, forced labor is nowhere listed in the statute.[316] The dichotomy between

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[308] *Id*.

[309] *See generally* Vicky Xiuzhong Xu et al., *Uyghurs for Sale: 'Re-Education,' Forced Labour, and Surveillance Beyond Xinjiang*, AUSTL. STRATEGIC POL'Y INST. (2020), https://www.aspi.org.au/report/uyghurs-sale (failing to employ the term "enslavement," "slavery," or "slave"). ASPI is a think tank that that produces advice for "Australia's strategic and defence leaders." *About Us*, AUSTL. STRATEGIC POL'Y INST., https://www.aspi.org.au/about-aspi.

[310] *See, e.g.*, Geneva Sands & Ben Westcott, *Trump Administration Blocks Some Xinjiang Goods from China Suspected of Being Made with Slave Labor*, CNN (Sept. 14, 2020, 11:20 PM), https://www.cnn.com/2020/09/14/politics/us-xinjiang-cotton-imports-intl-hnk/index.html; *Genocide and Crimes Against Humanity in Xinjiang?*, *supra* note 29, at 11.

[311] Helena Kaschel, *Uighur Persecution: German Politicians Condemn China's 'Modern Slave Exploitation Machine,'"* DEUTSCHE WELLE (Feb. 19, 2020), https://www.dw.com/en/uighur-persecution-german-politicians-condemn-chinas-modern-slave-exploitation-machine/a-52436495.

[312] Jianli Yang & Lianchao Han, *Did a Muslim Slave Make Your Chinese Shirt?* WALL STREET J. (Oct. 16, 2019, 6:18 PM), https://www.wsj.com/articles/did-a-muslim-slave-make-your-chinese-shirt-11571264293.

[313] Zenz, *Xinjiang's New Slavery*, *supra* note 301.

[314] *See* Rome Statute, art. 7(2)(h); Forced Labor Convention, *supra* note 179, art. 2(1); *see* Zenz, *Xinjiang's New Slavery*, *supra* note 301.

[315] *What is Forced Labour, Modern Slavery and Human Trafficking*, *supra* note 302.

[316] *See* Rome Statute, art. 7(2)(h).

forced labor and enslavement is arguably not a rigid one though.[317] Article 5 of the Slavery Convention notes that parties ought to take "all necessary measures to prevent . . . forced labour from developing into conditions analogous to slavery," thereby suggesting that enslavement and forced labor are not rigidly opposed categories.[318]

The International Labor Organization's ("ILO") Forced Labor Convention defines the term as, "All work or service, which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."[319] ASPI has "identified 27 factories in nine Chinese provinces that are using Uyghur labour transferred from Xinjiang since 2017."[320] These Uyghur workers lead a harsh, segregated life under so-called "military-style management," and are tracked "both physically and electronically."[321] ASPI also notes that Uyghur work conditions meet several of the ILO's indicators of forced labor since workers are "subjected to intimidation and threats," are "placed in a position of dependency and vulnerability," have their "freedom of movement restricted," live in "isolation," face "abusive working conditions," and work "excessive hours."[322] Thus, Chinese use of Uyghur workers in factories around the country constitutes forced labor.[323] However, since China has not yet ratified the Forced Labor Convention, potential plaintiffs cannot avail themselves of the ILO's complaint procedure, which deals with

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[317] *See What is Forced Labour, Modern Slavery and Human Trafficking*, *supra* note 302.

[318] *See* Slavery Convention, *supra* note 305, art. 5.

[319] Forced Labor Convention, *supra* note 179, art. 2(1). The Forced Labor Convention of 1930 is one of the core legal instruments of the International Labor Organization. *International Labour Standards on Forced Labour*, INT'L LAB. ORG., https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/forced-labour/lang--en/index.htm. The convention "prohibits all forms of forced or compulsory labor" and requires that ratifying states articulate relevant legal penalties for the "extraction of forced and compulsory labour." *Id.*

[320] Xu et al., *supra* note 309, at 4.

[321] *Id.* at 6.

[322] *ILO Indicators of Forced Labour*, INT'L LAB. ORG., https://www.ilo.org/global/topics/forced-labour/publications/WCMS_203832/lang--en/index.htm (last visited Nov. 13, 2020). The ILO indicators of forced labor expand upon the definition of forced labor articulated in the 1930 Forced Labor Convention. *Id.* The indicators "are intended to help 'front-line' criminal law enforcement officials" and other relevant actors "identify persons who are possibly trapped in a forced labor situation." *Id; see also* Xu et al., *supra* note 309, at 4–6.

[323] *See* Forced Labor Convention, *supra* note 179, art. 2(1); Xu et al., *supra* note 309, at 46.

disputes between countries that have ratified the Conventions governed by the ILO.[324]

The prohibition on forced labor, however, constitutes a *jus cogens* norm and thus represents a binding obligation on state behavior.[325] The Supreme Court of Canada, in its recent landmark decision *Nevsun v. Araya* (2020), held that "compelling authority also confirms that the prohibition against forced labour has attained the status of *jus cogens*."[326] They further stated that, "To the extent that debate may exist about whether forced labour is a peremptory norm, there can be no doubt that it is at least a norm of customary international law."[327] The ILO has similarly stated that the prohibition on forced labor has attained *jus cogens* status.[328] The prohibition on forced labor, just like the prohibition on crimes against humanity, represents a *jus cogens* norm and can thus furnish an independent cause of action.[329]

The previous sections have argued that Chinese actions have violated *jus cogens* norms of international law—specifically, the prohibitions on crimes against humanity and forced labor.[330] Of these two terms, crimes against humanity is probably more useful, since it elegantly encompasses multiple individual violations including forced sterilization, imprisonment, racial persecution, enforced disappearance, apartheid, and torture.[331] It does not, however, include the *jus cogens* prohibition on forced labor.[332] In confronting China for its actions in Xinjiang, the international community should prosecute Beijing for all of its *jus cogens* violations, and thus focus not only on crimes against humanity, but also on forced labor.[333]

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[324] *See Complaints*, INT'L LAB. ORG., https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/complaints/lang--en/index.htm (last visited Nov. 13, 2020); *Up-to-Date Conventions and Protocols not Ratified by China*, INT'L LAB. ORG., https://www.ilo.org/dyn/normlex/en/f?p=1000:11210:0::NO:11210:P11210_COUNTRY_ID:103404 (last visited Nov. 13, 2020).

[325] *See* Rassam, *supra* note 305, at 810.

[326] Nevsun Res. Ltd. v. Araya, 2020 S.C.C. 5, para. 83, 102 (Can.).

[327] *Id*.

[328] *See* Report of the Commission of Inquiry on Forced Labour in Myanmar (Burma), 81 ILO OFF. BULL. (ser. B), Special Supp., para 538 (1998).

[329] *See, e.g.*, *id*; *Araya*, 2020 S.C.C. 5 at para. 102.

[330] *See* discussion *supra* at Sections II.B.1, II.B.2.

[331] *See* Rome Statute, art. 7(1).

[332] *See id.* art. 7(2)(h).

[333] *See* Kleinlein, *supra* note 176, at 307; *Torture*, *supra* note 232; Report of the Commission of Inquiry on Forced Labour in Myanmar (Burma), *supra* note 328.

III. HOLDING CHINA TO ACCOUNT

Given that Chinese actions constitute violations of both the Rome Statute and *jus cogens* norms, what types of recourse should the international community pursue? This section argues that the international community does have viable legal tools that it can use to confront Chinese atrocities. This section lists three potential legal solutions and evaluates their legal and political viability. First, suit before the ICC remains a distant possibility, though analysis will demonstrate that such an option is likely to run into both legal and political barriers.[334] Thus, this article examines additional feasible solutions such as the U.N. filing a request for an advisory opinion by the International Court of Justice.[335] While such a course is legally possible, it is also politically difficult.[336] The third solution is the exercise of universal jurisdiction before a third-party national court.[337] This course of action is both legally and politically possible in certain jurisdictions.[338]

A. *Suit Before the International Criminal Court*

On December 14, 2020, the Office of the Prosecutor at the International Criminal Court released its "Report on Preliminary Examination Activities."[339] Although the ICC did not completely foreclose the possibility of suit against China for its atrocities in Xinjiang, the court noted there was "no basis to proceed" with an investigation "at this time."[340] A close analysis of the ICC Report and of the complaint filed by the East Turkistan Government in Exile and the East Turkistan National Awakening Movement indicates that while suit before the ICC remains a theoretical possibility, there remain a number of barriers to such a course.[341]

Given that Chinese atrocities in Xinjiang constitute violations of the *jus cogens* prohibition on crimes against humanity, suit before the ICC would seem to be a natural option.[342] After all, the Rome Statute, which

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[334] *See* discussion *infra* at Section III.A.

[335] *See* discussion *infra* at Section III.B.

[336] *See* discussion *infra* at Section III.B.

[337] *See* discussion *infra* at Section III.C.

[338] *See* discussion *infra* at Section III.C.

[339] INT'L CRIM. CT., REPORT ON PRELIMINARY EXAMINATION ACTIVITIES, 2020 para. 76 (Dec. 14, 2020) https://www.icc-cpi.int/itemsDocuments/2020-PE/2020-pe-report-eng.pdf [hereinafter REPORT ON PRELIMINARY EXAMINATION ACTIVITIES, 2020].

[340] *Id*.

[341] *Id*; Press Release, East Turkestan National Awakening Movement, *supra* note 19.

[342] *About*, INT'L CRIM. CT., https://www.icc-cpi.int/about (last visited Nov. 13, 2020). The ICC "investigates and, where warranted, tries individuals charged with the

established the ICC, provides the court with jurisdiction over "crimes against humanity."[343] However, China has not acceded to the Rome Statute at the time of this writing.[344] This complicates efforts to hale China before the ICC.[345]

Failure to accede to the Rome Statute does not effectively shield a country from jurisdiction.[346] The ICC can exercise jurisdiction over a non-State Party if the crimes alleged were committed on the territory of a State party to the Rome Statute.[347] Article 12(2) of the Statute stipulates that:

> [T]he Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court . . . a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft. b) the State of which the person accused of the crime is a national.[348]

In their complaint to the ICC Office of the Prosecutor, ETGE and ETNAM relied on Article 12(2)(a) and argued that "Uyghur victims [had] been unlawfully deported into occupied [Xinjiang] from Tajikistan and Cambodia."[349] Both Tajikistan and Cambodia are States Parties to the Rome Statute.[350] As one commentator has noted, prior ICC decisions on human rights atrocities in Myanmar have clarified that "the Court may exercise jurisdiction over international crimes when *part of* the criminal conduct takes place on the territory of a signatory."[351] For example, the ICC's Pre-Trial Chamber I held that even though Myanmar is not party to the Rome Statute, the Court could exercise jurisdiction over the alleged deportation of

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gravest crimes of concern to the international community: genocide, war crimes, crimes against humanity and the crime of aggression." *Id.*

[343] Rome Statute, art. 5.

[344] *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.

[345] *See id.*

[346] Rome Statute, art. 12(2).

[347] *Id.*

[348] *Id.*

[349] Press Release, East Turkestan National Awakening Movement, *supra* note 19.

[350] *The States Parties to the Rome Statute*, *supra* note 344.

[351] Tia Sewell, *Unpacking the Recent Uighur ICC Complaint Against Chinese Leaders*, LAWFARE (July 21, 2020, 1:58 PM), https://www.lawfareblog.com/unpacking-recent-uighur-icc-complaint-against-chinese-leaders.

Rohingya from Myanmar to Bangladesh.[352] The Pre-Trial Chamber noted that an "element" of the crime against humanity of deportation had taken place on the territory of Bangladesh, which is a State party to the Rome Statute.[353] Thus, the ICC could exercise jurisdiction.[354] The ETGE/ETNAM complaint resembled the Myanmar case in that it focused on the deportation of ethnic minorities.[355] One key difference lay in the directionality of deportation.[356] In the Myanmar case, the complaint focused on the alleged deportation of Rohingya from Myanmar to Bangladesh, while the complaint in the Xinjiang case focused on the deportation of Uyghur "victims from Tajikistan and Cambodia into Xinjiang."[357] In both cases, however, part of the criminal conduct had allegedly taken place on the territory of a signatory state.[358]

In its report, the Office of the Prosecutor noted that the majority of crimes alleged by ETGE and ETNAM had "been committed solely by nationals of China within the territory of China," which meant that the Court could not exercise territorial jurisdiction.[359] Thus, the Report did not meaningfully discuss those crimes that had allegedly occurred within Xinjiang itself.[360] The Report proceeded to analyze the crime against humanity of deportation, which allegedly had taken place in Cambodia and Tajikistan, concluding that the forcible transfer of Uyghurs to China from these countries did not "amount to the crime against humanity of deportation."[361] Of course, the Office of the Prosecutor did not permanently foreclose a suit against China: as the report noted, ETGE and ETNAM have already "communicated . . . a request for reconsideration . . . on the basis of new facts or evidence."[362] Yet it is clear that ETGE and ETNAM will

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[352] ICC-RoC46(3)-01/18, Decision on the "Prosecution's Request for a Ruling on Jurisdiction Under Article 19(3) of the Statute," ¶ 63 (Sept. 6, 2018).

[353] Press Release, International Criminal Court, 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.

[354] *Id.*

[355] Press Release, East Turkestan National Awakening Movement, *supra* note 19.

[356] Sewell, *supra* note 351.

[357] *Id.*

[358] *Id.*

[359] REPORT ON PRELIMINARY EXAMINATION ACTIVITIES, 2020, *supra* note 339, at para. 73.

[360] *Id.*

[361] *Id.* at para. 74.

[362] *Id.* at para. 76.

continue to face tremendous jurisdictional hurdles in getting the ICC to hear their case.[363]

An additional problem with suit before the ICC is that the court could prove unwilling to grant a formal investigation for discretionary reasons.[364] In April 2019, for example, the ICC's Pre-Trial Chamber rejected Prosecutor Fatou Bensouda's request to open a formal investigation into allegations that American servicemen and CIA personnel had committed crimes against humanity and war crimes in Afghanistan, noting that such a suit would face "insurmountable political hurdles."[365] Although the Pre-Trial Chamber's holding was later reversed, it is clear that the ICC weighs political limitations.[366] Given the ICC's conduct during the Afghanistan case, the Court may prove unwilling to hold a great power like China accountable even if "all the relevant requirements are met as regards both jurisdiction and admissibility."[367]

B. *Suit Before the International Court of Justice*

Filing a suit before the ICJ is a more viable solution.[368] This section will explain the two main ways to access the ICJ—the Article 36 process and the advisory opinion process—and will argue that the latter is a more feasible option in the Xinjiang context.[369] While a U.N. General Assembly request for an ICJ advisory opinion is both legally viable and desirable,

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[363] *See id*. at paras. 73–74.

[364] *See generally* Lovisa Badagard & Mark Klamberg, *The Gatekeeper of the ICC: Prosecutorial Strategies for Selecting Situations and Cases at the International Criminal Court*, 48 GEO. J. INT'L L. 639 (2017) (discussing prosecutorial discretion).

[365] Preston Lim, *National Security at the United Nations This Week,* JUST SECURITY (Apr. 12, 2019), https://www.justsecurity.org/63616/national-security-at-the-united-nations-this-week-4.html. "Once the Office of the Prosecutor (OTP) has sufficient evidence against an individual, it submits a request to the Pre-Trial judges to issue a warrant of arrest or summons to appear." *Pre-Trial Stage*, INT'L CRIM. CT., https://www.icc-cpi.int/pages/pre-trial.aspx (last visited Nov. 13, 2020).

[366] *See* Merrit Kennedy, *International Criminal Court Allows Investigation of U.S. Actions in Afghanistan*, NPR (Mar. 5, 2020; 3:57 PM), https://www.npr.org/2020/03/05/812547513/international-criminal-court-allows-investigation-of-u-s-actions-in-afghanistan.

[367] *See* Situation in the Islamic Republic of Afghanistan, No. ICC-02/17, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan, ¶ 96 (Apr. 12, 2019).

[368] Statute of the International Court of Justice arts. 36(1), 36(2) June 26, 1945, 33 U.N.T.S. 993 [hereinafter I.C.J. Statute]. The ICJ is the "principal judicial organ of the United Nations" and has a mandate to settle "legal disputes submitted to it by States" and to "give advisory opinions on legal questions…." *The Court*, INT'L CT. JUST., https://www.icj-cij.org/en/court (last visited Nov. 13, 2020).

[369] *The Court, supra* note 368; *Advisory Jurisdiction*, INT'L CT. JUST., https://www.icj-cij.org/en/advisory-jurisdiction (last visited Nov. 13, 2020).

however, one drawback of such a course is that liberal democracies may fail to find the requisite political support within the General Assembly.[370]

The standard route to the ICJ does not use advisory opinions and arises through Articles 36(1) and 36(2) of the Statute of the International Court of Justice ("ICJ Statute").[371] Article 36(1) states, "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force."[372] Article 36(2) asserts that, "States parties to the present Statute may at any time declare that they recognize as compulsory ipso facto . . . in relation to any other state accepting the same obligation, the jurisdiction of the court . . . ."[373]

China's treaty violations do not provide the ICJ with Article 36(1) jurisdiction because China has articulated reservations to those sections of international treaties that provide for ICJ referral.[374] The Genocide Convention provides an example of the issue of reservations.[375] In January 2020, the ICJ released a decision on a request for provisional measures addressing claims that Myanmar has committed genocide against the Rohingya people in the case *The Gambia v. Myanmar* (2020).[376] The *Myanmar* case is facially similar to the Xinjiang situation, but the critical difference is that Myanmar ratified the Genocide Convention without articulating a reservation to Article IX, which provides that the ICJ will resolve disputes under the Convention.[377] In contrast, China has articulated a reservation to Article IX and similar reservations to other human rights treaties.[378] Moreover, in the case of a suit over Xinjiang atrocities, China

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[370] *See The Court*, *supra* note 368; *Advisory Jurisdiction*, *supra* note 369.

[371] I.C.J. Statute, arts. 36(1), 36(2).

[372] *Id.* art. 36(1).

[373] *Id.* art. 36(2).

[374] *See* Convention on the Prevention and Punishment of the Crime of Genocide Convention, Dec. 9, 1948, 78 U.N.T.S. 277 (Reservations and Declarations Made Upon Signature by People's Republic of China). [hereinafter Chinese Reservations to Genocide Convention].

[375] *Status of Convention on the Prevention and Punishment of the Crime of Genocide*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=_en.

[376] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myan.), Order on Request for the Indication of Provisional Measures (Jan. 23, 2020).

[377] *See* Genocide Convention, *supra* note 43, art. 9; *Status of Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 375; *see also* Sewell, *supra* note 351.

[378] *See, e.g.*, Chinese Reservations to Genocide Convention, *supra* note 374;

would be unlikely to spontaneously recognize ICJ jurisdiction under Article 36(2).[379] Thus, the Article 36 process is not a viable option in the Xinjiang context.[380]

The ICJ could, however, issue an advisory opinion on the situation in Xinjiang.[381] To date, the ICJ has issued twenty-eight advisory opinions.[382] Advisory opinions are not an ineffective relic of the past;[383] for example, in 2019, the ICJ released an advisory opinion in response to a General Assembly request on the United Kingdom's administration of the Chagos Archipelago.[384] Article 65 of the ICJ Statute allows the ICJ to give "an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."[385] Article 96 of the Charter of the United Nations ("U.N. Charter") states that the General Assembly, Security Council, or other organs and specialized agencies of the U.N. that are authorized by the General Assembly may request an advisory opinion.[386] It is unlikely that the U.N. Security Council will request an advisory opinion on Xinjiang because China holds the power to veto any request presented at that level.[387] Nonetheless, the U.N. has two other excellent options through which to request an advisory opinion: the General Assembly and other organs authorized by the General Assembly.[388]

The first option is to request an advisory opinion through the General Assembly.[389] Whether the request for an advisory opinion would require a simple majority vote or two-thirds majority vote remains an open

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Chinese Reservations to CEDAW, *supra* note 173; Chinese Reservations to CERD, *supra* note 173.

[379] *See* I.C.J. Statute, art. 36(2).

[380] *Id.* arts. 36(1), 36(2).

[381] *Id.* art. 65; *see Advisory Jurisdiction*, *supra* note 369.

[382] *Judgments, Advisory Opinions and Orders*, INT'L CT. JUST., https://www.icj-cij.org/en/decisions/advisory-opinion/1946/2020/desc (last visited Nov. 13, 2020).

[383] *See* Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion (Feb. 25, 2019), https://www.icj-cij.org/en/case/169.

[384] *See id.*

[385] I.C.J. Statute, art. 65.

[386] U.N. Charter art. 96.

[387] *See* Alina Rizvi, *Uighur Crisis Highlights Flawed Structure of UN Security Council*, JURIST (July 10, 2020, 8:03 PM), https://www.jurist.org/commentary/2020/07/alina-rizvi-unsc-reform-uighurs/; *Voting System*, UNITED NATIONS SEC. COUNCIL, https://www.un.org/securitycouncil/content/voting-system (last visited Nov. 13, 2020).

[388] U.N. Charter art. 96.

[389] *Id.*

question for debate.[390] Article 18 of the U.N. Charter notes that "decisions of the General Assembly on *important questions* shall be made by a two-thirds majority of the members present and voting."[391] However, Article 18 does not comprehensively define which questions are "important," thereby automatically requiring a two-thirds vote.[392] A reexamination of past ICJ advisory opinions further reveals that a simple majority is often sufficient.[393] In December 1994, for example, the U.N. General Assembly adopted Resolution 49/75K which requested an advisory question on whether the threat or use of nuclear weapons was permitted under international law.[394] The vote passed with seventy-eight votes in favor, forty-three votes against and thirty-eight abstentions.[395] According to the General Assembly's Rules of Procedure, "members which abstain from voting are considered as not voting."[396] If a two-thirds majority vote regarding Resolution 49/75K were required, then eighty-one rather than seventy-eight votes would have been needed.[397] This demonstrates that the General Assembly can request an advisory opinion even with a simple majority.[398]

The General Assembly is not the only forum that can request an ICJ Advisory Opinion.[399] As the ICJ notes, advisory proceedings are open to other organs of the U.N.—the Economic and Social Council ("ECOSOC"), the Trusteeship Council,[400] the Interim Committee of the General

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[390] SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-1966, at 301 (3rd ed.1997).

[391] U.N. Charter, art. 18, ¶ 2 (emphasis added).

[392] *Id.*

[393] *See Judgments, Advisory Opinions and Orders*, *supra* note 382.

[394] G.A. Res. 49/75 K (Dec. 15, 1994).

[395] *Request for an Advisory Opinion from the International Court of Justice (ICJ) on the Legality of the Threat or Use of Nuclear Weapons: Resolution/Adopted by the General Assembly*, UNITED NATIONS, https://digitallibrary.un.org/record/283638?ln=en.html [hereinafter *Request for Advisory Opinion*].

[396] G.A. Res. A/520/Rev.18, art. 86 (Feb. 21, 2017).

[397] *Request for Advisory Opinion*, *supra* note 395.

[398] *See Judgments, Advisory Opinions and Orders*, *supra* note 382.

[399] U.N. Charter art. 96.

[400] The Trusteeship Council suspended its operations on 1 November 1994. *Trusteeship Council*, UNITED NATIONS, https://www.un.org/en/sections/about-un/trusteeship-council/ (last visited Nov. 13, 2020).

Assembly,[401] and fifteen specialized agencies.[402] Of these organs, ECOSOC is best placed to file a request for an advisory opinion as many of the crimes that China has committed are covered by the International Covenant on Economic, Social, and Cultural Rights, which comes under ECOSOC's jurisdiction.[403] Similar to the General Assembly, an ECOSOC request for an advisory opinion would only need to attract a simple majority.[404] Article 67 of the U.N. Charter stipulates that, "[D]ecisions of the Economic and Social Council shall be made by a majority of the members present and voting."[405] A potential advantage of getting an advisory opinion through ECOSOC is that the Council is comprised of only 54 members[406] in contrast to the 193 member states[407] of the General Assembly.[408] Since membership in ECOSOC is supposed to be a representative cross-section of the world, however, it is unclear whether members seeking an advisory opinion would more easily garner a simple majority than their General Assembly counterparts.[409]

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[401] The Interim Committee of the General Assembly never filed a request for an advisory opinion. *Organs and Agencies Authorized to Request Advisory Opinions*, INT'L CT. JUST., https://www.icj-cij.org/en/organs-agencies-authorized (last visited Nov. 13, 2020). Notably, the Interim Committee is no longer listed on the UN's webpage of "Funds, Programmes, Specialized Agencies and Others," indicating that it no longer exists or has since been subsumed. *Funds, Programmes, Specialized Agencies and Others*, UNITED NATIONS, https://www.un.org/en/sections/about-un/funds-programmes-specialized-agencies-and-others/index.html (last visited Nov. 13, 2020).

[402] *Organs and Agencies Authorized to Request Advisory Opinions*, *supra* note 401. Of these non-General-Assembly bodies, only the Security Council, Economic and Social Council ("ECOSOC"), United Nations Educational, Scientific and Cultural Organization ("UNESCO"), World Health Organization ("WHO"), International Fund for Agricultural Development ("IFAD"), and International Maritime Organization ("IMO") have requested advisory opinions. *Id.*

[403] *See* ICESCR, *supra* note 135, arts. 16–22 (establishing that the Economic and Social Council has the primary oversight role under the ICESCR); *see also* discussion *supra* at Part II.A.3.

[404] U.N. Charter art. 67.

[405] *Id.*

[406] *ECOSOC Members*, UNITED NATIONS, https://www.un.org/en/ecosoc/about/members.shtml (last visited Nov. 13, 2020).

[407] *Functions and Powers of the General Assembly*, UNITED NATIONS, https://www.un.org/en/ga/about/background.shtml.

[408] *See FAQ*, UNITED NATIONS ECON. SOC. COUNCIL, https://www.un.org/ecosoc/en/FAQ#:~:text=and%20related%20bodies.-,Where%20can%20I%20find%20the%20current%20membership%3F,terms%20by%20the%20General%20Assembly (last visited Nov. 13, 2020). ECOSOC member states are elected for three-year terms by the General Assembly, with quotas set for different regions of the world. *Id.*

[409] *See ECOSOC Members*, *supra* note 406.

Requesting an advisory opinion through ECOSOC, or most organs for that matter, is also more limited than requesting one through the General Assembly.[410] Article 96 of the U.N. Charter states that while the General Assembly or Security Council may ask the ICJ to "give an advisory opinion on any legal question," specialized agencies and other approved organs can only request advisory opinions "on legal questions arising within the scope of their activities."[411] Therefore, in the case of Xinjiang, the General Assembly is the best forum through which to request an ICJ advisory opinion since the General Assembly would be able to pose a broad legal question in a resolution.[412] The ECOSOC avenue is another option in the case that countries pushing for an advisory opinion within the General Assembly cannot find the requisite support.[413]

What would the international community gain by requesting an advisory opinion? Even though advisory opinions do not have binding force, they can be a powerful tool for expressing international condemnation.[414] Under the right conditions, an advisory opinion can convince a rogue state to change its actions.[415] One famous example is the case *Legal Consequences for States of the Continued Presence of South Africa in Namibia*.[416] From the end of the First World War, South Africa controlled the territory known today as Namibia as a League of Nations Mandate.[417] The U.N. Security Council issued Resolution 264 in 1969, which "called upon South Africa to withdraw its administration from the Territory."[418] In 1970, the Security Council escalated matters by requesting an advisory opinion from the ICJ in response to the question, "What are the legal consequences for States of the continued presence of South Africa in Namibia . . . ?"[419] The Court held that "the continued presence of South Africa in Namibia [was] illegal," and that South Africa was "under obligation to withdraw its administration from Namibia immediately."[420]

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[410] U.N. Charter art. 96.

[411] *Id.*

[412] *See id.*

[413] *Id.*

[414] *Advisory Jurisdiction*, *supra* note 369.

[415] *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia, 1971 I.C.J. 16 (June 21).

[416] *Id.*

[417] *Namibia—UNTAG: Background*, UNITED NATIONS PEACEKEEPING, https://peacekeeping.un.org/sites/default/files/past/untagFT.htm.

[418] S.C. Res. 269, ¶ 3 (Mar. 20, 1969).

[419] Legal Consequences for States of the Continued Presence of South Africa in Namibia, Advisory Opinion, 1971 I.C.J. at ¶ 1.

[420] *Id.* at ¶ 133.

The Court also held that member countries of the U.N. were "under obligation to recognize the illegality of South Africa's presence in Namibia," and that member countries had to refrain from "dealings with . . . South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration."[421]

One scholar has convincingly argued that the ICJ's *Namibia* opinion constituted "an important link in a chain of events that ultimately led to a political settlement of the conflict . . .."[422] The ICJ's *Namibia* opinion was a step that "enabled the international community eventually to persuade South Africa to recognize Namibia's claim to independence."[423] An ICJ advisory opinion on the Xinjiang crisis could similarly lead to the long-term political settlement of the conflict by clearly demonstrating to the international community that China's actions in Xinjiang violate international law.[424] The General Assembly should thus ask the ICJ to offer an advisory opinion on a question involving a term of high-utility such as, "Do China's actions in Xinjiang violate the *jus cogens* prohibitions on crimes against humanity, forced labor, torture, and apartheid? What are the legal consequences for States?"[425]

The final question is whether such a course by the General Assembly is politically viable.[426] Despite the fact that only a simple majority is required to request an advisory opinion, it is unlikely that the United States and its allies will be able to cobble up the required votes for an advisory opinion.[427] Some forty-five countries have publicly signaled their support for China's position on the Xinjiang issue, whereas only thirty-nine countries have publicly signaled their condemnation of Chinese actions in Xinjiang.[428] Within the General Assembly, the United States is likely to find consistent support only within the "Western European and Others Group,"

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[421] *Id.*

[422] David Sloss, *Using International Court of Justice Advisory Opinions to Adjudicate Secessionist Claims*, 42 SANTA CLARA L. REV. 357, 366 (2002).

[423] *Id.* at 365.

[424] *See id.* at 389.

[425] *See id.*

[426] *See* Catherine Putz, *2020 Edition: Which Countries Are For or Against China's Xinjiang Policies?*, DIPLOMAT (Oct. 9, 2020), https://thediplomat.com/2020/10/2020-edition-which-countries-are-for-or-against-chinas-xinjiang-policies/.

[427] *See 46 Countries Support China's Xinjiang Policies at UN Human Rights Council*, GLOB. TIMES (July 2, 2020, 12:51 AM), https://www.globaltimes.cn/content/1193257.shtml.

[428] Edith M. Lederer, Associated Press, *Nearly 40 Nations Criticize China's Human Rights Policies*, WASH. POST (Oct. 6, 2020, 9:39 AM), https://www.washingtonpost.com/world/asia_pacific/nearly-40-nations-criticize-chinas-human-rights-policies/2020/10/06/a19ae8e4-080b-11eb-8719-0df159d14794_story.html.

("WEOG")[429] whereas China will probably be able to convince members of the other four regional groups into opposing the request for an advisory opinion through its past and continued use of dollar diplomacy.[430] China has also convinced multiple members of the Organization of Islamic Cooperation to support its narrative on Xinjiang.[431] Of course, it is difficult to predict how every country in the General Assembly would vote on a request for an advisory opinion.[432] However, while an ICJ advisory opinion is legally viable, it will take a concerted campaign to render an advisory opinion politically viable.[433] Thus, despite the potential benefits of an advisory opinion, the option of going to the ICJ is far from assured.[434]

C. *Exercising Universal Jurisdiction*

The third avenue to a legal remedy is for a country to launch a national investigation or suit relying on the international law principle of universal jurisdiction.[435] This section argues that the exercise of universal jurisdiction against Chinese *jus cogens* violators is both legally and politically possible in certain countries. The working definition of universal jurisdiction for the purposes of this article is the ability of a national court to "prosecute individuals for serious crimes under international law . . . based on the principle that such crimes harm the international community or international order itself."[436] The Princeton Principles on Universal

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[429] UN member states are divided into five regional groups, including WEOG. *Groups of Member States*, UNITED NATIONS, https://www.un.org/en/model-united-nations/groups-member-states (last visited Nov. 13, 2020). That group is made up of 28 member states plus the United States. *Id.* The United States is not "an official member of any group" but is considered "a member of WEOG for electoral purposes." *Id.*

[430] *See "Dollar Diplomacy": Taiwan Condemns China After Solomons Switch*, ALJAZEERA (Sept. 17, 2019), https://www.aljazeera.com/news/2019/9/17/dollar-diplomacy-taiwan-condemns-china-after-solomons-switch.

[431] Tamara Qiblawi, *Muslim Nations Are Defending China as It Cracks Down on Muslims, Shattering Any Myths of Islamic Solidarity*, CNN (July 17, 2019, 4:21 AM), https://www.cnn.com/2019/07/17/asia/uyghurs-muslim-countries-china-intl/index.html.

[432] *See* Putz, *supra* note 426. Putz notes that several countries that supported China in a 2019 letter to the UN did not sign a 2020 statement that supported the Chinese position on Xinjiang. *Id.* Putz also notes that some of the countries that did not "renew their support for China's Xinjiang policies are either Muslim-majority states or have sizeable Muslim minority populations." *Id.*

[433] *See id.*

[434] *See id.*

[435] *Universal Jurisdiction*, INT'L JUST. RES. CTR., https://ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/#:~:text=The%20term%20%E2%80%9Cuniversal%20jurisdiction%E2%80%9D%20refers,community%20or%20international%20order%20itself%2C (last visited Nov. 13, 2020) [hereinafter *Universal Jurisdiction*, INT'L JUST. RES. CTR.].

[436] *Id.*

Jurisdiction, while not dispositive, also provide a useful starting point for a definition.[437] Principle 1(1) defines universal jurisdiction as "criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction."[438] In terms of the crimes covered by universal jurisdiction, the Princeton Principles list seven: piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide, and torture.[439] These crimes should not be taken as an exhaustive list of *jus cogens* violations.[440]

Part III(C)(1) of this paper sets out the difficulties of exercising universal jurisdiction against prominent Chinese officials like President Xi Jinping and Secretary Chen Quanguo and shows that suits against low-ranking Chinese officials over the Xinjiang atrocities are more likely to bear fruit in the short-term, based on past universal jurisdiction cases.[441] Part III(C)(2) through III(C)(5) will then provide in-depth case studies of how Canada, the United States, the Netherlands, and Germany practice universal jurisdiction, with the intention of providing a roadmap for lawyers in those countries who want to hold Chinese officials to account.[442] All four countries are home to significant numbers of the Uyghur diaspora and have historically proven open to the exercise of universal jurisdiction.[443]

In past years, constraints have emerged to govern the practice of universal jurisdiction.[444] Notably, universal jurisdiction is "no longer regarded as a primary source of jurisdiction, but one that should only be invoked when the territorial state is unwilling or unable to prosecute."[445] At first glance, it would seem that the heyday of universal jurisdiction has already passed.[446] After all, the historic cases of Adolf Eichmann and

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[437] *See* PRINCETON PROJECT ON UNIVERSAL JURISDICTION, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION (2001).

[438] *Id.* at 28.

[439] *Id.* at 29.

[440] The Princeton Principles note that "serious crimes under international law *include*: (1) piracy; (2) slavery; (3) war crimes; (4) crimes against peace; (5) crimes against humanity; (6) genocide; and (7) torture." *Id.* (emphasis added). The use of "include" indicates that the list is not meant to be exhaustive. *See id.*

[441] *See* discussion *infra* at Section III.C.1.

[442] *See* discussion *infra* at Section III.C.2–III.C.5.

[443] *See* discussion *infra id.*

[444] *See* Anthony J. Colangelo, *The Legal Limits of Universal Jurisdiction*, 47 VA. J. INT'L L. 149, 183 (2006).

[445] DUBLER & KALYK, *supra* note 192, at 986.

[446] *See The End of Universal Jurisdiction?*, CTR. JUST. ACCOUNTABILITY,

Augusto Pinochet are now well behind us.[447] In addition, the two countries that historically exercised the most extreme form of universal jurisdiction—Spain[448] and Belgium[449]—have in recent years restricted the reach of their universal jurisdiction laws.[450] In 2009, for example, Spain enacted an amendment that limited universal jurisdiction to cases in which "(i) the alleged perpetrators are present in Spain, (ii) the victims are of Spanish nationality, or (iii) there is some relevant link to Spanish interests."[451] Similarly, Belgium, under U.S. pressure, limited the scope of universal jurisdiction to cases in which "either victims or perpetrators have Belgian citizenship or long-term residence."[452]

Máximo Langer and Mackenzie Eason, however, have argued that "the use of universal jurisdiction has not been declining over recent decades

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https://cja.org/the-end-of-universal-jurisdiction/ (last visited Nov. 13, 2020).

[447] *See The Pinochet Precedent*, HUM. RTS. WATCH, https://www.hrw.org/legacy/campaigns/chile98/precedent.htm (last visited Nov. 13, 2020). "In 1961, Israel tried and convicted Adolf Eichmann for crimes against humanity committed in Europe during World War II, based in part on the principle of universal jurisdiction." *Id.* Decades later, General Augusto Pinochet, a former dictator in Chile, was arrested by British authorities. *Id.* A British magistrate "determined that Pinochet could be extradited to Spain on charges of torture and conspiracy to commit torture," but Pinochet was later released and allowed to return to Chile after "medical tests were said to reveal that Pinochet no longer had the mental capacity to stand trial." *Id.*

[448] *See Universal Jurisdiction in Europe: The State of the Art*, HUM. RTS. WATCH 86 (2006), https://www.hrw.org/reports/2006/ij0606/ij0606webwcover.pdf. Human Rights Watch explains that before 2009, Spain had fairly wide discretion under its universal jurisdiction law. *Id.* at 86. Spanish Courts had "universal jurisdiction over genocide and any offense that Spain [was] obliged to prosecute under international law." *Id*. Spain's National Court could proceed with a case even "in the absence of a 'national connection' with Spain." *Id.* at 88.

[449] *See Rights Groups Support Belgium's Universal Jurisdiction Law*, HUM. RTS. WATCH (Nov. 25, 2001, 7:00 PM), https://www.hrw.org/news/2001/11/25/rights-groups-support-belgiums-universal-jurisdiction-law. Human Rights Watch notes that Belgium's 1993 universal jurisdiction law, which is no longer in force, gave Belgian courts the "authority to prosecute individuals accused of genocide, crimes against humanity and war crimes regardless of the crimes' connection to Belgium or the accused's presence on Belgian soil." *Id.*

[450] *Spanish Congress Enacts Bill Restricting Spain's Universal Jurisdiction Law*, CTR. JUST. ACCOUNTABILITY, https://cja.org/spanish-congress-enacts-bill-restricting-spains-universal-jurisdiction-law/ (last visited Sept. 12, 2020); Christiane Wilke, *A Particular Universality: Universal Jurisdiction for Crimes Against Humanity in Domestic Courts*, 12 CONSTELLATIONS 83, 98 (2005).

[451] *Spanish Congress Enacts Bill Restricting Spain's Universal Jurisdiction Law*, *supra* note 450.

[452] Wilke, *supra* note 450.

but … has in fact been persistently, if quietly expanding over that time."[453] Langer and Eason quantitatively analyze the exercise of universal jurisdiction and conclude that "most defendants had become citizens or residents of the prosecuting states prior to the initiation of proceedings against them."[454] In recent decades, the international community and certain regional blocs have also developed hybrid tribunals to bring *jus cogens* violators to justice even if the defendant has not become a citizen or resident of the prosecuting state.[455] Hybrid tribunals are "courts of mixed composition and jurisdiction, encompassing both national and international aspects, usually operating within the jurisdiction where the crimes occurred."[456] A recent example of a universal-jurisdiction trial before a hybrid court occurred when the Extraordinary African Chambers[457] sentenced former Chadian President Hissène Habré to life imprisonment for offences that include torture and crimes against humanity.[458] As Human Rights Watch notes, the case was the first universal jurisdiction case to

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[453] Máximo Langer & Mackenzie Eason, *The Quiet Expansion of Universal Jurisdiction*, 30 EUROPEAN J. INT'L L. 779, 781 (2019).

[454] *Id.* at 783.

[455] *See International and Hybrid Criminal Courts and Tribunals*, UNITED NATIONS, https://www.un.org/ruleoflaw/thematic-areas/international-law-courts-tribunals/international-hybrid-criminal-courts-tribunals/ (last visited Nov. 13, 2020) (noting that through UN tribunals and tribunals assisted by the United Nations, the "United Nations has made substantial strides in developing a global accountability framework for serious international crimes").

[456] *International Tribunals*, GRADUATE INST. GENEVA, https://libguides.graduateinstitute.ch/icl/hybrid#:~:text=Introduction,jurisdiction%20where%20the%20crimes%20occurred (last visited Nov. 13, 2020).

[457] The Extraordinary African Chambers was a chamber "established within the Senegalese courts by agreement between the African Union and the government of Senegal." Jeanne Elone, *The Extraordinary African Chambers: A New Approach to Victim Participation in International Criminal Tribunals?*, INT'L JUST. MONITOR (Oct. 28, 2015), https://www.ijmonitor.org/2015/10/the-extraordinary-african-chambers-a-new-approach-to-victim-participation-in-international-criminal-tribunals/. It was charged with judging those "most responsible for the crimes committed in Chad between 1982 and 1990." *Id.*

[458] See *Senegal/Chad: Court Upholds Habré Conviction*, HUM. RTS. WATCH (Apr. 27, 2017), https://www.hrw.org/news/2017/04/27/senegal/chad-court-upholds-habre-conviction; *see also Q&A: The Case of Hissène Habré Before the Extraordinary African Chambers in Senegal*, HUM. RTS. WATCH (May 3, 2016, 6:00 AM), https://www.hrw.org/news/2016/05/03/qa-case-hissene-habre-extraordinary-african-chambers-senegal, for a discussion of how Habré's government "periodically targeted civilian populations" in the south of Chad as well as "various ethnic groups such as Chadian Arabs, the Hadjerai…and the Zaghawa."

proceed to trial in Africa.[459] In sum, universal jurisdiction may prove another tool through which to exert pressure on Chinese authorities.[460]

1. Lessons from Past Universal Jurisdiction Cases

A survey of past universal jurisdiction cases establishes the drawbacks that would bedevil a modern-day suit against prominent Chinese officials, such as President Xi Jinping or Xinjiang Party Secretary Chen Quanguo.[461] An immediate point of comparison is the wave of suits that public interest groups and lawyers filed against former Chinese President Jiang Zemin and other Chinese officials for human rights abuses.[462] At best, litigation resulted in unfulfilled arrest warrants.[463] At worst, litigation forced prosecuting countries to amend and weaken their universal jurisdiction statutes.[464]

In the United States, the plaintiffs never got past the issue of head-of-state immunity.[465] In *Plaintiffs A, B, C, D, E, F v. Zemin* (2003), practitioners of Falun Gong sued President Jiang Zemin—who was a former head of state at that point—as well as the Falun Gong Control Office, an agency Jiang established "for the purpose of suppressing the Falun Gong movement."[466] The Executive Branch of the United States argued that Jiang was "immune from suit based on his status as China's former head of state" and the U.S. District Judge agreed, recognizing Jiang's head-of-state immunity from the exercise of universal jurisdiction by dismissing the

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[459] *Q&A: The Case of Hissène Habré Before the Extraordinary African Chambers in Senegal*, *supra* note 458.

[460] *See Universal Jurisdiction*, INT'L JUST. RES. CTR., *supra* note 435.

[461] *See, e.g.*, Wei Ye v. Jiang Zemin, 383 F.3d 620 (7th Cir. 2004); Plaintiffs A, B, C, D, E, F v. Jiang Zemin, 282 F. Supp. 2d 875 (N.D. Ill., Sept 12, 2003).

[462] *See* John Pomfret, *Fight Over Banned Chinese Sect Moves to U.S.*, WASH. POST (Mar. 12, 2002), https://www.washingtonpost.com/archive/politics/2002/03/12/fight-over-banned-chinese-sect-moves-to-us/3684fb2f-c1be-4684-b714-39c0119b6415/. China banned the Falun Gong group in 1999; the group engages in "Buddhist-like practice that combines exercise and meditation with a cosmology involving aliens and flying humans." *Id.* Jiang Zemin, who was president of China from 1993-2003, "particularly [detested] the organization, according to Chinese sources." *Id*.

[463] Luis Andres Henao, *Argentine Judge Asks China Arrests over Falun Gong*, REUTERS (Dec. 22, 2009, 2:19 PM), https://www.hrw.org/news/2016/05/03/qa-case-hissene-habre-extraordinary-african-chambers-senegal.

[464] *Spain Bows to Chinese Pressure and Backs Law to Curb Pioneering Judges*, EURONEWS (Feb. 12, 2014), https://www.euronews.com/2014/02/12/spain-bows-to-chinese-pressure-and-backs-law-to-curb-pioneering-judges [hereinafter *Spain Bows to Chinese Pressure*].

[465] *See Jiang Zemin*, 282 F. Supp. 2d at 875.

[466] *Id.* at 877.

claims against him.[467] On appeal, the Seventh Circuit upheld the district court's decision.[468] The Seventh Circuit held that "there are exceptions to the immunity a head of state . . . granted in this country's courts," but noted that the court was "required to defer to the decision of the Executive Branch."[469] The *Zemin* cases prove that in at least some countries, plaintiffs will face significant jurisdictional hurdles in even getting the court to address the merits of the case.[470]

In the courts of other countries, plaintiffs did clear the jurisdictional hurdle and President Jiang was found guilty.[471] For example, in Argentina a federal judge asked Interpol to issue an arrest warrant against President Jiang and Politburo Standing Committee member Luo Gan "over crimes against humanity committed in China" against Falun Gong members in 2009.[472] The Chinese Foreign Ministry responded by warning the Argentine government to "properly handle" the situation.[473] Spanish Judge Ismael Moreno similarly issued arrest warrants in 2014 for former President Jiang and four other prominent Communist Party officials as part of an "investigation into alleged human rights abuses in Tibet."[474] China reacted furiously to Moreno's warrants.[475] For example, the state-owned *Global Times* newspaper railed that, "The judge might have never been to Tibet because he is totally ignorant of the enormous social progress made in recent decades. He still views China with an old, biased and arrogant attitude by attempting to interfere into Beijing's internal affairs."[476]

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[467] *Id.* at 878.

[468] *See* Wei Ye v. Jiang Zemin, 383 F.3d 620, 630 (7th Cir. 2004).

[469] *Id.* at 629–30.

[470] *See id.* at 630; *Jiang Zemin*, 282 F. Supp. 2d at 889.

[471] *See, e.g.*, *China Criticizes Argentina for Arrest Request of Jiang Zemin, Falun Gong Support*, VOICE AM. NEWS (Dec. 23, 2009, 11:55 PM), https://www.voanews.com/archive/china-criticizes-argentina-arrest-request-jiang-zemin-falun-gong-support [hereinafter *China Criticizes Argentina*]; Matt Moffett, *Spanish Court Issues Arrest Warrants for Ex-Chinese Leaders*, WALL STREET J. (Nov. 20, 2013, 5:55 AM), https://www.wsj.com/articles/spanish-court-issues-arrest-warrants-for-exchinese-leaders-1384900432.

[472] Henao, *supra* note 463.

[473] *China Criticizes Argentina*, *supra* note 471.

[474] Moffett, *supra* note 471.

[475] *See* Inmaculada Sanz, *China Bristling, Spain Seeks to Curb Its Judges' International Rights Clout*, REUTERS (Feb. 11, 2014, 2:07 PM), https://fr.reuters.com/article/uk-spain-china-idUKBREA1A26220140211.

[476] *Ignorance Leads to Spanish Judge's Ruling*, GLOB. TIMES (Feb. 12, 2014, 1:08 AM), http://www.globaltimes.cn/content/841958.shtml.

This time, Chinese anger was not just limited to rhetoric.[477] Notably, Chinese diplomats pressured the "Spanish government to stop the prosecution."[478] In 2014, China already held a "healthy share of Spanish debt" and was a "lucrative market for Spain's food and wine industries."[479] When push came to shove, the Spanish government proved unwilling to enforce Judge Moreno's warrant.[480] As a result, Spain's Parliament approved a law limiting the reach of future universal jurisdiction to "wrongdoers who reside in Spain."[481]

It should be noted that China is not the only country that has rejected the exercise of universal jurisdiction over its nationals.[482] After the New York-based Centre for Constitutional Rights filed a criminal complaint in Germany, requesting that the General Federal Prosecutor launch a criminal prosecution against American officials for human rights abuses committed in Iraq's Abu Ghraib prison, the U.S. threatened Germany with boycotts.[483] U.S. Secretary of Defense Donald Rumsfeld notably threatened that "he would not take part in a planned security conference in Germany."[484] In 2005, the German Federal Prosecutor "announced his decision not to launch an investigation."[485] Similarly, in the early years of the millennium, Belgium's relatively liberal universal jurisdiction law allowed parties to file a wave of suits against officials such as President George W. Bush and British Prime Minister Tony Blair.[486] Belgium ultimately amended its

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[477] *See* Jim Yardley, *Spain Seeks to Curb Law Allowing Judges to Pursue Cases Globally*, N.Y. TIMES (Feb. 10, 2014), https://www.nytimes.com/2014/02/11/world/europe/spanish-legislators-seek-new-limits-on-universal-jurisdiction-law.html.

[478] *Id.*

[479] *Id.*

[480] *Id.*

[481] *Spain Bows to Chinese Pressure*, *supra* note 464.

[482] *See* DUBLER & KALYK, *supra* note 192, at 983; Stephen Castle, *Belgium to Lift Threat of Bush War Crimes Trial*, INDEPENDENT (June 24, 2003, 12:00 AM), https://www.independent.co.uk/news/world/politics/belgium-to-lift-threat-of-bush-war-crimes-trial-110129.html; *Rumsfeld Sued for Alleged War Crimes*, DEUTSCHE WELLE (Nov. 30, 2004), https://www.dw.com/en/rumsfeld-sued-for-alleged-war-crimes/a-1413907.html.

[483] DUBLER & KALYK, *supra* note 192, at 983; Castle, *supra* note 482; *Rumsfeld Sued for Alleged War Crimes*, *supra* note 482.

[484] DUBLER & KALYK, *supra* note 192, at 983; Castle, *supra* note 482; *Rumsfeld Sued for Alleged War Crimes*, *supra* note 482.

[485] DUBLER & KALYK, *supra* note 192, at 983; Castle, *supra* note 482; *Rumsfeld Sued for Alleged War Crimes*, *supra* note 482.

[486] Castle, *supra* note 482.

universal jurisdiction law after Washington threatened to "boycott meetings at NATO's headquarters in Brussels."[487]

Taken together, these suits demonstrate the difficulty and futility of filing suit against prominent officials from powerful foreign countries.[488] Scholars argue that where trials for crimes against humanity "have taken place in domestic courts . . . they have largely been prosecuted by (or with the consent of) the territorial state."[489] In the case of suits against President Xi and Party Secretary Chen, human rights advocates would likely not have the consent of the territorial state—China.[490] Moreover, the Argentinian and Spanish cases prove that, in the few cases when countries find high-ranking Chinese officials guilty, the Chinese government will retaliate and make enforcement of a ruling extremely difficult.[491] In the Spanish case, Chinese retaliation even led to a narrowing of Spain's universal jurisdiction.[492] China has grown in strength since the early 2000s and is likely to harass any country willing to subject high-ranking officials, such as President Xi, to the ignominy of an arrest warrant.[493] Few countries today have the economic wherewithal to withstand unilateral Chinese retaliation.[494] Therefore, human rights lawyers and advocates have little to gain and much to lose by pushing national courts to find high-ranking Chinese officials guilty for the commission of crimes against humanity in Xinjiang.[495]

The exercise of universal jurisdiction against lower-ranking Chinese officials—camp guards and minor provincial functionaries—is more likely to bear fruit.[496] In the past, courts have used universal jurisdiction to

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[487] *Id.*

[488] *See, e.g.*, *id.*; *China Criticizes Argentina*, *supra* note 471; Moffett, *supra* note 471.

[489] DUBLER & KALYK, *supra* note 192, at 981.

[490] *See* Chris Buckley & Austin Ramzy, *Facing Criticism Over Muslim Camps, China Says: What's the Problem?* N.Y. TIMES (Dec. 9, 2019), https://www.nytimes.com/2019/12/09/world/asia/china-camps-muslims.html.

[491] *See China Criticizes Argentina*, *supra* note 471; *Spain Bows to Chinese Pressure*, *supra* note 464.

[492] *Spain Bows to Chinese Pressure*, *supra* note 464.

[493] *See China Criticizes Argentina*, *supra* note 471; *Spain Bows to Chinese Pressure*, *supra* note 464.

[494] *See* Stephen Johnson, *How China Uses Its Trading Clout to Bully Nations Like Australia—And Why This Is Set to Get Worse*, DAILY MAIL (Sept. 2, 2020, 3:12 AM), https://www.dailymail.co.uk/news/article-8687489/How-China-uses-trading-clout-bully-nations-like-Australia-set-worse.html.

[495] *See, e.g.*, *id.*; *China Criticizes Argentina*, *supra* note 471; Moffett, *supra* note 471.

[496] *See, e.g.*, Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980); Warfaa v. Ali, 811 F.3d 653 (4th Cir. 2016).

prosecute low-level officials.[497] A good example of this is the iconic American case, *Filartiga v. Pena-Irala* (1980), which, Harold Koh notes, "inaugurated the era of transnational public law litigation in which we now live."[498] In that case, a Paraguayan police officer, Pena-Irala, tortured Joelito Filartiga to death.[499] Joelito's sister sought asylum in the United States and sued Pena-Irala when she discovered that Pena-Irala was living there.[500] The Second Circuit held that the plaintiffs could proceed with their claims under the Alien Tort Statute ("ATS") and concluded that "for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind."[501] In principle then, human rights advocates have the option of pursuing lower-level Chinese torturers who have worked in Xinjiang' concentration camps.[502] At least in the American context, suit against torturers remains a possibility.[503] Notably, *Filartiga* involved a foreign tort, foreign plaintiff, and foreign defendant and might thus serve as a useful template case for Uyghur activists.[504] In 2016, the Fourth Circuit affirmed that "*Filartiga* is still good law and that its reasoning is instructive."[505] While the exercise of universal jurisdiction against low-ranking officials may not stop the Chinese government from operating the camp apparatus in Xinjiang, such prosecution might still deliver reprieve and a sense of justice for Uyghur victims of China's human rights abuses.[506]

As the above cases demonstrate, however, universal jurisdiction is governed and structured quite differently around the world.[507] Suits considered commonplace or reasonable in certain regions of the world like

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[497] *See, e.g.*, *Filártiga*, 630 F.2d at 890; *Warfaa*, 811 F.3d at 665.

[498] Harold Hongju Koh, *Transnational Public Law Litigation,* 100 YALE L.J. 2347, 2366 (1991).

[499] *Filártiga*, 630 F.2d at 878.

[500] *Id.* at 879.

[501] *Id.* at 890. The Alien Statute is a federal law first adopted in 1789 that "gives the federal courts jurisdiction to hear lawsuits filed by non-U.S. citizens for torts committed in violation of international law." *The Alien Tort Statute*, CTR. JUST. ACCOUNTABILITY, https://cja.org/what-we-do/litigation/legal-strategy/the-alien-tort-statute/#:~:text=An%20ancient%20law%2C%20an%20avant,in%20violation%20of%20international%20law (last visited Nov. 13, 2020).

[502] *See Filártiga*, 630 F.2d at 890; *Warfaa*, 811 F.3d at 665.

[503] *See Filártiga*, 630 F.2d at 890; *Warfaa*, 811 F.3d at 665.

[504] *See Filártiga*, 630 F.2d at 878.

[505] *Warfaa*, 811 F.3d at 663.

[506] *See* Langer & Eason, *supra* note 453, at 782.

[507] *See, e.g.*, *Filártiga*, 630 F.2d 876; *Universal Jurisdiction in Europe: The State of the Art*, *supra* note 448; *Warfaa*, 811 F.3d 653.

Western Europe may not necessarily be an option for lawyers in the United States or Canada.[508] The next sections thus seek to establish the basics of universal jurisdiction in four countries—Canada, the United States, the Netherlands, and Germany.

2. Universal Jurisdiction in Canada

Canada domesticated the Rome Statute into national law by using its text as the basis for the Crimes Against Humanity and War Crimes Act ("CAHWCA"), which it enacted in June 2000.[509] As the Government of Canada notes, Canada implemented CAHWCA so that it could "fully cooperate with ICC proceedings."[510] One scholar argues, however, that the Rome Statute and CAHWCA differ somewhat with regard to various criminal law principles.[511] For example, aiding and abetting "is likely to play a less important role before the ICC than before Canadian courts, because of the wide scope given to principal liability in the Rome Statute."[512] Broadly speaking though, CAHWCA lines up quite closely with the Rome Statute.[513] CAHWCA's definition of crimes against humanity almost matches the Rome Statute's definition, though the former adds that an alleged crime must constitute a "crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations. . . ."[514]

CAHWCA places restrictions on the exercise of universal jurisdiction.[515] Section 6(1) of the Act broadly stipulates that, "Every person who . . . commits outside Canada (a) genocide, (b) a crime against humanity, or (c) a war crime, is guilty of an indictable offense and may be prosecuted

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[508] *See Universal Jurisdiction in Europe: The State of the Art*, *supra* note 448.

[509] Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24 (Can.).

[510] *Canada and the International Criminal Court*, GOV'T CANADA (Feb. 26, 2019), https://www.international.gc.ca/world-monde/international_relations-relations_internationales/icc-cpi/index.aspx?lang=eng.

[511] Fannie Lafontaine, *Parties to Offences Under the Canadian Crimes Against Humanity and War Crimes Act: An Analysis of Principal Liability and Complicity*, 50 LES CAHIERS DE DROIT 967, 973 (2009).

[512] *Id.* at 983.

[513] *Universal Jurisdiction Law and Practice in Canada*, OPEN SOC'Y JUST. INITIATIVE 4 (2020), https://trialinternational.org/wp-content/uploads/2020/05/Universal-Jurisdiction-Law-and-Practice-in-Canada.pdf. As one briefing paper points out, it is "assumed that the Elements of Crimes of the Rome Statute…would be a persuasive tool for interpreting the corresponding crimes in the CAHWCA." *Id.*

[514] Crimes Against Humanity and War Crimes Act, sec. 4(3) (Can.); *see* Rome Statute, art. 7.

[515] *See Universal Jurisdiction Law and Practice in Canada*, *supra* note 513, at 19.

for that offence in accordance with section 8."[516] Section 9(3), however, places a crucial limit on the exercise of universal jurisdiction, stipulating that, "No proceedings . . . may be commenced without the personal consent in writing of the Attorney General or Deputy Attorney General of Canada, and those proceedings may be conducted only by the Attorney General of Canada or counsel acting on their behalf."[517]

Thus far, there have been two cases under CAHWCA.[518] In 2009, Québec Superior Court Judge André Denis found Désiré Munyaneza guilty of "war crimes, crimes against humanity and genocide for leading a gang of Hutu murderers and rapists in the 1994 Rwandan massacre."[519] The Québec Court of Appeal confirmed the lower court's conviction and sentence.[520] The second case under the Act, which centered on the acts of Rwandan refugee Jacques Mungwarere, resulted in an acquittal.[521]

Given China's power, the Xinjiang situation differs greatly from the two Rwandan-connected cases that have been heard under CAHWCA.[522] Under the limitation in Section 9(3), a Canadian Attorney General might prove unwilling to allow suit against a high-ranking Communist official.[523] Given the political repercussions that suit could engender, the Attorney

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[516] Crimes Against Humanity and War Crimes Act, sec. 6(1).

[517] *Id.* sec. 9(3).

[518] Les Perreaux, *Court Finds Rwandan Guilty of War Crimes*, GLOBE & MAIL (May 23, 2009), https://www.theglobeandmail.com/news/national/court-finds-rwandan-guilty-of-war-crimes/article1204092/; Fannie Lafontaine, *Universal Jurisdiction in Canada: Quebec Court of Appeal Judgment in Munyaneza Clarifies the Law and Paves the Way for Future (Unlikely?) Cases*, U. LAVAL CDPIH BLOG (May 19, 2014), https://www.quidjustitiae.ca/fr/blogue/universal-jurisdiction-canada-quebec-court-appeal-judgement-munyaneza-clarifies-law-and-paves.

[519] Perreaux, *supra* note 518. Munyaneza was one of the leaders of the Interahamwe Hutu paramilitary organization and "was at the forefront of the genocidal movement" during the 1994 Rwandan Genocide. Munyaneza, 2009 Q.C.C.S. 2201 at para. 2057 (Can.).

[520] Lafontaine, *supra* note 518.

[521] Canadian Press, *Rwanda Genocide Refugee Acquitted at Canadian War Crimes Trial*, STAR (July 5, 2013), https://www.thestar.com/news/canada/2013/07/05/canadian_court_acquits_rwandan_refugee_of_genocide.html.

[522] *Id.*; Lafontaine, *supra* note 518.

[523] Crimes Against Humanity and War Crimes Act, sec. 9(3); *see* John Ivison, *No Amount of Smooth Diplomatic Phrases can Mask China's Bullying*, NAT'L POST (Oct. 15, 2020), https://nationalpost.com/opinion/john-ivison-no-amount-of-smooth-diplomatic-phrases-can-mask-chinas-bullying (describing the poor state of Sino-Canadian relations and noting that the Chinese government has blithely engaged in "intimidation, blackmail and abduction").

General might decide that discretion is the better part of valor.[524] The Attorney General would likely be more amenable, however, to allowing suit against a low-level Chinese camp functionary or provincial bureaucrat.[525]

3. Universal Jurisdiction in the United States

The United States has historically taken an open, if tempered, approach to universal jurisdiction.[526] The incorporation of international law into domestic U.S. law has long been acknowledged; in the *Paquete Habana* case, the court held that "international law is part of our law."[527] The relevant legislative act governing universal jurisdiction is the Alien Tort Statute.[528] As the Center for Justice and Accountability ("CJA") notes, "in recent years, the Alien Tort Statute . . . has been used in U.S. courts as a form of Universal Jurisdiction for cases involving serious human rights violations committed outside the U.S."[529]

Two Supreme Court cases are critical to understanding the contours of the ATS.[530] In *Sosa v. Alvarez-Machain* (2004), the Supreme Court held that, "Courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms we have recognized."[531] The CJA argues that *Sosa* upheld "the connection between the ATS and universal jurisdiction."[532] Then, in *Kiobel v. Royal Dutch Petroleum* (2013), the Court narrowed the scope of the ATS by effectively holding that there is no subject matter jurisdiction in an ATS case unless the matter under dispute touches and concerns the United States.[533] As this paper has already established,

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[524] *See* Crimes Against Humanity and War Crimes Act, sec. 9(3); Ivison, *supra* note 523.

[525] *See* Crimes Against Humanity and War Crimes Act, sec. 9(3); Ivison, *supra* note 523.

[526] *See Universal Jurisdiction*, CTR. JUST. ACCOUNTABILITY (Oct. 1, 2018), https://cja.org/what-we-do/litigation/legal-strategy/universal-jurisdiction/ [hereinafter *Universal Jurisdiction*, CTR. JUST. ACCOUNTABILITY].

[527] Paquete Habana, 175 U.S. 677, 700 (1900).

[528] Alien Tort Statute, 28 U.S.C. § 1350 (1789).

[529] *Universal Jurisdiction*, CTR. JUST. ACCOUNTABILITY, *supra* note 526. The Center for Justice and Accountability is a non-profit human rights organization that "identifies and prosecutes the world's worst human rights criminals." *Who We Are*, CTR. JUST. ACCOUNTABILITY, https://cja.org/who-we-are/ (last visited Nov. 13, 2020).

[530] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004); Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013).

[531] *Sosa*, 542 U.S. at 725.

[532] *Universal Jurisdiction*, CTR. JUST. ACCOUNTABILITY, *supra* note 526.

[533] *See Kiobel*, 569 U.S. at 124–25.

however, *Filartiga*—a case in which all of the acts involved foreign nationals—remains good law, and neither *Sosa* nor *Kiobel* "explicitly overrules Filartiga or its progeny."[534] Theoretically then, Uyghur refugees in the U.S. could file suit against Chinese torturers.[535]

Another critical factor limiting the exercise of universal jurisdiction in the United States is the doctrine of foreign sovereign immunity.[536] Foreign sovereign immunity is governed by the Supreme Court's holding in *Samantar v. Yousuf* (2010): "The immunity of foreign government officials sued in their personal capacity in U.S. courts" is controlled by "immunity determinations made by the Executive Branch."[537] In other words, a suggestion of immunity by the U.S. State Department for a Chinese official would put an end to the matter.[538] However, if the U.S. State Department does not speak, the district court must "consider whether a foreign sovereign or foreign official defendant is entitled to immunity under the 'established policy of the [State Department].'"[539] Between the restricting influence of *Kiobel* and of foreign sovereign immunity, it seems unlikely that the United States will prove an ideal forum for the exercise of universal jurisdiction against Chinese officials implicated in the Xinjiang crisis.[540]

4. Universal Jurisdiction in the Netherlands

The Dutch practice of universal jurisdiction somewhat resembles the Canadian regime in that the "international provisions relating to international crimes and international humanitarian law have been domesticated" through legislation.[541] In this case, the relevant legislative act is the 2003 International Crimes Act ("ICA").[542] Article 2(1) of the ICA establishes that Dutch criminal law shall apply to:

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[534] Warfaa v. Ali, 811 F.3d 653, 663 (4th Cir. 2016).

[535] *See id.* at 665; Filártiga v. Peña-Irala, 630 F.2d 876, 890 (2d Cir. 1980).

[536] *See* Harold Hongju Koh, *Foreign Official Immunity After Samantar: A United States Government Perspective*, 44 VAND. J. TRANSNAT'L L. 1141, 1141–42 (2011).

[537] *Id.* at 1142.

[538] *See id.* at 1143 (noting that "if the State Department offered a suggestion of immunity, the court would allow that immunity and dismiss the case.").

[539] *Id.* at 1161.

[540] *Id.* at 1161; Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013).

[541] *Universal Jurisdiction Law and Practice in the Netherlands*, OPEN SOC'Y JUST. INITIATIVE 4 (2019), https://www.justiceinitiative.org/uploads/3574da67-0a4a-4cd1-855a-15317737162c/universal-jurisdiction-netherlands-20190606.pdf.

[542] *Id*. The 2003 International Crimes Act provides for "universal jurisdiction over specific offences allowing national authorities to investigate and prosecute such offences under certain conditions when they were committed abroad by foreign nationals…." *Id.* The Dutch statute does not perfectly match the language of the Rome Statute. *Id.* at 5–6.

> (a) anyone who commits any of the crimes defined in this Act outside the Netherlands, if the suspect is present in the Netherlands; (b) anyone who commits any of the crimes defined in this Act outside the Netherlands, if the crime is committed against a Dutch national; (c) a Dutch national who commits any of the crimes defined in this Act outside the Netherlands.[543]

There are two notable limits on the exercise of universal jurisdiction in the Netherlands.[544] First, the Dutch Public Prosecution Service ("DPPS") has the "monopoly to prosecute . . . ICA crimes."[545] Second, the Dutch Minister of Justice and Security exercises a great deal of authority under the ICA scheme.[546] The Minister has the authority to "direct the DPPS to prosecute a crime" and may also "decide to give an order not to prosecute."[547]

A notable and recent case under the ICA, with ramifications for the Xinjiang situation, involved Eshetu Alemu, who was convicted for "war crimes committed . . . in Ethiopia."[548] Eshetu Alemu served as an aide to Ethiopia's ruler—Mengistu Haile Mariam—and as a "senior representative" of the Ethiopian government; thus, Alemu was no minor functionary.[549] His prosecution indicates that universal jurisdiction in the Netherlands can be successfully exercised against mid-to-high ranking officials in addition to minor officials.[550] Dutch authorities built their case by tracking leads into the "Diaspora community: first in the Netherlands . . . and later in the USA and Canada, where 20 Ethiopian refugees were questioned."[551] In the Xinjiang case, given the number of Uyghur refugees living in Europe and around the world, it is perfectly conceivable that Dutch prosecutors would

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[543] Wet Internationale Misdrijven, Stb. 2003, 270.

[544] *Universal Jurisdiction Law and Practice in the Netherlands*, *supra* note 541, at 12–14.

[545] *Id.* at 12.

[546] *Id.* at 13–14.

[547] *Id.*

[548] Thijs B. Bouwknegt, *Eshetu Alemu: 'The Black Sheep of the Dergue'—Ethiopian War Crimes and Universal Jurisdiction in the Netherlands*, 12 INT'L J. TRANSNAT'L JUST. 549, 553 (2018).

[549] *See Ethiopia 'Red Terror' Aide Alemu Jailed for War Crimes*, BBC NEWS (Dec. 15, 2017), https://www.bbc.com/news/world-africa-42370895; Felix Horne, *A Rare Victory for Ethiopia's Victims*, HUM. RTS. WATCH (Dec. 21, 2017, 2:42 PM), https://www.hrw.org/news/2017/12/21/rare-victory-ethiopias-victims.

[550] *See Ethiopia 'Red Terror' Aide Alemu Jailed for War Crimes*, *supra* note 549; Horne, *supra* note 549.

[551] Bouwknegt, *supra* note 548.

be able to put together a convincing case relying primarily on similar witness interviews.[552] The biggest barrier to any suit remains not the collection of evidence but the discretion of the Minister of Justice and Security.[553]

Additionally, under Article 3:305a of the Dutch Civil Code, anyone can "establish a foundation, mandated to protect a public interest, and then . . . institute legal proceedings, aimed at protecting that public interest, against the State of the Netherlands, or against private persons, such as a multinational based in the Netherlands."[554] In past cases, foundations have used Article 3:305a to hold the Netherlands responsible for violations of the European Convention on Human Rights ("ECHR").[555] For example, the Supreme Court of the Netherlands held in *The State of the Netherlands v. Stichting Urgenda* (2019), that the "Netherlands Government must ensure that . . . greenhouse gas emission levels from the Netherlands are at least a quarter below 1990 levels, otherwise the rights to life and wellbeing," guaranteed under the ECHR, would be breached.[556] Article 3:305a can also be used against "private persons" or multinational companies.[557] If a multinational firm was found to be implicated in Xinjiang's forced labor system, a foundation could thus file suit under the provision.[558] In sum, the Netherlands is likely to prove a promising forum for the exercise of universal jurisdiction against Chinese *jus cogens* violators.[559]

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[552] *See Uyghurs in the Netherlands Call on Dutch Gov to Defend Their Rights*, DUTCHNEWS (Aug. 15, 2019), https://www.dutchnews.nl/news/2019/08/uyghurs-in-the-netherlands-call-on-dutch-gov-to-defend-their-rights/.

[553] *See Universal Jurisdiction Law and Practice in the Netherlands*, *supra* note 541, at 12–14.

[554] Otto Spijkers, *Public Interest Litigation Before Domestic Courts in the Netherlands on the Basis of International Law: Article 3:305a Dutch Civil Code*, BLOG EUROPEAN J. INT'L L. (Mar. 6, 2020), https://www.ejiltalk.org/public-interest-litigation-before-domestic-courts-in-the-netherlands-on-the-basis-of-international-law-article-3305a-dutch-civil-code/.

[555] For a discussion of how organizations have used Article 3:305a, see *id.* For a brief description of the European Convention on Human Rights, see *What is the European Convention on Human Rights?*, AMNESTY INT'L, https://www.amnesty.org.uk/what-is-the-european-convention-on-human-rights, which explains that the ECHR is an "international human rights treaty between the 47 states that are members of the Council of Europe."

[556] HR 20 December 2019, NJ 2020, 41 m.nt. J. Spier (Staat der Nederlanden/Stichting Urgenda) ¶ 8.2.7 (Neth.); Spijkers, *supra* note 554.

[557] Spijkers, *supra* note 554.

[558] *Id.*

[559] *See id.*; Bouwknegt, *supra* note 548.

5. Universal Jurisdiction in Germany

The final example is Germany. As one writer has noted, "no European country has laws that are more expansive on universal jurisdiction than Germany."[560] Germany domesticated the Rome Statute through the Code of Crimes against International Law ("VStGB").[561] Perhaps the most notable feature of German universal jurisdiction is the principle of mandatory prosecution.[562] German prosecutors "generally have the obligation to investigate and prosecute all crimes under the VStGB to avoid impunity and to gather evidence that might be of use in a later trial in country or abroad."[563] The prosecutor can "deviate from the principle of mandatory prosecution in situations where there is no nexus to Germany."[564] Section 153f of the *Strafprozessordnung* sets out the conditions under which prosecutor "may choose to forgo investigation and prosecution."[565] Those conditions arise if:

> (1) no German national is suspected of having committed the offence, (2) the offence is not committed against a German national, (3) no suspect is or is expected to be staying in Germany, (4) the offence is being prosecuted by an international court of justice or by a state on whose territory the offence was committed, a citizen of which is either suspected of the offence or was injured by the offence.[566]

Notably, even if "none of the above factors are met, the prosecutor may still choose to investigate and prosecute."[567]

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[560] Beini Ye, *How Germany is Leading the Way for Accountability for Crimes in Syria*, INT'L JUST. MONITOR (Apr. 19, 2019), https://www.ijmonitor.org/2019/04/how-germany-is-leading-the-way-for-accountability-for-crimes-in-syria/.

[561] *See* Völkerstrafgesetzbuch [VStGB] [Code of Crimes Against International Law], June 26, 2002, BGBL (Ger.)*; see also Explaining the Code of Crimes Against International Law*, DEUTSCHE WELLE (Nov. 30, 2004), https://www.dw.com/en/explaining-the-code-of-crimes-against-international-law/a-1414097 (explaining that the Code of Crimes Against International Law, which has been in effect since July 2002, "is a unique piece of legislation that allows Germany to prosecute crimes against international law anywhere in the world").

[562] *Universal Jurisdiction Law and Practice in Germany*, OPEN SOC'Y JUST. INITIATIVE 17 (2019), https://www.justiceinitiative.org/uploads/cc4f8190-8afa-4513-9603-25ab7bc5bb46/universal-jurisdiction-law-and-practice-germany-20190417.pdf.

[563] *Id.*

[564] *Id.*

[565] *Id.* at 18.

[566] *Id.*

[567] *Id.*

Mandatory prosecution has led to the robust exercise of universal jurisdiction.[568] As of March 2018, for example, Germany had pursued cases against "at least three dozen state and non-state actors for atrocities in Syria."[569] In October 2019, Germany charged "two alleged former Syrian secret service officers with crimes against humanity."[570] With Russia and China unwilling to let the ICC hear the Syrian cases, Germany's exercise of universal jurisdiction means that at least some Syrian war criminals will face justice.[571] Applied to Xinjiang, the principle of mandatory prosecution would make it easier for rights advocates to proceed with a suit.[572] German prosecutors, as set out above, only have limited discretion to avoid mandatory prosecution.[573]

Thus, the exercise of universal jurisdiction is both a legally and politically feasible solution to the Xinjiang crisis, at least in certain jurisdictions such as the Netherlands and Germany.[574] Of course, universal jurisdiction is not a silver bullet. One core problem is that universal jurisdiction, while relying on international law principles, ultimately pits one country against another in a bilateral contest of strength.[575] Yet the option of universal jurisdiction is realistic in certain jurisdictions.[576] In particular, rights organizations in the Netherlands and Germany should push for the exercise of universal jurisdiction because such a solution is likely to make headlines and furnish gains in the short term.[577]

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[568] *See* Ye, *supra* note 560; Philip Oltermann & Emma Graham-Harrison, *Germany Charges Two Syrians with Crimes Against Humanity*, GUARDIAN (Oct. 29, 2019, 6:51 AM), https://www.theguardian.com/law/2019/oct/29/germany-charges-two-syrians-with-crimes-against-humanity.

[569] Ye, *supra* note 560.

[570] Oltermann & Graham-Harrison, *supra* note 568.

[571] Somini Sengupta, *China and Russia Block Referral of Syria to Court*, N.Y. TIMES (May 22, 2014), https://www.nytimes.com/2014/05/23/world/middleeast/syria-vote-in-security-council.html; *see also* Caroline Fehl, *The Partial Return of Universal Jurisdiction: Syrian Torturers on Trial in Germany*, GLOB. POL'Y (May 12, 2020), https://www.globalpolicyjournal.com/blog/12/05/2020/partial-return-universal-jurisdiction-syrian-torturers-trial-germany.

[572] *See Universal Jurisdiction Law and Practice in Germany*, *supra* note 562, at 18 (noting that it is the "legal duty of German prosecutors to investigate crimes according to the principle of mandatory prosecution" if other jurisdictions do not mount investigations).

[573] *See id.*

[574] *See* discussion *supra* at Section III.C.

[575] *See Universal Jurisdiction*, INT'L JUST. RES. CTR., *supra* note 435.

[576] *See* discussion *supra* at Sections III.C.4–III.C.5.

[577] *See* discussion *supra id.*

IV. A CALL TO ACTION

This article has matched Chinese actions in Xinjiang with legal terms, arguing that the best way to describe Chinese actions in Xinjiang is as violative of the *jus cogens* prohibitions on crimes against humanity and forced labor. There are three potential solutions under international law for holding Chinese *jus cogens* violators to account. Despite the ICC's December 2020 report, suit before that court remains a distant possibility.[578] The international community should, however, prioritize two other viable international law solutions. First, the United Nations General Assembly should request an ICJ Advisory Opinion.[579] A coalition of states could request that the ICJ answer the following question, "Do Chinese actions in Xinjiang violate *jus cogens* prohibitions on crimes against humanity, forced labor, torture, and apartheid? What are the legal consequences for States?" An ICJ opinion would be seen by most members of the international community as an unbiased and definitive interpretation of international law and would likely dissuade several countries from supporting Beijing's narrative on Xinjiang. Second, human rights advocates in various countries should rally around the exercise of universal jurisdiction over Chinese rights abusers.[580] As this article has established, their task will be easier in certain countries than in others. In particular, rights activists in the Netherlands and Germany should push for the prosecution of low-level Chinese rights abusers.

Ultimately, this article contends that international law remains a valuable tool for addressing Chinese atrocities in Xinjiang. While commentators have tended to focus on what individual countries can do to curtail Chinese activities, this article argues that international law has a vital part to play in the broader discussion.[581] Chinese activities in Xinjiang violate *jus cogens* norms. The international community must meet these violations head on by pursuing international law solutions.

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[578] *Report on Preliminary Examination Activities*, *2020*, *supra* note 339, at para. 76.

[579] *See* U.N. Charter art. 96.

[580] *See Universal Jurisdiction*, INT'L JUST. RES. CTR., *supra* note 435.

[581] *See* Kate Duffy, *Human Rights Groups Urge Trump to Ban Chinese Cotton over Xinjiang Forced Labor Camps. The Implications of a Ban 'Would Be Enormous' in Beijing, One Expert Said*, BUS. INSIDER (Sept. 12, 2020, 3:50 AM), https://www.businessinsider.com/us-cotton-ban-increase-pressure-china-end-forced-labor-xinjiang-2020-9.