

A Silent Cry - Uyghurs in Xinjiang, China (Part II of II)

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The second part of this series on the Uyghurs situation explores the complex jurisdictional challenges the International Criminal Court (ICC) faces with China's status as a non-signatory party to the Rome Statute. First, this post explores whether these jurisdictional issues can be overcome, and whether creative solutions are possible for the ICC to be found competent with respect to the crimes perpetrated against the Uyghurs people. Then, given that China is still a signatory to many other international treaties, including the Genocide Convention, this post outlines other solutions that are still possible for other international courts to exercise their jurisdiction. China, like any other State, still has a positive obligation to prevent human rights violations, particularly those taking place on its own territory, and should be accordingly held to account for its actions.

Potential Solutions to the ICC's Jurisdiction Issue

1. Individual responsibility before the ICC: Prosecution of Chinese officials for a crime against humanity as a non-signatory party to the Rome Statute

Given that China is not a signatory party to the Rome Statute, the International Criminal Court's jurisdiction is limited in prosecuting Chinese officials for alleged crimes against humanity and genocide perpetrated against the Uyghurs. Furthermore, unlike the U.S. or Russia, who were signatories who later withdrew from the Court, China is and has always been a persistent objector and non-member of the ICC, further solidifying its status as a non-member.

The alleged crimes against humanity perpetrated against the Uyghur people is also committed on China's own sovereign territory, thereby restricting other Member States of the Statute in potentially bringing forward an article 12(2) exercise of jurisdiction, like in Myanmar Rohingya people's case with Bangladesh serving as an appropriate proxy. Furthermore, many of the neighbouring countries that have hosted former detainees of these camps who have escaped to, such as Kazakhstan or Turkey, are also non-signatory states to the Rome Statute.

Yet, with all these obstacles, the Court may still potentially have jurisdiction and China may still be held accountable via some alternative avenues. Indeed, a recent file to the ICC by Uyghur exiles are [leveraging countries such as Cambodia and Tajikistan](#) - two member states - to prosecute Chinese officials. The lawyer leading the case indicated that since Beijing has pursued the repatriation and unlawful arrests of Uyghurs in these member states, it thus gives the ICC jurisdiction to prosecute Chinese officials for their acts. If successful, this will be a watershed case in holding China accountable at an international court.

1. *Jus Cogens* and international human rights law

First, the protection of a State's own population can sometimes be seen as a crystallized international norm, a *jus cogens* law which benefits from universal jurisdiction. In particular, there are some internationally recognized human rights obligations that are considered so fundamental that their abrogation by States would be deemed impermissible from the inalienable nature.^[1] From this perspective, the relevant rights in the [United Nations Declaration of Human Rights](#) (UNDHR) can be arguably universal, and thus binding for China. In particular:

Article 2.

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs.

whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.
[Emphasis added]

Article 9.

No one shall be subjected to arbitrary arrest, detention or exile.

Article 12.

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Furthermore, though the UNDHR is not a legally binding document as the nature of the document is simply a declaration, it can be argued that the Preamble of the UN Charter give states a positive duty to respect their international obligations. Specifically, it states:

We the peoples of the United Nations determined ...to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained... [emphasis added]

Though China can argue their state sovereignty and the claims of “counter-terrorism” in an effort to protect their own people, it would be hard to justify the need to detain virtually a whole ethnic group for the sake of “protection”.

1. Responsibility to Protect principle

Next, the Responsibility to Protect principle in international law is a well-regarded principle that may be applied in this situation and to China as a member of the UN and a P5 member on the Security Council. This principle – which first arose from paragraphs 138 and 139 of the 2005 World Summit Outcome – was later described in the [Report of the Secretary-General to the UN General Assembly](#) [“Report”]. It is enumerated by three pillars, namely, (1) the protection responsibilities of the State, (2) international assistance and capacity-building for protection, and (3) timely and decisive response from other State parties to act if the State party was “manifestly failing” to protect its own citizens from the specified international crimes, including crimes against humanity (Report, at p. 1) In particular, it states that:

Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. (Report, at para. 13)

Within the Secretary-General’s Report, it placed a positive obligation on national authorities to assist the ICC in locating and apprehending accused persons. [2] This is in line with second pillar of the principle of international assistance, which calls upon the international community to intervene when the State is unable to fully meet the responsibility of protecting its citizens from the international crimes. Specifically, that:

[...] the international community should be prepared to support and assist the State in meeting this core responsibility as needed under pillar two. (Report, at para. 13)

Furthermore, the interpretation of responsibility of the international community should be read as wide and on-going, one that respects the measures listed in Chapter VI and Article 52 of the UN Charter. This can be seen in the opening sentence of the principle:

“the international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.” (Report, at para. 49)

Assuming that the Responsibility to Protect principle applies in this situation, the international community at large can be given jurisdiction to intervene and protect persons from international crimes, including crimes against humanity. Furthermore, in consideration of the permanent five members of the Security Council and their privilege of tenure and veto power, the Secretary-General made a particular mention that the invoking or the threat of invoking this veto power in situations of “manifest failure” of a State’s ability to meet their obligations of the responsibility to protect is frowned upon and the P5 states should refrain from doing so (Report, at para. 61).

1. Via the International Court of Justice and the Genocide Convention

This last solution is inspired from the [recent case](#) the Gambia has brought forward to the International Court of Justice (ICJ) against Myanmar and their treatment of the Rohingya people. China is also a party to the Genocide Convention, though it has, similar to Myanmar, signed the Convention with reservations on the immunity from prosecutions. The crime of genocide has historically been one that is difficult to prove with the specific intent element. Furthermore, the outcome from the Gambia case against Myanmar, if proceeded, will serve as a precedent for the potential case China faces. The political implications of bringing China in a case before the ICJ cannot be overstated either. This avenue, if chosen, is one fraught with difficulty and uncertainty, though not impossible.

Critical Mass = An imminent Tipping Point

As more evidence emerges about the state of these detention camps, it is becoming increasingly difficult for China to claim ignorance and persistent denial. The CCP’s continued position remains that these camps serve as a counter-terrorism measure. They have continually denied all accusations of the inhumane treatment and all testimonies of detainees, stating instead that these camps were simply “[boarding schools](#)” and that anything stated otherwise is “[pure fabrication](#)”. Amidst [contests](#) from the international community of the treatment of its people, the CCP remains adamant and has reiterated to the international community that their “[preventative](#)” work in Xinjiang should not be condemned but rather applauded for their proactivity. Yet, there is clear and more pressing pressure from the international community at large for China to recognize its actions. We are approaching a critical mass in increased pressure on China to confront their actions.

At a 2019 Human Rights Council (HRC) meeting in Geneva, various civil societies brought forth a [proposed resolution](#) that would urge the High Commissioner of Human Rights to commence a fact-finding mission and to report its findings at the following session. It also reminded China that as a member of the HRC, it needs to “[uphold the highest standards of human rights](#)” and to “fully cooperate with the HRC.” This stance was supported by other civil societies who also urged that the Council’s integrity demands states remain a bystander while these detention happen and “[allow China to hide behind its membership or economic might to escape accountability](#).” Similarly, at an October 2019 UN General Assembly, UK led a statement of 23 countries, including Canada, which called on China to “[uphold its national and international obligations and commitment to respect human rights](#)”.

The U.S. has also passed Bill 178, the *Uyghur Human Rights Policy Act* via the Foreign Affairs Committee of the U.S. House of Representatives in late October, calling on sanctions and export restrictions on technology used to surveil persons in China.

CONCLUSION

Though the issue of jurisdiction poses a great obstacle to the potential prosecution of China for the alleged crime against humanity or genocide before the ICC, prosecutions can potentially be carried based on either *jus cogens* norms, the responsibility to protect principle, or the Genocide Convention before the ICJ. Nevertheless, the likelihood of such proceedings or their success remain unclear.

It is clear upon analysis, however, that further action is required by the international community as a collective to raise awareness and demand action on the part of China. It is only by [raising our collective voices](#) that we can affect change for those who are voiceless. This imminent tipping point can be all that is needed to pivot the course of history.

The pseudonym "John Doe" was used to protect the author's identity for security reasons.

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[1] John Currie, Craig Forcese & Joanna Harrington, *International law: doctrine, practice, and theory*, 2nd ed (Scarborough: Irwin Law Inc., 2014) at 27.

[2] *Ibid* at para 19.

Sujet:

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