

# THE INTERNATIONAL CRIMINAL COURT'S JURISDICTION OVER EXTRAORDINARY RENDITIONS FROM THE TERRITORY OF STATES PARTIES



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The Global Accountability Network's Ukraine Task Force Presents:

**THE INTERNATIONAL CRIMINAL COURT'S  
JURISDICTION OVER EXTRAORDINARY RENDITIONS  
FROM THE TERRITORY OF STATES PARTIES**

January 2023

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The Ukraine Task Force (“UKTF”) aims to produce non-partisan, high quality analysis of opensource materials and to catalogue that information relative to applicable bodies of law including, the Geneva Conventions, the Rome Statute of the International Criminal Court, and the Criminal Code of Ukraine.

The UKTF creates documentation products in a narrative and graphical format, as well as a quarterly and annual trend analysis of ongoing crimes. Furthermore, the UKTF publishes issue specific white papers. UKTF clients include transnational NGOs, the United Nations, the U.S. Department of State, and the Public Interest International Law & Policy Group (“PILPG”).

The UKTF is grateful for its ongoing partnerships with the Ukrainian Bar Association (“UBA”) and the New York State Bar Association (“NYSBA”). Their volunteers have provided invaluable support to the UKTF.

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## EXECUTIVE SUMMARY

This white paper argues China's extraordinary rendition of Uyghurs from the territory of States Parties to the Rome Statute and Russia's extraordinary rendition of Ukrainians from the territory of Ukraine, a State which has accepted the jurisdiction of the International Criminal Court ("ICC"), may constitute the crime against humanity of deportation under Rome Statute Article 7(1)(d). In the cases where non-States Parties deport lawfully present persons from a State Party and at least a part of the first element of the crime under Article 7(1)(d) is satisfied on the territory of a State Party (or one which has granted the ICC jurisdiction), the ICC should logically follow its decision in the 2018 and 2019 Rohingya rulings, despite the territorial reversal, and find it has jurisdiction in such cases.

Furthermore, this white paper reiterates that selective justice, or even the appearance of such, threatens the rule of law. Just as forty-three States Parties rightly referred the grave "Situation in Ukraine" for investigation in March and April 2022, States Parties should similarly exercise their political will and refer the crimes actively being committed on the territory of States Parties by China to be investigated by the ICC. Since the ICC Prosecutor will gather evidence of Ukrainians being sent to Russia, it should also gather evidence of Uyghurs being sent to China from the territory of States Parties to the Rome Statute if all other admissibility requirements are met.

The U.S. has an infamous extraordinary renditions program. This white paper acknowledges this history and argues that just as the individuals in Russia and China with the greatest responsibility for extraordinary renditions from States Parties should be subject to the Rome Statute for any extraordinary renditions from States Parties to the Rome Statute, similarly situated individuals in the U.S., or any country not party to the Statute that engage in extraordinary renditions from States Parties, must also be subject to it if all other admissibility requirements are met.

Part I includes an introduction by Professor David M. Crane, Founding Chief Prosecutor of the U.N. Special Court for Sierra Leone, and Founder of the Global Accountability Network. Part II discusses the difference between ordinary and extraordinary rendition and how modern extraordinary renditions persist under the facade of their necessity. Part III first presents the foundation of international human rights law, the Universal Declaration of Human Rights and subsequently discusses key international agreements and foundational prohibitions relating to extraordinary rendition, including: the Rome Statute; Genocide Convention; Convention Against Torture; International Covenant on Civil and Political Rights; Geneva Conventions IV Arts. 45, 49, AP I 78, AP I 85; Refugee Convention; and International Covenant for the Protection of all Persons from Enforced Disappearance.

Part IV argues that the ICC should follow its decision in the 2018 the Pre-Trial Chamber I Rohingya ruling despite the territorial reversal, and find it has jurisdiction in the cases where non States Parties deport or forcibly transfer lawfully present persons from a State Party and at least part of the first element of the crime under Article 7(1)(d) is satisfied on the territory of a State Party (or one which has granted the ICC jurisdiction). It argues that China's extraordinary rendition of Uyghurs from the territory of States Parties to the Rome Statute and Russia's extraordinary rendition of Ukrainians from the territory of Ukraine, a State which has accepted the jurisdiction of the ICC, may violate Rome Statute Article 7(1)(d).

Part V discusses the Chinese Communist Party's extraordinary rendition program of Uyghurs and other Muslims, with a focus on extraordinary renditions from States Parties to the

Rome Statute. Part V further analyzes extraordinary renditions in the context of the genocide, deportations and enforced disappearances, torture, and transnational repression of Uyghurs. Part V includes analysis of the cases of (A) Israel Ahmet, (B) Mutellip Mamut, and (C) Gulbahar Haitiwaji under Rome Statute Articles 7(1)(d) and (i).

Part VI discusses Russia's extraordinary rendition program of Ukrainians, with a focus on extraordinary renditions from Ukraine, a State which has accepted the jurisdiction of the ICC. Part VI further analyzes extraordinary renditions in the context of the filtration camps, kidnapping and detention of journalists and local officials, torture, forceful transfer of Ukrainian children, and ongoing war crimes in Ukraine. Part VI includes analysis of the cases of (A) Timofey Lopatkina, (B) Viktoria Andrusha, (C) Yevgeny Malyarchuk, (D) Ihor, and (E) Kira Obedinsky under Rome Statute Articles 7(1)(d) and (i).

Part VII names individuals bearing the greatest responsibility for extraordinary renditions conducted by China and Russia from the territory of States Parties, or from the territory of a State which has accepted the jurisdiction of the ICC.

Part VIII discusses the infamous U.S. extraordinary renditions program. Part VIII argues that just as the individuals in Russia and China most responsible for extraordinary renditions from States Parties should be subject to the Rome Statute for any extraordinary renditions from States Parties to the Rome Statute, individuals in the U.S., or any country not party to the Statute that engage in extraordinary renditions from States Parties, must also be subject to it if all other admissibility requirements are met.

Part IX argues that when a State not Party to the Rome Statute is reaching into States Parties and coercing people through extreme pressure tactics (whether on the ground or online) to travel to that State not Party (even if they never do travel), where such persons likely face persecution, this practice may qualify as an attempted deportation. Part IX analyzes China and Russia's attempted extraordinary renditions under Rome Statute Article 7(1)(d). Part IX specifically focuses on transnational repression and the technological aspects used in modern attempts at extraordinary renditions.

Part X examines complicity in China and Russia's extraordinary renditions programs by States Parties to the Rome Statute. Part X includes specific analysis of Rome Statute Articles 25 and 30. Part X discusses specific examples of potential complicity by individuals in Tajikistan and Cambodia in the extraordinary rendition of Uyghurs. Part X further discusses the potential complicity of individuals adopting children from Russia.

## I. INTRODUCTION

As the world watches one member of the United Nations Security Council wreak havoc upon a fellow member state, another member of the Security Council sinisterly cloaks its global oppression of a minority ethnic group. Direct evidence shows that the Russian Federation is removing whole populations from Ukraine to Russian territory. Meanwhile, numerous cases demonstrate China is reaching into Tajikistan, Cambodia, Afghanistan, and other states, and abducting Uyghurs as well as exerting its influence transnationally to coerce Uyghurs back to China. These acts are extraordinary in that they are fundamentally wrong legally, morally, and politically. Forced movement and removal of peoples is an ages old practice: one only has to read the Old Testament and the extraordinary rendition of Hebrews from Judea to Babylon by way of immediate example.

Alas, extraordinary rendition is a state practice in the modern era. Its use as a tool of dominance in the geopolitical space is a fact. States that have the political clout employ it with impunity and with little concern for accountability. This must change and the extraordinary renditions currently being perpetrated in Ukraine and Tajikistan should be a catalyst for recognition that it is a wrongful state practice (regardless of the already clear prohibition under international law) and accountability must be had.

This white paper discusses various examples of the use of extraordinary rendition, a practice that highlights the two major powers in the modern era—China and Russia. Though other States use it as a practice, these two States are masters of the wholesale movement of peoples for their internal and external political and military gain. The international community will have to deal with both countries now and in the future.

The geopolitical balance is shifting in ways that are not completely understood. Both China and Russia face dangerous economic upheaval, pandemic challenges, and, in the case of the Russian Federation, military defeat. The world is looking at both countries with fresh eyes through a lens of the rule of law and a democratic-based world order. Governments based on lawless tyranny are inherently weak and over time never succeed in their political gains.

Lawless behavior in the twenty-first century is a threat to international peace and security and the world community. Under the leadership of the United Nations, the international community is reassessing its response to tyranny and unacceptable behavior. The last few years has been a wake-up call for democracies around the world that government of the people and by the people is not a given. We are at a moment in our history that the decisions made in the year 2023 will impact the entire twenty-first century.

Accountability under the rule of law and the United Nations paradigm has and must remain the cornerstone to State action. Strong condemnation and action against the tyranny of lawlessness must take place, with legal and military force considered, in protecting international peace and security. War crimes, crimes against humanity, aggression, and even genocide, to include extraordinary rendition, must be dealt with under law. Our time is NOW, not tomorrow. The forces of evil gather at the gates of a United Nations that must smite them and restore a balance to world order. Peace through strength should be our watch words.

## II. ORDINARY VS. EXTRAORDINARY RENDITION

Ordinary rendition is the movement of a person or persons *legally* under international law to trial and justice.<sup>1</sup> Extraordinary rendition, on the other hand, is the movement of a person or persons *illegally* under international law to interrogation, indefinite pretrial detention, or complete disappearance.<sup>2</sup> Extraordinary rendition is thus the forcible removal and displacement of a person or persons from one jurisdiction to the state enacting the removal, or to a third-party state wherein human rights are often held in question, and legal rights are denied.<sup>3</sup> Extraordinary rendition is referred to in several ways—namely also as “extraterritorial abduction” or “international abduction.”<sup>4</sup>

The Rome Statute of the International Criminal Court Article 7(1)(d) includes the two distinct crimes of (1) deportation and (2) forcible transfer.<sup>5</sup> In 2018, the Pre-Trial Chamber I explained that the difference between these two crimes is that deportation is only completed when the victim is forced across an international border, and that forcible transfer<sup>6</sup> may be completed within one state.<sup>7</sup> As such, this white paper considers “deportation” as the crime most akin to “extraordinary rendition,” with note that evidence of “enforced disappearance” can be used to prove the *actus reus* of the crime of deportation.<sup>8</sup>

The U.S. Department of Justice has used the term “extraordinary rendition” since the late 1980s, when it actively engaged in the practice of abducting suspects abroad and bringing them to the U.S. or another country to stand trial.<sup>9</sup> The modern age and understanding of extraordinary rendition rose out of the Clinton administration’s practice of extraordinary rendition.<sup>10</sup> After 11 September 2001, the practice and understanding of extraordinary rendition accelerated under a global fear of terrorism.<sup>11</sup>

The CIA systematically captured persons of interest and sent them to black sites in countries where they faced a high risk of abuse or torture.<sup>12</sup> Former CIA agent Robert Baer said:

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<sup>1</sup> See generally Ingrid D. Frankopan, *Extraordinary Rendition and the Law of War*, 33 N.C. J. INT’L L. 657 (2007).

<sup>2</sup> *Id.*

<sup>3</sup> *Extraordinary rendition*, BRITANNICA, <https://www.britannica.com/topic/extraordinary-rendition> (last visited 19 Dec. 2022).

<sup>4</sup> *Id.*

<sup>5</sup> Rome Statute of the International Criminal Court, Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9, art. 7(1)(d) [hereinafter Rome Statute]; ICC-RoC46(3)-01/18, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, ¶ 53-60 (6 Sept. 2018), [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2018\\_04203.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2018_04203.PDF).

<sup>6</sup> See INT’L CRIM. CT., ELEMENTS OF CRIMES, at art. 7(1)(d) n.12, <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf> (last visited 4 Jan. 2023) [hereinafter ELEMENTS]. (explaining “The term ‘forcibly’ is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.”).

<sup>7</sup> ICC-RoC46(3)-01/18, *supra* note 5, at ¶ 53-60.

<sup>8</sup> *Id.* at ¶ 61.

<sup>9</sup> *United States v. Alvarez-Machain*, 504 U.S. 655 (1992). See also David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 HARV. HUM. RTS. J. 123, 127 n. 33 (2006) (citing Richard Sisk & Patrice O’Shaughnessy, *Streetwise Safir’s Return*, DAILY NEWS (New York), Apr. 14, 1996, at 7).

<sup>10</sup> James D. Boys, *The Clinton Administration’s Development and Implementation of Rendition (1993–2001)*, 42 STUDIES IN CONFLICT & TERRORISM 1090 (2019).

<sup>11</sup> *Extraordinary Rendition*, ACLU, <https://www.aclu.org/issues/national-security/torture/extraordinary-rendition> (last visited 19 Dec. 2022).

<sup>12</sup> Patricio Galella & Carlos Espósito, *Extraordinary Renditions in the Fight Against Terrorism*, 9 SUR 7 (2012).



“If you want a serious interrogation, you send a prisoner to Jordan. If you want them to be tortured, you send them to Syria. If you want someone to disappear — never to see them again — you send them to Egypt.”<sup>13</sup>

The term “extraordinary rendition” became a “euphemism describing abduction designed not only to circumvent extradition procedures, but also to avoid the protections of [the U.S.] or other judicial authorities.”<sup>14</sup> The infamous Guantanamo Bay detention center was created to evade prisoners’ rights and, twenty years on, thirty-five prisoners remain in this legal black hole.<sup>15</sup>

Established under the guise of combating terrorism, modern extraordinary renditions persist under the facade of their necessity.<sup>16</sup> Current practices of extraordinary rendition are applied to members of minority populations due to the fear that ideological separatism or religious practice threaten sovereignty or imperialist efforts.<sup>17</sup> At present, extraordinary rendition persists as a weapon of war and is actively employed in contravention of international law and the *Universal Declaration of Human Rights* (“UDHR”).<sup>18</sup>

### III. EXTRAORDINARY RENDITION VIOLATES INTERNATIONAL LAW

Extraordinary rendition is a hybrid violation of international law, including elements of enforced disappearance, deportation, torture, denial of access to consular officials, and denial of impartial tribunals,<sup>19</sup> and may amount to a crime against humanity, war crime, and/or a crime of genocide under the Rome Statute.<sup>20</sup> This section first presents the foundation of international human rights law, the UDHR. The subsequent sections discuss key international agreements and foundational prohibitions relating to extraordinary rendition, including:

- A. *Rome Statute of the International Criminal Court* (“Rome Statute”)
- B. *Convention on the Prevention and Punishment of the Crime of Genocide* (“Genocide Convention”)
- C. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (“CAT”)
- D. *International Covenant on Civil and Political Rights* (“ICCPR”)
- E. *Geneva Conventions* — GC IV Arts. 45, 49, AP I 78, AP I 85
- F. *Convention Relating to the Status of Refugees* (“Refugee Convention”)

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<sup>13</sup> *Fact Sheet: Extraordinary Rendition*, ACLU (Nov. 6, 2018), <https://www.aclu.org/other/fact-sheet-extraordinary-rendition> (last visited 19 Dec. 2022).

<sup>14</sup> Weissbrodt & Bergquist, *supra* note 9 (citing Gloria Cooper, *State of the Art*, COLUM. L. REV., 1 July 2005, at 13.).

<sup>15</sup> See Mia Bonardi, *Learning from Guantánamo: Avoiding Legal Black Holes in Outer Space*, VI CARDOZO INT’L & COMP. L.R. (forthcoming Apr. 2023); Hina Shamsi, *20 Years Later, Guantánamo Remains a Disgraceful Stain on Our Nation. It Needs to End.*, ACLU (11 Jan. 2022), <https://www.aclu.org/news/human-rights/20-years-later-guantanamo-remains-a-disgraceful-stain-on-our-nation-it-needs-to-end>; Sarah Almukhtar et al., *The Guantánamo Docket*, THE NEW YORK TIMES, <https://www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html> (last visited 19 Dec. 2022).

<sup>16</sup> See e.g., All Things Considered, *Who The Uyghurs Are And Why China Is Targeting Them*, NPR (31 May 2021) <https://www.npr.org/2021/05/31/1001936433/who-the-uyghurs-are-and-why-china-is-targeting-them>.

<sup>17</sup> See *infra*.

<sup>18</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights (10 Dec. 1948) [hereinafter UDHR].

<sup>19</sup> Weissbrodt & Bergquist, *supra* note 9.

<sup>20</sup> Rome Statute, *supra* note 5, at arts. 7(1) & 7(2).

### *G. International Convention for the Protection of All Persons from Enforced Disappearances (“ICPPED”)*

Each subsection addresses the provisions of these international treaties relevant to extraordinary rendition and limitations in their application and enforcement.

#### *A. Universal Declaration of Human Rights*

The UDHR, adopted by the United Nations General Assembly (“UNGA”) in 1948,<sup>21</sup> is considered the foundation of international human rights law.<sup>22</sup> It created the baseline for fundamental human rights to be universally protected, which have since been developed through individual specialized human rights treaties.<sup>23</sup> The UDHR is not legally binding and thus it is not independently enforceable. However, several of its provisions have achieved the status of customary international law,<sup>24</sup> including the right to life (Art. 3), freedom from torture (Art. 5), and the right to a fair trial (Art. 10).<sup>25</sup>

In addition to the aforementioned rights—the right to life, freedom from torture, and the right to a fair trial—a number of articles of the UDHR are directly implicated by extraordinary rendition.<sup>26</sup> Victims of extraordinary rendition may be denied their “right to recognition as a person before the law” under Article 6 and their right to an “effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law” under Article 8. Extraordinary rendition can constitute “arbitrary arrest, detention or exile,” prohibited by Article 9, and victims may be deprived of their right “to seek and to enjoy in other countries asylum from persecution” under Article 14. Article 13 is also implicated, which provides people with “the right to leave any country and to return to their home country.” Finally, several other rights established by the UDHR, such as the prohibition against arbitrary deprivation of property,<sup>27</sup> may be violated indirectly by extraordinary rendition.<sup>28</sup>

#### *B. Rome Statute of the International Criminal Court*

The Rome Statute does not explicitly address extraordinary renditions, but at least crimes against humanity under Article 7(1) and war crimes under Article 7(2) may be applicable in such

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<sup>21</sup> UDHR, *supra* note 18.

<sup>22</sup> *The Foundation of International Human Rights Law*, UNITED NATIONS, <https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law> (last visited 31 Dec. 2022).

<sup>23</sup> *Universal Declaration of Human Rights*, UNITED NATIONS, <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (last visited 31 Dec. 2022). Together with the International Covenant on Economic Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR), the UDHR forms the so-called International Bill of Human Rights. See *The International Bill of Human Rights*, UNITED NATIONS: HUM. RTS. OFF. OF THE HIGH COMM’R, <https://www.ohchr.org/en/what-are-human-rights/international-bill-human-rights> (last visited 31 Dec. 2022).

<sup>24</sup> Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L. 287, 289 (1996).

<sup>25</sup> See U.N. Econ. & Soc. Council (ECOSOC), Comm. on Human Rights, *Preliminary Report by the Special Representative of the Commission, Mr. Andris Aguilar, Appointed Pursuant to Resolution 1984/54, on the Human Rights Situation in the Islamic Republic of Iran*, ¶¶ 14-15, U.N. Doc. E/CN.4/1985/20 (1 Feb. 1985).

<sup>26</sup> See Weissbrodt & Bergquist, *supra* note 9, at 130-132.

<sup>27</sup> UDHR, *supra* note 18, at art. 17.

<sup>28</sup> Weissbrodt & Bergquist, *supra* note 9, at 130-132.

situations. Article 7(1) of the Rome Statute defines crimes against humanity. In the Rome Statute framework, a crime against humanity means any of the enumerated acts, “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”<sup>29</sup> Deportation or forcible transfer of population and enforced disappearance of persons are included as separate crimes.<sup>30</sup>

Article 7(1)(d) defines that deportation or forcible transfer of population is “forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.”<sup>31</sup> The Pre-Trial Chamber I of the ICC explained:

consistent with customary international law, article 7(1)(d) of the Statute contains two related but distinct crimes: deportation and forcible transfer. Deportation is distinguished from forcible transfer by the legal requirement that the victim is forced to cross an international border, whether *de jure* or *de facto*. In circumstances where the enforced bordercrossing takes the victim *directly* into the territory of another State, this legal element is completed in that second State.<sup>32</sup>

Further guidance as to the concept is found in the Elements of Crimes, which assist the ICC in its interpretation of Articles 6, 7, 8, and 8bis of the Statute.<sup>33</sup> A deportation or forcible transfer of population can be a crime against humanity if the following elements are found:

1. The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts.
2. Such person or persons were lawfully present in the area from which they were so deported or transferred.
3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.<sup>34</sup>

A forcible transfer may take place if there is the threat of force or coercion, without a direct physical element.<sup>35</sup> Element 1 can be established through evidence of various conducts, including enforced disappearance.<sup>36</sup> In its assessment, the ICC will consider factors such as the presence of fear of violence, duress, or detention.<sup>37</sup> It is to be noted that the Rome Statute definition of transfer

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<sup>29</sup> Rome Statute, *supra* note 5, at art. 7(1).

<sup>30</sup> *Id.* at arts. 7(1)(d) & 7(1)(i).

<sup>31</sup> *Id.* at art. 7(2)(d).

<sup>32</sup> ICC-RoC46(3)-01/18, *supra* note 5, at ¶ 13.

<sup>33</sup> The Elements are adopted by a two-thirds majority of the Assembly of States Parties. *Id.* at art. 94.

<sup>34</sup> ELEMENTS, *supra* note 6, at art. 7(1)(d)

<sup>35</sup> *Id.* at art. 7(1)(d) n. 12.

<sup>36</sup> ICC-RoC46(3)-01/18, *supra* note 5, at ¶ 61.

<sup>37</sup> *Id.*

of population also covers such situations within a territory of a state.<sup>38</sup> Thus, crimes against humanity under Article 7 include so-called “ethnic cleansing.”<sup>39</sup>

The crime against humanity of enforced disappearance of persons is a relatively recent addition to the crimes against humanity: it was codified for the first time in the Rome Statute.<sup>40</sup> Enforced disappearance of persons means “the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.”<sup>41</sup> Thus, the *actus reus* consists of two main elements: (1) the deprivation of liberty and (2) the withholding of information. These elements are defined in more detail in the Elements of Crimes as follows:

1. The perpetrator:
  - (a) Arrested, detained or abducted one or more persons; or
  - (b) Refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons.
2. (a) Such arrest, detention or abduction was followed or accompanied by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or  
(b) Such refusal was preceded or accompanied by that deprivation of freedom.
3. The perpetrator was aware that:
  - (a) Such arrest, detention or abduction would be followed in the ordinary course of events by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or
  - (b) Such refusal was preceded or accompanied by that deprivation of freedom.
4. Such arrest, detention or abduction was carried out by, or with the authorization, support or acquiescence of, a State or a political organization.
5. Such refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons was carried out by, or with the authorization or support of, such State or political organization.
6. The perpetrator intended to remove such person or persons from the protection of the law for a prolonged period of time.
7. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

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<sup>38</sup> Chandra Jeet, *Definitions and Elements of Crimes in the Rome Statute: Some Critical Reflections*, 6 ISIL Y.B. INT’L HUMAN. & REFUGEE L. 169, 178 (2006).

<sup>39</sup> *Id.*

<sup>40</sup> While state involvement is well established as the constitutive element of the crime of enforced disappearance, the Rome Statute, unlike any other convention addressing enforced disappearances, attributes the crime also to a “political organization.” For further analysis, see Irena Giorgiou, *State Involvement in the Perpetration of Enforced Disappearance and the Rome Statute*, 11 J. INT’L CRIM. JUST. 1001 (2013).

<sup>41</sup> Rome Statute, *supra* note 5, at art. 7(2)(i).



8. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.<sup>42</sup>

The perpetrator's awareness in Element 3, an element which the drafters "inserted because of the complexity" of the crime, is to be assessed on par with the General Introduction to the Elements of Crimes.<sup>43</sup> The criminal responsibility turns on the perpetrator's intent and/or knowledge, which can be inferred from relevant facts and circumstances.<sup>44</sup>

Article 8 of the Rome Statute governs war crimes, which entail grave breaches of the *Geneva Conventions of 12 August 1949* and other serious violations of the laws and customs applicable in international armed conflict, as well as serious violations of Article 3 common to the four *Geneva Conventions of 12 August 1949* and other serious violations of the laws and customs applicable in armed conflicts not of an international character.<sup>45</sup> Among the listed war crimes under Article 8(2) are unlawful deportation or transfer or unlawful confinement as well as torture or inhuman treatment, both of which may be applicable in the context of this study.<sup>46</sup>

The war crime of unlawful deportation or transfer and the war crime of unlawful confinement share four elements: (1) the victim of the perpetrator's conduct was protected under one or more of the *Geneva Conventions of 1949*; (2) the perpetrator was aware of the factual circumstances that established that protected status; (3) the conduct took place in the context of and was associated with an international armed conflict; and (4) the perpetrator was aware of factual circumstances that established the existence of an armed conflict.<sup>47</sup> Additionally, in the case of unlawful deportation, the perpetrator must have deported or transferred one or more persons to another State or to another location; in unlawful confinement, the perpetrator confined or continued to confine one or more persons to a certain location.<sup>48</sup>

States Parties to the Rome Statute accept the ICC's jurisdiction under Article 12(1) regarding Article 5 crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; or (d) The crime of aggression.<sup>49</sup> Under Article 12(2)(a), the ICC may also exercise its jurisdiction if the "State on the territory of which the conduct in question occurred" has accepted the jurisdiction of the ICC.

The Rome Statute has not been ratified by any of the four countries in this paper's focus (China, Russia, Ukraine, U.S.). China has neither signed nor ratified the treaty. The Russian Federation and the U.S. have signed, but not ratified it. The U.S. signed the Statute in December 2000, but a bit over a year later informed the Secretary-General that the U.S. did not "intend to become a party to the treaty" and accordingly had "no legal obligations arising from its signature."

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<sup>42</sup> ELEMENTS, *supra* note 6, at art. 7(1)(i)

<sup>43</sup> *Id.* at art. 7(1)(i) n.27.

<sup>44</sup> *Id.* at General Introduction, ¶ 3.

<sup>45</sup> Rome Statute, *supra* note 5, at art. 8(2). *See infra*.

<sup>46</sup> *Id.* at art. 8(2)(a)(vii).

<sup>47</sup> ELEMENTS, *supra* note 6, at arts. 8(2)(a)(vii)-1 & 2.

<sup>48</sup> *Id.*

<sup>49</sup> The jurisdictional regime of the crime of aggression is different from that of the other three international crimes. Based on the Rome Statute Articles 15 *bis* and 15 *ter*, the ICC cannot exercise its jurisdiction over crimes of aggression committed by nationals of states not party to the Rome Statute or on those states' territories, unless the Security Council, acting under Chapter VII of the Charter of the United Nations, refers the situation to the Prosecutor. The temporal jurisdiction of the ICC over the crime of aggression was activated as of 17 July 2018. *Assembly of State Parties to the ICC*, Res. ICC-ASP/16/Res.5 (14 Dec. 2017), [https://asp.icc-cpi.int/sites/asp/files/asp\\_docs/Resolutions/ASP16/ICC-ASP-16-Res5-ENG.pdf](https://asp.icc-cpi.int/sites/asp/files/asp_docs/Resolutions/ASP16/ICC-ASP-16-Res5-ENG.pdf).

Russia signed the Rome Statute in September 2000, but in November 2016, announced its intention not to become a party.<sup>50</sup> This coincided with the release of the ICC Prosecutor’s 2016 Report on Preliminary Examination Activities, where the Prosecutor suggested that the situation in Crimea and Sevastopol amounted “to an international armed conflict between Ukraine and the Russian Federation.”<sup>51</sup>

Ukraine signed the Rome Statute in January 2000, but there seems to be little political will to ratify it.<sup>52</sup> However, Ukraine has officially accepted the ICC’s jurisdiction by submitting two declarations pursuant to Article 12(3) of the Rome Statute. The first declaration, submitted in April 2014, accepted ICC jurisdiction with respect to alleged crimes committed on Ukrainian territory from 21 November 2013 to 22 February 2014; the second, submitted in September 2015, extended this time period on an open-ended basis to encompass ongoing alleged crimes committed throughout the territory of Ukraine from 20 February 2014 onwards.<sup>53</sup> With these declarations, Ukraine has accepted ICC jurisdiction “for the purpose of identifying, prosecuting and judging the perpetrators and accomplices of acts committed in the territory of Ukraine” from 21 November 2013, onwards.<sup>54</sup>

### *C. Convention on the Prevention and Punishment of the Crime of Genocide*

Genocide as an international crime was born out of the atrocities of the second World War and the Holocaust and charged for the first time in Nuremberg.<sup>55</sup> In 1946, the UNGA affirmed that genocide, a denial of the right of existence of entire human groups, was a crime under international law.<sup>56</sup> In the same resolution, UNGA tasked the Economic and Social Council to start preparing for a draft convention on the crime of genocide.<sup>57</sup> On 9 December 1948, the *Convention on the Prevention and Punishment of the Crime of Genocide* became the first human rights treaty adopted by UNGA.<sup>58</sup> It entered into force on 12 January 1951.<sup>59</sup>

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<sup>50</sup> Chapter XVIII Penal Matters, 10 . *Rome Statute of the International Criminal Court*, UNITED NATIONS TREATY COLLECTION,

[https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSOnline&tabid=2&mtmsg\\_no=XVIII-10&chapter=18&lang=en](https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSOnline&tabid=2&mtmsg_no=XVIII-10&chapter=18&lang=en) (last visited 31 Dec. 2022).

<sup>51</sup> ICC OFFICE OF THE PROSECUTOR, REP. ON PRELIMINARY EXAMINATION ACTIVITIES (2016), ¶ 158 (Nov. 2016), [https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE\\_ENG.pdf](https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf).

<sup>52</sup> On reasons behind the ratification resistance, see, e.g., Aloka Wanigasuriya, *After all this time, why has Ukraine not ratified the Rome Statute of the International Criminal Court?*, JUSTICE IN CONFLICT (14 Mar. 2022), <https://justiceinconflict.org/2022/03/14/after-all-this-time-why-has-ukraine-not-ratified-the-rome-statute-of-the-international-criminal-court/>.

<sup>53</sup> *Ukraine*, INTERNATIONAL CRIMINAL COURT, <https://www.icc-cpi.int/ukraine> (last visited 13 Jan. 2023).

<sup>54</sup> Declaration by the Government of Ukraine, accessible at *Ukraine*, INTERNATIONAL CRIMINAL COURT, <https://www.icc-cpi.int/ukraine> (last visited 13 Jan. 2023).

<sup>55</sup> Henry T. King Jr., Benjamin B. Ferencz, & Whitney R. Harris, *Origins of the Genocide Convention*, 40 CASE W. RES. J. INT’L L. 13, 15–17 (2007).

<sup>56</sup> G.A. Res. 96 (I), *The Crime of Genocide* (11 Dec. 1946).

<sup>57</sup> *Id.*

<sup>58</sup> *Crimes Against Humanity*, UNITED NATIONS OFFICE ON GENOCIDE PREVENTION AND THE RESPONSIBILITY TO PROTECT, <https://www.un.org/en/genocideprevention/crimes-against-humanity.shtml> (last visited 31 Dec. 2022).

<sup>59</sup> G.A. Res. 96 (I), *supra* note 56.

A critical difference between the Charter of the Nuremberg Tribunal and the Genocide Convention is that the Convention covers also crimes committed during times of peace.<sup>60</sup> Article II of the Convention defines genocide:

Article II

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.<sup>61</sup>

Article III condemns acts related to genocidal conduct broadly: in addition to the act of genocide *per se*, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide are also punishable.<sup>62</sup>

There are 152 States Parties to the Genocide Convention.<sup>63</sup> Russia (formerly the “U.S.S.R.”) and Ukraine ratified the Convention in 1954. Decades later, China ratified the Convention in 1983 with a critical reservation: China does not consider itself bound by article IX, which provides that disputes relating to the interpretation of the Convention “including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice (“ICJ”) at the request of any of the parties to the dispute.”<sup>64</sup> The U.S. finally joined in 1988, but with a number of reservations and understandings. These include limiting the jurisdiction of the ICJ with a requirement of case-specific consent of the U.S. and establishing that acts committed in the course of an armed conflict without specific genocidal intent are not sufficient to constitute genocide.<sup>65</sup> Some commentators have called the U.S. adherence to the Genocide Convention “symbolic.”<sup>66</sup>

***D. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment***

Contrary to most rules in international human rights law, the protection from torture is not a relative, contextual norm, but an absolute right.<sup>67</sup> This is explicitly stipulated in CAT Article 2,

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<sup>60</sup> Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, S. Exec. Doc. O, 81-1 (1949), 78 U.N.T.S. 277, art. I [hereinafter Genocide Convention].

<sup>61</sup> *Id.* at art. II.

<sup>62</sup> *Id.*

<sup>63</sup> *The Genocide Convention*, UNITED NATIONS OFFICE ON GENOCIDE PREVENTION AND THE RESPONSIBILITY TO PROTECT, <https://www.un.org/en/genocideprevention/genocide-convention.shtml> (last visited 31 Dec. 2022).

<sup>64</sup> *Chapter IV Human Rights, 1. 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#EndDec](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=_en#EndDec) (last visited 31 Dec. 2022).

<sup>65</sup> *Id.*

<sup>66</sup> King, Benjamin B. Ferencz, & Harris, *supra* note 55.

<sup>67</sup> See, e.g., Yuval Shany, *The Prohibition Against Torture and Cruel, Inhuman, and Degrading Treatment and Punishment: Can the Absolute Be Relativized Under Existing International Law?*, 56 CATH. U. L. REV. 837, 842

which declares that “[n]o exceptional circumstances whatsoever” may justify torture.<sup>68</sup> CAT Article 3 addresses expulsion, refoulement, and extradition and appears directly applicable in extraordinary renditions:

1. No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.<sup>69</sup>

Whether the sending state is aware of the threat of torture is not material.<sup>70</sup>

CAT’s definition of torture—intentionally inflicted severe physical or mental pain or suffering<sup>71</sup>—has not, however, been coherently incorporated into domestic legislation by all States Parties.<sup>72</sup> The U.N. Committee Against Torture has emphasized that the elements of intent and purpose in the definition “do not involve a subjective inquiry into the motivations of the perpetrators, but rather must be objective determinations under the circumstances. It is essential to investigate and establish the responsibility of the chain of command as well as that of the direct perpetrator(s).”<sup>73</sup>

The obligations of States Parties extend to any territory under its jurisdiction,<sup>74</sup> including all areas where the State Party in question exercises “directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law.”<sup>75</sup> This encompasses areas under military occupation, military bases, and detention facilities.<sup>76</sup>

CAT was adopted by the UNGA in December 1984, and it entered into force in 1987.<sup>77</sup> The Ukrainian Soviet Socialist Republic ratified CAT in February 1987, the Soviet Union in March

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(2007).

<sup>68</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2(2), Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT].

<sup>69</sup> *Id.* at art. 3.

<sup>70</sup> See, e.g., Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition under International Law*, 37 CASE W. RES. J. INT’L L. 309, 320 (2005-2006).

<sup>71</sup> CAT, *supra* note 68, at art. 1(1) (“For the purposes of this Convention, the term ‘torture’ means 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 to lawful sanctions.”).

<sup>72</sup> Comm. Against Torture on Its Thirty-Ninth Session, *General Comment No. 2, Implementation of article 2 by States Parties*, ¶ 9, U.N. Doc. CAT/C/GC/2/CRP. 1/Rev.4 (2007).

<sup>73</sup> *Id.*

<sup>74</sup> CAT, *supra* note 68, at art. 2(1). See Bonardi, *Learning from Guantánamo: Avoiding Legal Black Holes in Outer Space*, *supra* note 15.

<sup>75</sup> Comm. Against Torture on Its Thirty-Ninth Session, *supra* note 72, at ¶ 16.

<sup>76</sup> *Id.*

<sup>77</sup> Historic Archives, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW, <https://legal.un.org/avl/ha/catcidtp/catcidtp.html> (last visited 8 Jan. 2022).



1988, China in October 1988, and the U.S. in October 1994.<sup>78</sup> The U.S., however, has rejected the application of CAT in its ongoing military operations, which it considers to be governed by the law of armed conflict.<sup>79</sup>

### *E. International Covenant on Civil and Political Rights*

The ICCPR is a U.N. human rights treaty monitored by the U.N. Human Rights Committee (“UNHRC”) that entered into force in 1976.<sup>80</sup> Ukraine and the Russian Federation both ratified the ICCPR in 1973 without a substantive reservation and are currently bound by its prohibitions.<sup>81</sup> The U.S. also ratified the treaty in 1992 but maintained a reservation that the Treaty’s substantive obligations are not self-executing.<sup>82</sup> The People’s Republic of China is currently a signatory of the ICCPR but has yet to ratify it.<sup>83</sup> These noted reservations potentially obscures ICCPR compliance and leaves potential enforcement up to a State’s domestic law and policy.

The ICCPR is designed to codify human rights protections for individuals within States Parties.<sup>84</sup> The protections specifically include the prohibition against torture or inhumane treatment under Article 7, the right to liberty under Articles 9 and 10, and the protection of ethnic or religious minorities under Article 27.<sup>85</sup> These underlying protections may be violated as a consequence of extraordinary rendition by either belligerent States in conflict or by similar deprivations of liberty to a state’s internal populations.

The ICCPR provides a baseline prohibition against torture under Article 7 stating, in relevant part, that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>86</sup> These prohibitions may be extended to situations of extraordinary rendition through the UNHRC’s General Comment 20: “States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.”<sup>87</sup> While comments are non-binding on States Parties, this comment could create a positive obligation to prevent any instance of rendition or internal detention under Articles 9 and 10 where an individual is put at risk of torture.

ICCPR Article 9(1) provides protections for individual liberty against detention by the state: “Everyone has the right to liberty and security of person.”<sup>88</sup> The UNHRC remarked in General Comment 35 that “Everyone” is intended to be read expansively and covers all genders,

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<sup>78</sup> *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-9&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&clang=_en) (last visited 4 Jan. 2023). In 1999, China submitted a Communication informing the Secretary-General of the United Nations that China would assume responsibility for the international rights and obligations arising from the application of the Convention to Macau and that the Chinese reservations to Article 20 and Article 30.1 would equally apply to Macau. 2086 U.N.T.S. 124.

<sup>79</sup> Walter Kalin, *Extraterritorial Applicability to the Convention against Torture*, 11 N.Y. CITY L. REV. 293 (2008).

<sup>80</sup> See International Covenant on Civil and Political Rights, 16 Dec. 1966, 933 U.N.T.S. [hereinafter ICCPR].

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> ICCPR, *supra* note 80, at Preamble.

<sup>85</sup> *Id.* at arts. 7, 9, 10, 27.

<sup>86</sup> *Id.* at art. 7.

<sup>87</sup> UNHRC, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 2 (10 Mar. 1992), <https://www.refworld.org/docid/453883fb0.html> (last visited 22 Nov. 2022).

<sup>88</sup> ICCPR, *supra* note 80, at art. 9.

sexes, occupations, residents, aliens, refugees, convicts, *and even those who have engaged in terrorist activity*.<sup>89</sup> Intending to mirror Article 3 of the UDHR, the UNHRC defined “liberty” as concerning a person’s freedom of bodily confinement without free consent and includes situations of unlawful detention in police custody or involuntary hospitalization.<sup>90</sup> Additionally, “security” concerns freedom from mental or bodily injury and integrity regardless of whether they are detained.<sup>91</sup> These protections require a state to take appropriate measures to prevent deprivations or liberty or threats of violence by other persons or States solely within their territory.<sup>92</sup>

The remaining elements of Article 9(1) state that, “No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.”<sup>93</sup> The prohibition on the deprivation of liberty necessarily refers to the acts of “arrest,” or the beginning the deprivation of liberty and “detention” or the process of adjudication.<sup>94</sup> Both instances also share the same standard of arbitrariness. In order for an arrest or detention to not be considered arbitrary it must broadly meet the general elements of due process—appropriateness, predictability, reasonableness, necessity, and proportionality.<sup>95</sup> However, Article 9(1) does not forbid the detention of persons seeking asylum or immigrants but does require such detention to meet the same requirements for arbitrariness.<sup>96</sup>

Read together, these prohibitions illustrate a general protection from detention by a state or from another entity for anyone within a State’s borders. In any case, where arrest or detention can meet the lawful and non-arbitrary requirements, conditions must still conform with Article 7 and 10.<sup>97</sup> Article 10 requires the humane treatment of individuals deprived of their liberty while Article 7 sets a general prohibition of torture or inhuman treatment or punishment.<sup>98</sup>

ICCPR Article 10(1) builds on Article 9 and codifies the treatment of persons who are lawfully detained by a state: “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”<sup>99</sup> A person *lawfully* deprived of liberty under Article 10 retains all protections under the ICCPR, regardless of the institution in which they are held.<sup>100</sup> These institutions include, but are not limited to, a state’s prisons, correctional facilities, hospitals, and psychiatric institutions.<sup>101</sup>

It is incumbent on a state to ensure that all institutions within their jurisdiction operate in accordance with the ICCPR.<sup>102</sup> This imposes a positive obligation on a state to treat all individuals with the humanity and dignity required under ICCPR Article 7.<sup>103</sup> The application of this standard

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<sup>89</sup> UNHRC, *CCPR General Comment No. 35: Article 9 (Liberty and security of person)*, 1 (16 Dec. 2014), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/244/51/PDF/G1424451> (last visited 20 Nov. 2022).

<sup>90</sup> *Id.* at 1-2 (emphasis supplied). See UDHR, *supra* note 18, at art. 3.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> ICCPR, *supra* note 80, at art. 9.

<sup>94</sup> UNHRC, *CCPR General Comment No. 35*, *supra* note 89 at 3-4.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 5.

<sup>97</sup> *Id.* at 4.

<sup>98</sup> ICCPR, *supra* note 80, at arts. 7, 10.

<sup>99</sup> *Id.* at art. 10.

<sup>100</sup> UNHRC, *CCPR General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)*, 1 (16 Dec. 2014), <https://www.refworld.org/docid/453883fb11.html> (last visited 20 Nov. 2022).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

is not contingent on a State's material resources and extends equally to all persons regardless of sex, gender, national origin, or status.<sup>104</sup>

Finally, Article 27 contains a specific prohibition on persecution of minorities and its protections apply to any ethnic, religious, and linguistic minorities within a State Party.<sup>105</sup> When a minority exists within a State, they “shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”<sup>106</sup> A person qualifies for Article 27 protection whenever they seek to practice their language or culture within a State's minority group regardless of their citizenship or visitor status.<sup>107</sup> The UNHRC commented that a minority does not need to permanently exist or be formally recognized within a State to fall under Article 27 protections.<sup>108</sup> These protections apply equally to citizens as well to migrant groups and are assessed on an objective factual basis.<sup>109</sup> The UNHRC further notes that Article 27 creates a positive right where a State must take measures to protect a minority group's freedom to worship, to speak their languages, and a culture's way of life so long as it does not conflict with other provisions of the ICCPR.<sup>110</sup>

#### *F. Geneva Conventions — GC IV Arts. 45, 49, AP I 78, AP I 85*

The 1949 Fourth Geneva Convention (“GC IV”) is an almost universally recognized international treaty ratified by China, Russia, Ukraine, and the U.S. as observing States Parties.<sup>111</sup> At its core, GC IV is intended to define and provide protections to civilians in times of war.<sup>112</sup> GC IV Article 2 outlines that these civilian protections extend to armed conflict between two or more State Parties and applies to all cases of partial or total occupation regardless of armed resistance.<sup>113</sup> It is specifically the civilian protections in areas of conflict under Article 45 and areas of occupation under Article 49 that are likely violated in situations of extraordinary rendition.<sup>114</sup>

Article 45 is largely concerned with civilian transfers between powers during a conflict and does not affect existing extradition treaties or post conflict civilian repatriation.<sup>115</sup> Under Article 45, a State in conflict that has control over foreign civilians may only transfer these protected persons to another State that is a party to the GC IV.<sup>116</sup> The receiving State must be willing and able to apply the GC IV and it is the responsibility of the original detaining State to take effective

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<sup>104</sup> *Id.*

<sup>105</sup> ICCPR, *supra* note 80, at art. 27.

<sup>106</sup> *Id.*

<sup>107</sup> UNHRC, *CCPR General Comment No. 23: Article 27 (Rights of Minorities)*, 2 (8 April 1994), <https://www.refworld.org/docid/453883fc0.html> (last visited 23 Nov. 2022).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 3.

<sup>111</sup> ICRC, *Treaties, State Parties and Commentaries*, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountry.xsp> (last visited 20 Nov. 2022).

<sup>112</sup> See ICRC, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 U.N.T.S. 287 [hereinafter GC IV]; *Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Commentary of 1957*, ICRC INT'L HUMANITARIAN L. DATABASES, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=AE2D398352C5B028C12563CD002D6B5C&action=openDocument>.

<sup>113</sup> GC IV, *supra* note 112, at art. 2.

<sup>114</sup> *Id.* at arts. 45, 49.

<sup>115</sup> *Id.* at art. 45.

<sup>116</sup> *Id.*

measures to correct any failure to uphold the GC IV.<sup>117</sup> The specific responsibilities of a detaining State over protected persons are outlined under GC IV Articles 4, and 27 to 34.<sup>118</sup> Overall, the transfer provisions under Article 45 are intended to prevent belligerent States from transferring protected persons into dangerous or inhumane conditions.<sup>119</sup>

Article 45 also contains an explicit prohibition that supersedes any State's ability to transfer protected persons. Article 45, paragraph 4 provides, "In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs."<sup>120</sup> The 1957 Geneva Commentary further illustrates that even the threat of discrimination against protected persons is violative of the Convention and a detaining State can only transfer if it is absolutely certain such persons will be free from political and/or religious persecution.<sup>121</sup>

Occupying powers must also follow the prohibitions under Article 49 which prevents a State from undertaking "[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive."<sup>122</sup> The Commentary notes that this clause is intended to be absolute unless the transfer is voluntary by a protected person or falls into the narrow exceptions of Article 49.<sup>123</sup>

An Occupying State may only evacuate protected persons if their security is at risk or an imperative military reason demands it.<sup>124</sup> In these circumstances, the population may not be moved outside the occupied territory unless material reasons require it.<sup>125</sup> However, these evacuations must be temporary, the Occupying State must provide for the health and safety of the protected persons, and the Protecting Power must be notified of the evacuation.<sup>126</sup> The Commentary also stipulates that the Protecting Power may verify the conditions of the evacuees in all phases and extends outside of the occupied territory.<sup>127</sup> An Occupying State also may not deport or transfer its own population into occupied territory.<sup>128</sup> Finally, GC IV Article 147 further provides that any expulsion or deportation of protected persons in violation of the Convention is considered a grave breach.<sup>129</sup>

In addition to GC IV, China, Russia, and Ukraine have also ratified the *Geneva Convention's 1977 Additional Protocol I* (AP I).<sup>130</sup> AP I Article 85 further refines what constitutes

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at arts. 4, 27-34.

<sup>119</sup> *Commentary of 1957, supra* note 112, at art. 45.

<sup>120</sup> GC IV, *supra* note 112, at art. 45.

<sup>121</sup> *Commentary of 1957, supra* note 112, at art. 45.

<sup>122</sup> GC IV, *supra* note 112, at art. 49.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* See *Commentary of 1957, supra* note 112, at art. 49.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> GC IV, *supra* note 112, at art. 147. See e.g., Prosecutor v. Naletilić (Mladen) AKA Tuta and Martinović (Vinko) AKA Štela, Case No. IT-98-34-T, ICC, 2003, [https://www.icty.org/x/cases/naletilic\\_martinovic/tjug/en/nal-tj030331-e.pdf](https://www.icty.org/x/cases/naletilic_martinovic/tjug/en/nal-tj030331-e.pdf).

<sup>130</sup> The U.S. has signed but has not ratified AP I. See ICRC, *Treaties, State Parties and Commentaries*, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountry.xsp> (last visited 22 Nov. 2022).



grave breaches of population transfer in accordance with Article 49.<sup>131</sup> Article 85 first adds that a State must act willfully in order to commit a grave breach for the preceding Conventions.<sup>132</sup> Then under subsection 85(a), these willful actions also apply specifically when, “the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 . . . .” Thus, creating a nexus between Articles 49 and 85 of willful State action.

AP I Article 78 concerns additional protections for the evacuation of children.<sup>133</sup> This Article only allows an Occupying State to transfer children internally within an occupied territory and only for compelling reasons of health or safety.<sup>134</sup> These evacuations cannot separate a child from their parent or guardian and must be supervised by the Protecting State.<sup>135</sup> The 1987 Commentary adds that Article 78 is intended to facilitate evacuation of children to allied or neutral countries based on effective historical precedent.<sup>136</sup>

These four Articles represent some of the foundational international prohibitions on when and how a State may move protected persons. It is clear that there is significant elemental overlap with extraordinary rendition. In any case where prohibitions are willfully violated by a State in conflict, specifically in the context of AP I States Parties, it likely constitutes a grave breach of international law.

### *G. Convention Relating to the Status of Refugees*

The 1951 Refugee Convention contains specific prohibitions on refoulement, otherwise referred to as expulsion or return, that limit a State Party’s ability to expel refugees.<sup>137</sup> China, Russia, and Ukraine have all either ascended or ratified the Refugee Convention and are bound as States Parties, with the U.S. only ratifying the additional 1967 Protocol.<sup>138</sup> These additional prohibitions may be applied to certain instances of extraordinary rendition.

Article 33 of the Refugee Convention prohibits States Parties from expelling or returning a refugee to any territory where that person’s “life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”<sup>139</sup> However, this protection does not extend to instances where a nation has “reasonable grounds” to

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<sup>131</sup> ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), arts. 78 & 85, 8 June 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at art. 78.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Commentary of 1987, ICRC INT’L HUMANITARIAN L. DATABASES, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=B420929F958AB3A3C12563CD00436DA5> (last visited 4 Jan. 2023).

<sup>137</sup> Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

<sup>138</sup> States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, UNHCR, <https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf> (last visited 13 Dec. 2022).

<sup>139</sup> Refugee Convention, *supra* note 129, at art. 33.

believe a refugee is a danger to national security or has previously been convicted of a dangerous crime.<sup>140</sup>

This protection from expulsion is intended to expand Article 5 of the 1938 Convention which prevented countries from returning refugees to Germany without just cause.<sup>141</sup> The official U.N. Commentary first clarifies that the term refugee under Article 33 extends to any Convention refugee as defined in Article I who is present within a States Party's territory irrespective of their legal status.<sup>142</sup>

The Commentary also clarifies the lawful exception to refoulement. Article 33 does not require a strict or international standard of proof for determining who is a threat to national security.<sup>143</sup> The standard for "reasonable grounds" is instead left to each nation to decide if a person is a future danger to the people of the nation.<sup>144</sup> This logic extends to the conviction requirement for dangerous crimes as well. A State Party may expel a refugee under the same reasonableness standard so long as the person received a "final conviction" for what the host nation may consider a dangerous crime.<sup>145</sup> This standard also requires that the person in question still presents a danger to the community to be lawfully expelled.<sup>146</sup>

#### ***H. International Convention for the Protection of All Persons from Enforced Disappearances***

The ICPPED provides basic protections against state-orchestrated disappearances and was drafted in order to provide awareness, prevention, and justice for the families and victims of enforced disappearances.<sup>147</sup> Currently, China, Russia, and the U.S. have not signed or ratified the ICPPED, leaving only Ukraine as a State Party.<sup>148</sup>

ICPPED Article 2 defines an enforced disappearance, in relevant part, as an "arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization . . . followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person . . . ."<sup>149</sup> Under ICPPED Article 1, this type of action by a State Party is intended to be prohibited without exception even in times of war or public emergency.<sup>150</sup> A State that allows for widespread or systematic violations of this prohibition essentially commits a crime against humanity.<sup>151</sup>

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<sup>140</sup> *Id.*

<sup>141</sup> *Commentary of the Refugee Convention 1951*, DIVISION OF INTERNATIONAL PROTECTION OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, 135-136 (1997), <https://www.unhcr.org/3d4ab5fb9.pdf> (last visited 7 Jan. 2022).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 138-39.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 142-43

<sup>146</sup> *Id.*

<sup>147</sup> International Convention for the Protection of All Persons from Enforced Disappearance, Preamble, *opened for signature* 6 Feb. 2007, 2716 U.N.T.S. 3 (*entered into force* 23 Dec. 2010) [hereinafter ICPPED].

<sup>148</sup> *Id.*

<sup>149</sup> ICPPED, *supra* note 147, at art. 2.

<sup>150</sup> *Id.* at art. 1.

<sup>151</sup> *Id.* at art. 5.

The ICPPED also obligates States Parties to take various proactive measures to prevent and investigate enforced disappearances.<sup>152</sup> States Parties are required to search for disappeared persons and investigate their disappearances, as well as provide access to justice and reparation to these victims and families.<sup>153</sup> Access to justice includes the obligation to maintain records for all detention, guarantee legal minimum standards for detention, and creation of penal penalties for those who take part in such deprivation of liberty.<sup>154</sup>

The ICPPED Article 16 contains a specific prohibition on refoulement and prohibits a state from expelling a person to another state where “there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.”<sup>155</sup> It is up to the host State to consider all relevant considerations including the existence of human rights law violations in the potential return State.<sup>156</sup>

The reach of the ICPPED appears rather limited due to the lack of major signatory nations. However, the ICPPED may still have an effect outside of its State Parties due to its overlapping protections with many other major international treaties. A State may not be subject to the jurisdiction of the ICPPED but a violation of one of its provisions will likely violate a mirrored provision within CAT, ICCPR, or Refugee Convention.

#### **IV. ICC JURISDICTION OVER EXTRAORDINARY RENDITIONS FROM THE TERRITORY OF STATES PARTIES**

China’s extraordinary rendition of Uyghurs from the territory of States Parties to the Rome Statute and Russia’s extraordinary rendition of Ukrainians from the territory of Ukraine, a State which has accepted the jurisdiction of the ICC, may constitute the crime against humanity of deportation under Rome Statute Article 7(1)(d). In both China and Russia, it appears that orders for the extraordinary renditions discussed in this report go all the way up the chain of command.<sup>157</sup>

Rome Statute Article 7(1)(d) includes the two distinct crimes of (1) deportation and (2) forcible transfer.<sup>158</sup> In 2018, the Pre-Trial Chamber I of the ICC explained that the difference between these two crimes is that deportation is completed when the victim is forced across an international border, and that forcible transfer<sup>159</sup> may be completed within the borders of a single state.<sup>160</sup> As mentioned above, this white paper considers “deportation” and “extraordinary rendition” as reference to the same transnational crime at the ICC, but “forcible transfer” as distinct.<sup>161</sup>

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<sup>152</sup> *Background to the International Convention for the Protection of All Persons from Enforced Disappearance*, UN Committee on Enforced Disappearances, UNITED NATIONS: HUM. RTS. OFF. OF THE HIGH COMM’R, <https://www.ohchr.org/en/treaty-bodies/ced/background-international-convention-protection-all-persons-enforced-disappearance> (last visited 4 Jan. 2023).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> ICPPED, *supra* note 147, art. 16.

<sup>156</sup> *Id.*

<sup>157</sup> See *infra* Section VII for a list of individuals bearing the greatest responsibility for these crimes.

<sup>158</sup> ICC-RoC46(3)-01/18, *supra* note 5, at ¶ 53-60.

<sup>159</sup> See ELEMENTS, *supra* note 6, at art. 7(1)(d) n.12 (explaining “The term ‘forcibly’ is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.”).

<sup>160</sup> *Id.*

<sup>161</sup> See *supra* Section II.

In 2018, the Pre-Trial Chamber I concluded that it could exercise jurisdiction over crimes perpetrated in Myanmar (a non-State Party) because part of the crime occurred in Bangladesh (a State Party).<sup>162</sup> This decision specifically regarded deportations of Rohingya people to Bangladesh.<sup>163</sup> Pre-Trial Chamber I of the ICC determined that it “may assert jurisdiction pursuant to article 12(2)(a) of the Statute if at least one element of a crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party to the Statute.”<sup>164</sup> The ICC reasoned that “an element of the crime of deportation is forced displacement across international borders, which means that the *conduct* related to this crime necessarily takes place on the territories of at least two States.”<sup>165</sup>

This white paper argues that the ICC can logically come to the same conclusion in cases of extraordinary rendition. In 2018, the Pre-Trial Chamber I concluded that “acts of deportation initiated in a State not Party to the Statute (through expulsion or other coercive acts) and completed in a State Party to the Statute (by virtue of victims crossing the border to a State) fall within the parameters of article 12(2)(a) of the Statute.”<sup>166</sup> In some cases of extraordinary rendition, deportations are initiated *in* (not necessarily *by*) a State Party (via forced transport or excessive coercion) and completed *by and in* a State not Party (by forced importation of victims).

In 2019, Pre-Trial Chamber III of the ICC explained that “The only clear limitation that follows from the wording of [A]rticle 12(2)(a) of the [Rome] Statute is that at least part of the conduct (*i.e.* the *actus reus* of the crime) must take place in the territory of a State Party.”<sup>167</sup> The ICC lists the five elements of Article 7(1)(d), the crime against humanity of deportation, which would govern an extraordinary rendition.<sup>168</sup> The first element “The perpetrator deported or forcibly, transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts” is the *actus reus* of the crime of deportation.<sup>169</sup> As such, the ICC can assert jurisdiction under Article 12(2)(a) if *at least part of* element one is committed *in* the territory of a State Party.

The Pre-Trial Chamber I explained “various types of conduct may, if established to the relevant threshold, qualify as ‘expulsion or other coercive acts’ for the purposes of the crime against humanity of deportation, including deprivation of fundamental rights, killing, sexual violence, torture, enforced disappearance, destruction and looting.”<sup>170</sup> As such, the following sections analyze cases under Article 7(1)(i), because if such cases of extraordinary rendition meet the threshold of enforced disappearance under Article 7(1)(i), such cases could be used to prove the first element of Article 7(1)(d).

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<sup>162</sup> ICC-RoC46(3)-01/18, *supra* note 5.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at ¶¶ 30-33. The Court used the principle of *la compétence de la compétence* to come to its conclusion, explaining that it is “an established principle of international law that any international tribunal has the power to determine the extent of its own jurisdiction.” *See also* ICC-01/19-27, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, ¶ 48 (14 Nov. 2019), [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019\\_06955.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_06955.PDF) (noting that “the notions of ‘conduct’ and ‘crime’ in article 12(2)(a) of the Statute have the same functional meaning.”).

<sup>165</sup> ICC-RoC46(3)-01/18, *supra* note 5, at ¶ 71.

<sup>166</sup> *Id.* at ¶ 73.

<sup>167</sup> ICC-01/19-27, *supra* note 164, at ¶ 61.

<sup>168</sup> ELEMENTS, *supra* note 6, at art. 7(1)(d).

<sup>169</sup> *Id.*

<sup>170</sup> ICC-RoC46(3)-01/18, *supra* note 5, at ¶ 61.

In the cases where non States Parties deport lawfully present persons from a State Party and the first element of the crime under Article 7(1)(d) is satisfied on the territory of a State Party (or one which has granted the ICC jurisdiction), the Court should logically follow its decision in its 2018 Rohingya ruling, despite the territorial reversal, and find it has jurisdiction in such cases.<sup>171</sup> Neither China nor Russia are States Parties to the Rome Statute. However, evidence shows both are engaging in extraordinary renditions of lawfully present persons *in* States Parties and deporting (importing) such persons into their territory—under the guise of “repatriation.”<sup>172</sup> While the Rohingya were deported out of a State not Party (Myanmar) and into a State Party (Bangladesh), Uyghurs are being forcibly transferred out of States Parties (Tajikistan, Afghanistan, and Cambodia) and imported into a State not Party (China), and Ukrainians are being forcibly transferred out of a state which has granted the ICC jurisdiction (Ukraine) and imported into a State not Party (Russia<sup>173</sup>). As such, the ICC should apply its 2018 Rohingya decision as precedent in these cases.<sup>174</sup>

On 6 July 2020, the East Turkistan Government in Exile (“ETGE”) and the East Turkistan National Awakening Movement (“ETNAM”) requested an ICC investigation into acts of genocide and crimes against humanity by the Chinese Communist Party in Xingjiang, specifically the forced importation of Uyghurs from the States Parties of Tajikistan and Cambodia.<sup>175</sup> The Prosecutor denied this first complaint.<sup>176</sup> Notably, the Prosecutor stated that a “majority” of the alleged crimes did not fall within the jurisdiction of the court, but addressed separately the alleged deportation crimes in Cambodia and Tajikistan from the overall alleged crimes of genocide and crimes against humanity ongoing in Xingjiang.<sup>177</sup> While the Prosecutor concluded at the time (2020) that there was insufficient evidence for the alleged deportation crimes in Cambodia and Tajikistan to fall within Article 7(1)(d), the Prosecutor did not deny the claim on a jurisdictional basis under Article 12(2)(a).<sup>178</sup> Rodney Dixon, lawyer for the Uyghurs, submitted additional evidence in July and November 2021 and in June 2022, arguing that the new evidence in fact falls within the scope of Rome Statute 7(1)(d).<sup>179</sup>

On 28 February 2022, four days after Russia’s full-scale invasion of Ukraine, the Prosecutor opened an investigation into the “Situation in Ukraine” on the basis of its prior

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<sup>171</sup> If all other admissibility requirements are met. See Mia Bonardi, *More Problems from Hell: The Uyghur Genocide*, 12 J. GLOB. RTS. & ORGS. 1 (2022).

<sup>172</sup> See *infra*.

<sup>173</sup> And Russian occupied territory.

<sup>174</sup> *Id.*

<sup>175</sup> ICC OFFICE OF THE PROSECUTOR, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2020, ¶ 70 (Dec. 14, 2020), <https://www.icc-cpi.int/sites/default/files/itemsDocuments/2020-PE/2020-pe-report-eng.pdf> [hereinafter 2020 OTP REPORT]. See also Marlise Simons, *Uighur Exiles Push for Court Case Accusing China of Genocide*, THE NEW YORK TIMES (6 July 2020, Updated 15 Dec. 2020), <https://www.nytimes.com/2020/07/06/world/asia/china-xinjiang-uyghur-court.html>; Tia Sewell, *Unpacking the Recent Uyghur ICC Complaint Against Chinese Leaders*, Lawfare (21 July 2020), <https://www.lawfareblog.com/unpacking-recent-uyghur-icc-complaint-against-chinese-leaders>.

<sup>176</sup> 2020 OTP REPORT, *supra* note 175, at ¶ 73. See also Javier C. Hernández, *I.C.C. Won’t Investigate China’s Detention of Muslims*, THE NEW YORK TIMES (15 Dec. 2020, Updated 10 May 2021), <https://www.nytimes.com/2020/12/15/world/asia/icc-china-uyghur-muslim.html>.

<sup>177</sup> 2020 OTP REPORT, *supra* note 175, at ¶ 74-6.

<sup>178</sup> *Id.* at ¶ 73-6.

<sup>179</sup> *The case against China at the ICC*, Eurasianet (12 Aug. 2022), <https://eurasianet.org/the-case-against-china-at-the-icc>.

conclusions from its preliminary examination covering events from 2014.<sup>180</sup> Notably, in the 2020 preliminary examinations, the Office of the Prosecutor found a reasonable basis to conclude that “in the context of the period leading up to and during the (ongoing) occupation of Crimea” violations of Rome Statute Article 7(1)(d) occurred.<sup>181</sup> On 2 March 2022, with numerous referrals of the situation by States Parties under Article 14 filed—referrals which the Prosecutor indicated would expedite investigations if provided—the Prosecutor indicated that the investigations would proceed.<sup>182</sup>

Selective justice, or even the appearance of such, threatens the rule of law.<sup>183</sup> For if the rule of law cannot be upheld in one place, it is threatened in every place.<sup>184</sup> As Areesha Shahid writes, “Selective justice serves no justice, rather it sponsors injustice.”<sup>185</sup> Thus, just as forty-three States Parties rightly referred the grave “Situation in Ukraine” for investigation in March and April 2022, States Parties should similarly exercise their political will and refer the crimes actively being committed on the territory of States Parties by China to be investigated by the ICC.<sup>186</sup> As Rodney Dixon argues, just as the ICC Prosecutor will gather evidence of Ukrainians being sent to Russia, so too should it gather evidence of Uyghurs being sent to China from the territory of States Parties to the Rome Statute.<sup>187</sup>

## V. THE CHINESE COMMUNIST PARTY’S EXTRAORDINARY RENDITION PROGRAM OF UYGHURS & OTHER MUSLIMS

The Chinese Communist Party (“CCP”), under the guise of targeting separatists and terrorists, have pushed ethnic and religious minorities into ideological conformity with the goal of eradicating their cultural identities.<sup>188</sup> The most expansive campaign of the CCP against a minority population has been its targeting of the Uyghurs, a Turkic ethnic group native to the Xinjiang Uyghur Autonomous Region (“XUAR”) in northwest China.<sup>189</sup> After a violent outbreak in

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<sup>180</sup> *Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination in the situation in Ukraine*, ICC OFFICE OF THE PROSECUTOR (11 Dec. 2020), <https://www.icc-cpi.int/news/statement-prosecutor-fatou-bensouda-conclusion-preliminary-examination-situation-ukraine>.

<sup>181</sup> 2020 OTP REPORT, ¶ 279. *See also Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination in the situation in Ukraine*, *supra* note 180.

<sup>182</sup> *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation*, ICC OFFICE OF THE PROSECUTOR (2 Mar. 2022), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states>

<sup>183</sup> Areesha Shahid, *Selective Justice: A Threat to the Rule of Law*, RESEARCH SOCIETY OF INT’L L. (2021), <https://rsilpak.org/2021/selective-justice-a-threat-to-the-rule-of-law/>.

<sup>184</sup> *See Bonardi, Learning from Guantánamo: Avoiding Legal Black Holes in Outer Space*, *supra* note 15.

<sup>185</sup> Shahid, *supra* note 183.

<sup>186</sup> *Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination in the situation in Ukraine*, *supra* note 180.

<sup>187</sup> Asim Kashgarian, *ICC Urged to Investigate China’s Treatment of Uyghurs*, VOA NEWS (23 June 2022), <https://www.voanews.com/a/icc-urged-to-investigate-china-s-treatment-of-uyghurs/6630740.html>.

<sup>188</sup> Doug Bandow, *Chinese Oppression of the Uyghurs Goes Global*, CATO INSTITUTE (9 June 2022), <https://www.cato.org/commentary/chinese-oppression-uyghurs-goes-global>.

<sup>189</sup> HUMAN RIGHTS WATCH, “BREAK THEIR LINEAGE, BREAK THEIR ROOTS” CHINA’S CRIMES AGAINST HUMANITY TARGETING UYGHURS AND OTHER TURKIC MUSLIMS (19 Apr. 2021), <https://www.hrw.org/report/2021/04/19/break-their-lineage-break-their-roots/chinas-crimes-against-humanity-targeting>. Notably, the CCP built upon the measures it took in Tibet, brought them to the XUAR, and are reimplementing such measures in Tibet. *See* The Editorial Board, *The Xingjiang Model Comes to Tibet*, THE WALL STREET JOURNAL (22 Sept. 2020),

Ürümqi, the capital of the XUAR, in 2009, Chinese authorities launched crackdowns on the Uyghur population, which included dramatic increases in surveillance.<sup>190</sup> The CCP's efforts expanded in 2014 in line with the principle of “reeducation” and escalated in 2017 with the formal holding of Uyghurs as detainees in political education camps, pre-trial detention centers, and prisons.<sup>191</sup>

### A. Genocide

It is estimated that around one million detainees have been held at the political “reeducation” camps wherein concerns for health, physical and psychological abuse, harsh conditions, and indefinite confinement raise many concerns.<sup>192</sup> Along with internment camps, the CCP has also initiated the mass sterilization of Uyghur women, separation of children from their families, forced labor camps, and massive security crackdowns designed to control the population and break the cultural traditions of the minority groups.<sup>193</sup>

International experts and some States have labeled the CCP's systematic erasure of the Uyghurs a genocide.<sup>194</sup> Several reports by organizations, including the Newlines Institute for Strategy and Policy and the Raoul Wallenberg Centre for Human Rights (“Newlines Report”) and the Global Accountability Network (“GAN Report”) have found evidence to support a finding of genocide against the Uyghurs in breach of each and every act prohibited in Article II (a) through (e) of the Genocide Convention.<sup>195</sup>

Adrian Zenz, a leading expert on CCP government policies in Tibet and the XUAR, provides evidence that the CCP's dual systematic strategy of detaining Uyghur men while also instituting a forced birth control and sterilization regime on Uyghur women meets *at least* section

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<https://www.wsj.com/articles/the-xinjiang-model-comes-to-tibet-11600816095>; Adrian Zenz, *Xinjiang's System of Militarized Vocational Training Comes to Tibet*, 20 CHINA BRIEF 7, 9 (2020).

<sup>190</sup> Uyghur, BRITANNICA, <https://www.britannica.com/topic/Uyghur> (last visited 20 Dec. 2022).

<sup>191</sup> Lindsay Maizland, *China's Repression of Uyghurs in Xinjiang*, COUNCIL ON FOREIGN RELATIONS (22 Sept. 2022),

<https://www.cfr.org/backgrounder/china-xinjiang-uyghurs-muslims-repression-genocide-human-rights>.

<sup>192</sup> HUMAN RIGHTS WATCH, “ERADICATING IDEOLOGICAL VIRUSES” CHINA'S CAMPAIGN OF REPRESSION AGAINST XINJIANG'S MUSLIMS (9 Sept. 2018),

<https://www.hrw.org/report/2018/09/09/eradicating-ideological-viruses/chinas-campaign-repression-against-xinjiangs>.

<sup>193</sup> BBC, *Who are the Uyghurs and why is China being accused of genocide?* (24 May 2022),

<https://www.bbc.com/news/world-asia-china-22278037>.

<sup>194</sup> See, e.g., NEWLINES INSTITUTE FOR STRATEGY AND POLICY AND THE RAOUL WALLENBERG CENTRE FOR HUMAN RIGHTS, *THE UYGHUR GENOCIDE: AN EXAMINATION OF CHINA'S BREACHES OF THE 1948 GENOCIDE CONVENTION* (Mar. 2021) [hereinafter ‘NEWLINES REPORT’]; ADRIAN ZENZ, *STERILIZATIONS, IUDs, AND MANDATORY BIRTH CONTROL: THE CCP'S CAMPAIGN TO SUPPRESS UYGHUR BIRTHRATES IN XINJIANG*, The Jamestown Foundation (June 2020, Updated 17 Mar. 2021); Evidence, *Uyghur Tribunal* (Statements and testimony, 4 June — 27 Nov. 2021), <https://uyghurtribunal.com/statements/>; THE GLOBAL ACCOUNTABILITY NETWORK, *A MULTI-GENERATIONAL EFFORT TO ELIMINATE THE UYGHURS: AN ONGOING GENOCIDE* (Sept. 2022) [hereinafter ‘GAN REPORT’]; Benjamin Fearnow, *United States Becomes First Country in World to Declare China's Uighur Treatment Genocide*, NEWSWEEK (19 Jan. 2021), <https://www.newsweek.com/united-states-becomes-first-country-world-declare-chinas-uighur-treatment-genocide-1562717>; John Hudson, *At the 11th hour, Trump administration declares China's treatment of Muslims in Xinjiang “genocide”*, THE WASHINGTON POST (19 Jan. 2021), [https://www.washingtonpost.com/national-security/trump-china-genocide-uighur-muslims/2021/01/19/272a9df4-5a7f-11eb-aaad-93988621dd28\\_story.html](https://www.washingtonpost.com/national-security/trump-china-genocide-uighur-muslims/2021/01/19/272a9df4-5a7f-11eb-aaad-93988621dd28_story.html).

<sup>195</sup> NEWLINES REPORT, *supra* note 194; GAN REPORT, *supra* note 194.

(d) of Article II: ‘imposing measures intended to prevent births within the group.’<sup>196</sup> Both the Newlines Report and the GAN Report have extensive analyses on the ‘intent to destroy’ element of the Genocide Convention Article II.<sup>197</sup>

### ***B. Deportations and Enforced Disappearances***

On 31 August 2022, the Office of the UN High Commissioner for Human Rights (“OHCHR”) finally released its report concluding that serious human rights violations have been committed against the Uyghur people.<sup>198</sup> China vehemently denies all such allegations.<sup>199</sup> The OHCHR report specifically addresses deportations, including family separations and reprisals.<sup>200</sup> In fact, the increasing number of allegations of family separations and enforced disappearances are what first brought the plight of the Uyghurs to the attention of the OHCHR.<sup>201</sup> Specifically, the OHCHR saw an uptick in allegations starting in 2017—the same year China passed its infamous anti-extremism legislation prohibiting people from growing long beards and wearing veils in public, and recognized the use of “training centers” to eliminate “extremism”.<sup>202</sup>

The OHCHR report concludes, “Over the past few years, credible information has been received about members of the Uyghur community living abroad in several countries, having been forcibly returned, or being placed at risk of forcible return to China, in breach of the prohibition under international law of *refoulement*.”<sup>203</sup> It further warns “countries hosting Uyghurs and other Muslim minorities from XUAR should refrain from forcibly returning them, in any circumstance of real risks of breach of the principle of non-refoulement.”<sup>204</sup>

The GAN Report provides a statement by Dr. Erkin Sidick, a Uyghur-American and the President of the Uyghur Projects Foundation and senior advisor to the World Uyghur Congress, that “international reports on the situation in Xinjiang are at least two years behind—that the situation is worse than initially thought to be.”<sup>205</sup> Also, the Washington-based Campaign for Uyghurs expressed a similar sentiment, accusing China of being “a primary perpetrator of forced disappearances.”<sup>206</sup>

### ***C. Torture***

The GAN Report details evidence of rape and other sexual violence used against both male and female Uyghurs. It notes how former inmates reported that especially younger and unmarried

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<sup>196</sup> ZENZ, STERILIZATIONS, IUDS, AND MANDATORY BIRTH CONTROL, *supra* note 194.

<sup>197</sup> NEWLINES REPORT, *supra* note 194; GAN REPORT, *supra* note 194.

<sup>198</sup> OHCHR ASSESSMENT OF HUMAN RIGHTS CONCERNS IN THE XINJIANG UYGHUR AUTONOMOUS REGION, PEOPLE’S REPUBLIC OF CHINA, OHCHR (31 Aug. 2022), <https://www.ohchr.org/sites/default/files/documents/countries/2022-08-31/22-08-31-final-assesment.pdf> [hereinafter 2022 OHCHR REPORT]. *See also China responsible for ‘serious human rights violations’ in Xinjiang province: UN human rights report*, UN NEWS (31 Aug. 2022), <https://news.un.org/en/story/2022/08/1125932>.

<sup>199</sup> PRC Response to 2022 OHCHR Report, No.GJ/56/2022 (Aug. 2022), [https://www.ohchr.org/sites/default/files/documents/countries/2022-08-31/ANNEX\\_A.pdf](https://www.ohchr.org/sites/default/files/documents/countries/2022-08-31/ANNEX_A.pdf).

<sup>200</sup> 2022 OHCHR REPORT, *supra* note 198, at ¶¶ 129-142.

<sup>201</sup> *Id.* at 40.

<sup>202</sup> *Id.* *See also* Maizland, *supra* note 191.

<sup>203</sup> 2022 OHCHR REPORT, *supra* note 198, at ¶ 139.

<sup>204</sup> *Id.* at ¶ 142.

<sup>205</sup> GAN REPORT, *supra* note 194, at 29.

<sup>206</sup> *Id.*



women were taken from their cells at night to be raped—and that some never returned. The GAN Report provides accounts of brutal and public gang rapes of both male and female Uyghurs while detained.

The GAN Report further details four different electroshock methods used on former inmates: the chair, the glove, the helmet, and a stick. It explains how detainees have been subjected to beatings during interrogations and that inmates as young as 14 were beaten and kicked until bruised, swollen, and crying. Additionally, some suspects were hung from the ceiling during interrogations.

Finally, the GAN Report explains that torture techniques also target the Uyghurs religious practices. Specifically, inmates exhibiting “bad behavior” were forced to eat pork; others accused of religious extremism were forced to drink alcohol. If detainees moved their lips, police would assume they were reciting the Quran and torture them badly.

#### ***D. Transnational Repression***

The CCP’s control of the Uyghur people has further extended beyond the borders of China with the deportation of Uyghurs to China, allowing for the CCP to “transnationally repress” the Uyghur people.<sup>207</sup> According to Freedom House, China conducts the most sophisticated, global, and comprehensive campaign of transnational repression in the world.<sup>208</sup> China’s campaign includes a full spectrum of tactics such as direct attacks like renditions, to co-opting other countries to detain and render exiles, to mobility controls, to threats from a distance like digital threats, spyware, and coercion by proxy.<sup>209</sup>

A report by the Woodrow Wilson Center’s Kissinger Institute on China and the United States finds that “The People’s Republic of China has engaged in transnational repression in 44 countries since 1997. From then until January 2022, there were 1,574 publicly reported cases of detentions and refoulements of Uyghurs to China, where they faced imprisonment and torture in police custody.”<sup>210</sup> Notably, “Of the 523 most detailed cases . . . [the report] logged 108 deportations, 89 incidents of Uyghurs being coerced to return to the XUAR, 11 renditions, and nine extraditions.”<sup>211</sup>

Similarly, Human Rights Watch reports that “Chinese authorities have tracked down hundreds of Turkic Muslim asylum seekers around the world and forced them to return to repression and in some cases detention.”<sup>212</sup> Human Rights Watch specifically notes cases in Egypt, Malaysia, Saudi Arabia, and Thailand—all non States Parties to the Rome Statute.<sup>213</sup>

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<sup>207</sup> Catherine Putz, *China’s Transnational Repression Leaves Uyghurs No Space to Run*, THE DIPLOMAT (24 June 2021), <https://thediplomat.com/2021/06/chinas-transnational-repression-leaves-uyghurs-no-space-to-run/>.

<sup>208</sup> *China: Transnational Repression Origin Country Case Study*, FREEDOM HOUSE (2021), <https://freedomhouse.org/report/transnational-repression/china>.

<sup>209</sup> *China: Transnational Repression Origin Country Case Study*, FREEDOM HOUSE (2021), <https://freedomhouse.org/report/transnational-repression/china>.

<sup>210</sup> BRADLEY JARDINE, *GREAT WALL OF STEEL: CHINA’S GLOBAL CAMPAIGN TO SUPPRESS THE UYGHURS*, xviii, (Wilson Center, 2022).

<sup>211</sup> *Id.*

<sup>212</sup> HUMAN RIGHTS WATCH, “BREAK THEIR LINEAGE, BREAK THEIR ROOTS” CHINA’S CRIMES AGAINST HUMANITY TARGETING UYGHURS AND OTHER TURKIC MUSLIMS, *supra* note 189, at 33.

<sup>213</sup> *Id.*

There is, however, evidence of Chinese officials attempting to deport and actually deporting Uyghurs from the territory of States Parties to the Rome Statute.<sup>214</sup> Specifically, in a November 2021 evidence submission to the ICC, Rodney Dixon, lawyer for the Uyghurs, provided “insider witness testimony” which showed how Chinese officials “would focus their strategies on coming into Tajikistan and getting Uyghurs detained, arrested and deported out.”<sup>215</sup> Such evidence is critical to proving “how Chinese officers are operating on Tajikistan soil.”<sup>216</sup> Dixon explained how such Chinese officials would create a legal problem for the Uyghurs, such as visa and paperwork issues, which China would then use to import them back into China from Tajikistan.<sup>217</sup> Such weaponization of the passports of Uyghurs has been heavily documented and criticized.<sup>218</sup>

### *E. Cases of Uyghur Deportations and the Article 7(1)(d) Elements*

#### *Case A: Deportation of Israel Ahmet<sup>219</sup>*

- Element 1.* In the summer of 2014, Chinese emigrant Israel Ahmet was arrested in Kabul, his home for over ten years, on charges of lacking legal documentation, carrying counterfeit money, and espionage. He was held in a jail cell with over two dozen other Uyghurs, including women and children, before being taken to Kabul International Airport. There, Chinese officials were waiting for him and forced him to board a plane. Ahmet has not been heard from since.
- Element 2.* Ahmet lived in Kabul for over ten years, and citizenship by naturalization in Afghanistan, at the time of his arrest, required just five years.
- Element 3.* Ahmet lived in a small mud-brick house in Kabul and had established residency.
- Element 4.* Since at least 2009, the CCP has perpetrated an ongoing widespread and systematic attack on Uyghur culture, identity, and people. Ahmet was held in a cell with about two dozen other Afghani Uyghurs, including, women and children, who were all meritlessly described by Afghanistan’s National Directorate of Security as

<sup>214</sup> See e.g., *Evidence Of Chinese Operatives In Tajikistan Rounding Up Uyghurs And Deporting Them Submitted To ICC Prosecutors To Establish Jurisdiction*, EAST TURKISTAN GOVERNMENT IN EXILE (10 June 2021), <https://east-turkistan.net/press-release-evidence-of-chinese-operatives-in-tajikistan-rounding-up-uyghurs-and-deporting-them-submitted-to-icc-prosecutors-to-establish-jurisdiction/>. See also Kashgarian, *ICC Urged to Investigate China's Treatment of Uyghurs*, *supra* note 187.

<sup>215</sup> Helen Davidson, *Chinese Agents Operating Abroad to Get Uyghurs Deported, ICC Told*, THE GUARDIAN (11 Nov. 2021), <https://www.theguardian.com/world/2021/nov/11/chinese-agents-operating-abroad-to-get-uyghurs-deported-icc-told>.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> See e.g., UYGHUR HUMAN RIGHTS PROJECT, *WEAPONIZED PASSPORTS: THE CRISIS OF UYGHUR STATELESSNESS* (1 Apr. 2020), <https://uhrp.org/report/weaponized-passports-the-crisis-of-uyghur-statelessness/>.

<sup>219</sup> Bethany Matta, *China to neighbours: Send us your Uighurs*, AL JAZEERA (18 Feb. 2015), <https://www.aljazeera.com/features/2015/2/18/china-to-neighbours-send-us-your-uighurs>. See also Asim Kashgarian, *Uyghurs From Afghanistan Fear Deportation to China*, VOA NEWS (1 Sept. 2021), [https://www.voanews.com/a/south-central-asia\\_uyghurs-afghanistan-fear-deportation-china/6210234.html](https://www.voanews.com/a/south-central-asia_uyghurs-afghanistan-fear-deportation-china/6210234.html); WORLD UYGHUR CONGRESS, *SEEKING A PLACE TO BREATHE FREELY: CURRENT CHALLENGES FACED BY UYGHUR REFUGEES & ASYLUM SEEKERS* (June 2016, Updated June 2017), [https://www.uyghurcongress.org/en/wp-content/uploads/dlm\\_uploads/2017/06/WUC-Refugee-Report-Updated-June-2017.pdf](https://www.uyghurcongress.org/en/wp-content/uploads/dlm_uploads/2017/06/WUC-Refugee-Report-Updated-June-2017.pdf).

“spies” and “suicide bombers.” The diversity of the Uyghurs’ genders and ages suggests they were only detained for being Uyghur.<sup>220</sup>

*Element 5.* The perpetrator knew that Ahmet’s deportation was part of the widespread and systematic attack against Uyghurs generally and under the guise of targeting ETIM because the remaining ETIM in the region, if any, “are largely isolated, small-scale, and lack either the resources, networks, or fighting prowess to warrant such disproportionate attention from China.”<sup>221</sup>

*Case B: Denial of right to asylum, deportation, and detention of Mutellip Mamut*<sup>222</sup>

*Element 1.* In November 2009, Mamut and about 22 Uyghurs fled to Cambodia seeking asylum after suffering the CCP crackdown on Uyghurs. Before the UNHCR could decide their status, they were forcibly deported back to China and arrested. Mamut was sentenced to life in prison (under no known charges) after being deported.

*Element 2.* Seeking asylum, Mamut and the other Uyghurs were entitled to stay temporarily in Cambodia in accordance with the 1951 UN Refugee Convention and the 1967 Protocol, of which Cambodia is a State Party.<sup>223</sup>

*Element 3.* According to Chinese officials, Mamut and the other asylum seekers were “involved in crimes,” but this would still have required a determination by the UNHCR.

*Element 4.* Since at least 2009, the CCP has perpetrated an ongoing widespread and systematic attack on Uyghur culture, identity, and people. Mamut and others shared only one commonality — being Uyghur — yet collectively and individually, they were all wanted by the CCP.

*Element 5.* The CCP reached into Cambodia to accelerate their deportation. There is no evidence that any of the Uyghurs who fled were involved

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<sup>220</sup> See UYGHUR HUMAN RIGHTS PROJECT, “NETS CAST FROM THE EARTH TO THE SKY”: CHINA’S HUNT FOR PAKISTAN’S UYGHURS (11 Aug. 2021), <https://uhrp.org/report/nets-cast-from-the-earth-to-the-sky-chinas-hunt-for-pakistans-uyghurs/> (providing further evidence widespread or systematic attack against uyghurs generally and under the guise of targeting ETIM: “In October 2014, President Xi Jinping and Afghan President Ashraf Ghani met to agree on a deal. In exchange for a pledge of hundreds of millions of Chinese dollars in assistance, training, and scholarships for Afghan students to study in China, Ghani assured Xi that Afghanistan would support China’s fight against ETIM. Currently, an estimated 200 ETIM fighters are believed to be in Afghanistan’s Taliban-controlled Kunar province and Pakistan’s Federally Administered Tribal Areas (i.e., the ‘Tribal Belt’). These groups are largely isolated, small-scale, and lack either the resources, networks, or fighting prowess to warrant such disproportionate attention from China.”).

<sup>221</sup> *Id.*

<sup>222</sup> Shohret Hoshur, *Two More Uyghurs Get Life Sentence*, RADIO FREE ASIA (27 Jan. 2012), <https://www.rfa.org/english/news/uyghur/life-01272012201754.html>. See also Cong.-Exec. Comm’n on China, *New Information Available on Uyghur Asylum Seeker, Status of Others Remains Unknown* (7 Jan. 2011), <https://www.cecc.gov/publications/commission-analysis/new-information-available-on-uyghur-asylum-seeker-status-of-others>.

<sup>223</sup> UNHCR, *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (Sept. 2011), <https://www.unhcr.org/en-us/about-us/background/4ec262df9/1951-convention-relating-status-refugees-its-1967-protocol.html>.

in the ethnic riots, and they do not appear to have been charged with a specific crime. Additionally, in December 2009, days after the Uyghurs were improperly deported to China, then-Chinese Vice-President Xi Jinping signed 14 trade deals with Cambodia worth nearly one billion dollars.<sup>224</sup>

*Case C: Coerced transport, arrest, and detention of Gulbahar Haitiwaji*<sup>225</sup>

- Element 1.* On 30 November 2016, Haitiwaji was arrested in China after being told to leave her home in France and return to her former employer in Xinjiang to update forms for her residence permit. Upon arriving, she was arrested and interrogated without a lawyer by the police and (along with her husband and daughter) accused of being a terrorist. She served two years of a seven-year “re-education” sentence and was released on 2 August 2019. She returned to France.
- Element 2.* Haitiwaji was at the time still a Chinese citizen toward the end of her ten-year residency permit which was renewable. Haitiwaji’s husband (also Uyghur) was by then a French citizen. Both lived and worked in France.
- Element 3.* The Chinese officials knew Haitiwaji was a legal resident of France, which was the subject of the initial phone call. Upon her return, her passport and papers were confiscated, which would indicate her legal residency in France.
- Element 4.* Since at least 2009, the CCP has perpetrated an ongoing widespread and systematic attack on Uyghur culture, identity, and people. China is contacting emigrant Uyghurs beyond its borders to coerce and intimidate their return to China.<sup>226</sup> Haitiwaji is one such instance of this.
- Element 5.* When she was interrogated by the police, Haitiwaji was shown a picture of her daughter in France holding an East Turkestan flag (which are banned in China as a symbol of Uyghur separatism). China kept their knowledge of this photograph and their allegations a secret until Haitiwaji was in their custody. She was only released when a judge was convinced that she was re-indoctrinated with Chinese values.

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<sup>224</sup> Reuters staff, *Two Uighurs deported from Cambodia to China get life*, REUTERS (27 Jan. 2012), <https://www.reuters.com/article/us-china-uighurs/two-uighurs-deported-from-cambodia-to-china-get-life-idUSTRE80Q0AW20120127>.

<sup>225</sup> Gulbahar Haitiwaji & Rozenn Morgat, ‘Our souls are dead’: How I survived a Chinese ‘re-education’ camp for Uyghurs, THE GUARDIAN (12 Jan. 2021), <https://www.theguardian.com/world/2021/jan/12/uighur-xinjiang-re-education-camp-china-gulbahar-haitiwaji>.

<sup>226</sup> CBC Radio, *Uighurs in Canada fear deportation after China's crackdown on Turkic Muslims* (13 Sept. 2018), <https://www.cbc.ca/radio/thecurrent/the-current-for-september-13-2018-1.4821663/uighurs-in-canada-fear-deportation-after-china-s-crackdown-on-turkic-muslims-1.4821690>.

## ***F. Cases of Uyghur Enforced Disappearances and the Article 7(1)(i) Elements***

### ***Case A: Deportation of Israel Ahmet***<sup>227</sup>

- Element 1(a).* Ahmet was taken against his will by Chinese authorities at Kabul International Airport onto a plane bound for China.
- Element 2(a).* No information about Ahmet's whereabouts or those of the other Uyghur men who were initially held in Afghanistan are known from the time they boarded the plane. The Uyghur women and children that Ahmet was held with refused to go. Their current whereabouts are also unknown.
- Element 3(b).* At least up to the point when he was forced onto the plane, the Chinese officials gave Ahmet no information as to why he was being taken, refusing to acknowledge his abduction while they carried it out.
- Element 4.* Officials from the Chinese government led Ahmet onto the plane.
- Element 5.* No information from the CCP or from the officials present at the airport emerged acknowledging Ahmet's deportation, despite being fully aware of it.
- Element 6.* Ahmet was deported on charges including lacking legal documentation, counterfeiting, and espionage, all of which involve long jail sentences, but there is no evidence Ahmet committed any of these crimes.
- Element 7.* Since at least 2009, the CCP has perpetrated an ongoing widespread and systematic attack on Uyghur culture, identity, and people. China makes informal arrangements with the governments of Asian and Middle Eastern nations to deport Uyghurs back to China under the pretense of strengthening security between the nations and as ancillary agreements to lucrative trade deals.
- Element 8.* The only similarity between two dozen men, women, and children who Chinese officials sought to deport to China was that they were Uyghur.

### ***Case B: Denial of right to asylum, deportation, and detention of Mutellip Mamut***<sup>228</sup>

- Element 1(a).* Mamut was one of over twenty men arrested after fleeing China to Cambodia seeking asylum.
- Element 2(a).* The Chinese government sentenced Mamut and others to prison sentences without acknowledging that the UNHCR had yet to rule on Mamut's status as an asylum seeker.
- Element 3(b).* As a member of the U.N., the Chinese government would be aware that when it arrested Mamut that its actions would constitute a refusal to recognize the authority of the UNHCR and the U.N. Refugee Convention (1951) and Protocol (1967), to both of which China and Cambodia are States Parties.

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<sup>227</sup> Matta, *supra* note 219. See also Kashgarian, *Uyghurs From Afghanistan Fear Deportation to China*, *supra* note 219.

<sup>228</sup> Hoshur, *supra* note 222. See also Cong.-Exec. Comm'n on China, *supra* note 222.

- Element 4.* After his arrest, Mamut was sentenced to life in prison in Chinese courts.
- Element 5.* In both Mamut’s arrest and sentencing, neither the officers nor did courts recognize or address the illegality of Mamut’s arrest and deportation.
- Element 6.* Mamut was handed down a life sentence by the Chinese courts.
- Element 7.* Since at least 2009, the CCP has perpetrated an ongoing widespread and systematic attack on Uyghur culture, identity, and people. Mamut and the other men were fleeing China because they had witnessed Chinese attacks against Uyghurs, they themselves were Uyghurs, and they were arrested and faced charges including terrorism and the political charge of splittism.
- Element 8.* Mamut was arrested with more than twenty others, all of whom were clearly civilians. They shared little in common other than that they were Uyghurs.

*Case C: Coerced transport, arrest, and detention of Gulbahar Haitiwaji*<sup>229</sup>

- Element 1(a).* Haitiwaji was held by the Chinese state in a re-education camp for over two years from late-2016 until August 2019.
- Element 2(a).* Before returning to China, Chinese officials told Haitiwaji needed to return just to sign paperwork concerning her visa. After being arrested, she was charged as a “terrorist,” and her French residency, along with her husband’s French citizenship.
- Element 3(a).* When taken by police from her former employer’s office, Haitiwaji was shown a photograph of her daughter at a pro-Uyghur rally in France. This “evidence,” in Chinese officials’ opinion, justified charging Haitiwaji with terrorism.
- Element 4.* Haitiwaji was initially contacted and then arrested by national and local members of the Chinese State.
- Element 5.* Haitiwaji was taken before a Chinese court for sentencing before being placed in a “re-education” camp.
- Element 6.* Haitiwaji was sentenced to seven years at a re-education camp.
- Element 7.* Since at least 2009, the CCP has perpetrated an ongoing widespread and systematic attack on Uyghur culture, identity, and people. According to the U.S. State Department, over one million Uyghurs have been held in camps since 2017, though this is likely a low estimate.<sup>230</sup>
- Element 8.* Haitiwaji’s paperwork that indicated she was a civilian was confiscated upon her arrest and this paper also would have indicated her lawfulness as a French resident.

<sup>229</sup> Haitiwaji & Morgat, *supra* note 225.

<sup>230</sup> U.S. DEP’T OF STATE OFFICE OF INT’L RELIGIOUS FREEDOM, 2021 REPORT ON INT’L RELIGIOUS FREEDOM: CHINA–XINJIANG, (2 June 2022), <https://www.state.gov/reports/2021-report-on-international-religious-freedom/china/xinjiang/>.

## VI. THE RUSSIAN FEDERATION'S EXTRAORDINARY RENDITION PROGRAM OF UKRAINIANS

On 24 February 2022, the Russian bombing, shelling, and mobilization of forces into Ukraine signified the greatest launch of military force in Europe since the end of World War II.<sup>231</sup> By July 2022, a recorded seven million people were internally displaced by the conflict, while another six million were forced to flee to neighboring countries.<sup>232</sup> Thus far, 6,952 civilian deaths and 11,144 civilian injuries are recorded.<sup>233</sup> Many Russian attacks have been targeted against civilian locations such as bread lines, apartment blocks, and playgrounds;<sup>234</sup> health care facilities, namely maternity and children's hospitals;<sup>235</sup> and places of cultural significance including museums, churches, and historical buildings.<sup>236</sup>

Despite the destruction, Ukrainian forces have resisted the invasion of Russia and have begun retaking areas of southern and eastern Ukraine, including the liberation of settlements in Kherson<sup>237</sup>, Kharkiv, Luhansk, and Donetsk.<sup>238</sup> Liberated areas have produced many reports of war crimes such as possible kidnappings, unlawful executions, confinement in degrading conditions, and cases of torture.<sup>239</sup> Mass graves containing bodies displaying signs of torture have also been found on the outskirts of liberated areas.<sup>240</sup> On top of the destruction within Ukraine, estimates vary from 900,000 to 1.6 million people having been taken by Russian officials from the

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<sup>231</sup> Dan Bilefsky, Richard Pérez-Peña, & Eric Nagourney, *The Roots of the Ukraine War: How the Crisis Developed*, THE NEW YORK TIMES (12 Oct. 2022), <https://www.nytimes.com/article/russia-ukraine-nato-europe.html>.

<sup>232</sup> *Ukraine Refugee Situation*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (2022), <https://data.unhcr.org/en/situations/ukraine>.

<sup>233</sup> *Ukraine: Civilian Casualty Update*, UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (10 Jan. 2023), <https://www.ohchr.org/en/news/2023/01/ukraine-civilian-casualty-update-10-january-2023>.

<sup>234</sup> Daniel Victor & Ivan Nechepurenko, *Russia Repeatedly Strikes Ukraine's Civilians. There's Always an Excuse.*, THE NEW YORK TIMES (2 July 2022), <https://www.nytimes.com/article/russian-civilian-attacks-ukraine.html>.

<sup>235</sup> Diane Cole, *Russia's 226 Attacks on Health-Care Targets in Ukraine are Part of a Larger Pattern*, NPR (24 May 2022), <https://www.npr.org/sections/goatsandsoda/2022/03/16/1086982186/russias-strike-on-ukraine-maternity-hospital-is-part-of-a-terrible-wartime-tradi>.

<sup>236</sup> *Russia's Destruction of Ukraine Culture on Industrial Scale, Officials Say*, VOA NEWS (9 Oct. 2022), <https://www.voanews.com/a/russia-s-destruction-of-ukraine-culture-on-industrial-scale-officials-say-/6782170.html>.

<sup>237</sup> Kherson City was recaptured by Ukrainian forces in November 2022.

<sup>238</sup> Bloomberg News, *Ukraine Retakes More of South as Putin Signs off on Annexation*, BLOOMBERG (5 Oct. 2022), <https://www.bloomberg.com/news/articles/2022-10-05/ukraine-retakes-more-of-south-as-putin-signs-off-on-annexation?leadSource=uverify%20wall>.

<sup>239</sup> Paul D. Shinkman, *Russian Carnage, Destruction Revealed in Newly Liberated Ukrainian Territory*, U.S. NEWS (17 May 2022), <https://www.usnews.com/news/world-report/articles/2022-05-17/russian-carnage-destruction-revealed-in-newly-liberated-ukrainian-territory>. See also Andrew E. Kramer, *Electrical Cords, Metal Pipes: In Kherson, Signs of Torture Emerge*, THE NEW YORK TIMES, (16 Nov. 2022), <https://www.nytimes.com/2022/11/16/world/europe/kherson-ukraine-detain-torture.html>. See also Anthony Deutsch, et al., *Scale of Alleged Torture, Detentions by Russian Forces in Kherson Emerges*, REUTERS, (12 Jan. 2023), <https://www.reuters.com/world/europe/scale-alleged-torture-detentions-by-russian-forces-kherson-emerges-2023-01-12/>.

<sup>240</sup> Kat Lonsdorf & Claire Harbage, *Outside a Liberated Ukrainian Town, Inspectors Search for Evidence of War Crimes*, NPR (18 Sept. 2022), <https://www.npr.org/2022/09/17/1123629627/ukraine-izium-russia-war-crimes>.

areas of Ukraine under Russian control and placed within camps inside of Russia.<sup>241</sup> Estimates also vary that between 200,000 to 700,000 children have been among those abducted.<sup>242</sup>

### A. Filtration Camps

Filtration camps are appearing throughout Russian claimed territories in Ukraine and are believed to be “black holes” of human rights abuses.<sup>243</sup> As of June 2022, eighteen locations in eastern Ukraine and western Russia have been identified by the National Intelligence Council as possible filtration camps.<sup>244</sup> Originally set up to temporarily detain and screen Ukrainians and identify anyone perceived to pose a threat to Russian occupation efforts, the use of filtration camps has only intensified with growing Ukrainian resistance in occupied territories.<sup>245</sup> The filtration process can be analogous to internally displaced persons and refugee processing, using tactics such as temporary detention, data collection, interrogation, and a variety of abuse.<sup>246</sup> Ukrainians passing through the filtration camps “have reported treatment ranging from humiliation to verbal abuse and physical torture” including confiscation of electronics, strip searches, use of electric shocks, and staged executions of detainees.<sup>247</sup>

Russia is using filtration camps as a means of solidifying political control in occupied areas by eliminating Ukrainians sympathetic to Kyiv and by diminishing the Ukrainian national identity through depopulation, an act that some human rights activists are deeming “cultural genocide.”<sup>248</sup> And yet the Russian Ministry of Defense is framing this mass deportation of Ukrainians as a “humanitarian relief effort” claiming they are being “evacuated” to Russia.<sup>249</sup> Authorities further claim that they are providing accommodations and dispensing payments to the evacuees.<sup>250</sup>

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<sup>241</sup> HUMAN RIGHTS WATCH, “WE HAD NO CHOICE” FILTRATION AND THE CRIME OF FORCIBLY TRANSFERRING UKRAINIAN CIVILIANS TO RUSSIA (1 Sept. 2022), <https://www.hrw.org/report/2022/09/01/we-had-no-choice/filtration-and-crime-forcibly-transferring-ukrainian-civilians>. See also *Hundreds of Thousands of Ukrainians forced to Russia, U.S. Claims*, POLITICO, (8 Sept. 2022), <https://www.politico.com/news/2022/09/08/ukraine-forced-russia-deport-united-nations-00055394>.

<sup>242</sup> HUMAN RIGHTS WATCH, “WE HAD NO CHOICE” FILTRATION AND THE CRIME OF FORCIBLY TRANSFERRING UKRAINIAN CIVILIANS TO RUSSIA, *supra* note 241; *Ukrainian children stolen by Russia: how many have been taken, who is behind it, whereabouts of children*, MOLFAR GLOBAL (30 Dec. 2022), <https://www.molfar.global/en-blog/ukrainian-children-stolen-by-russia>. See also Jason Paladino, *Russian Filtration Camps: ‘Black Holes of Human Rights Abuses’ Where Ukrainians Face Torture and Loyalty Tests*, GRID NEWS (8 Aug. 2022), <https://www.grid.news/story/global/2022/08/08/russian-filtration-camps-black-holes-of-human-rights-abuses-where-ukrainians-face-torture-and-loyalty-tests/>.

<sup>243</sup> Kristina Hook, *Why Russia’s War in Ukraine Is a Genocide*, FOREIGN AFFAIRS (28 July 2022), <https://www.foreignaffairs.com/ukraine/why-russias-war-ukraine-genocide>. See Bonardi, *Learning from Guantánamo: Avoiding Legal Black Holes in Outer Space*, *supra* note 15.

<sup>244</sup> Marc Santora, *A U.S. intelligence report finds that Russia’s use of ‘filtration centers’ to detain and deport Ukrainians has intensified*, THE NEW YORK TIMES (25 July 2022), <https://www.nytimes.com/2022/07/25/world/europe/ukraine-russia-filtration-centers.html>.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> Paladino, *supra* note 242.

<sup>248</sup> Katie Bo Lillis, Kylie Atwood, & Natasha Bertrand, *Russia is depopulating parts of eastern Ukraine, forcibly removing thousands into remote parts of Russia*, CNN (26 May 2022), <https://www.cnn.com/2022/05/26/politics/ukraine-filtration-camps-forcibly-remove-russia/index.html>.

<sup>249</sup> Santora, *supra* note 244.

<sup>250</sup> *Ukraine says 400,000 citizens have been forcibly taken to Russia*, CBC (24 Mar. 2022), <https://www.cbc.ca/news/world/ukraine-people-taken-russia-1.6396247>.



A major concern is the data collection that Russian authorities have been able to capture. The filtration and screening process has allowed authorities to document vast amounts of personal data about Ukrainian civilians, including their biometrics.<sup>251</sup> Reports at filtration camps state that Russian officials took photographs of people and collected their fingerprints.<sup>252</sup> This is a mass illegal data collection carried out by Russian and Russian-affiliated forces, inflicted upon non-Russians that is a clear violation of the right to privacy with a clear path to continued abuse.<sup>253</sup>

Russia may have legitimate grounds for conducting said screenings if those individuals were voluntarily seeking refuge in Russia, but the filtration process's current scope and system is involuntary, punitive, and abusive.<sup>254</sup> Estimates from multiple sources indicate that Russian authorities have interrogated, detained, and forcibly deported between 900,000 and 1.6 million Ukrainian citizens, including between 200,000 to 700,000 children, from their homes to Russia—often to isolated regions in the Far East.<sup>255</sup> Amnesty International has documented cases of members of protected groups, including children, elders, and people with disabilities, being forcibly transferred.<sup>256</sup> Reports include abuse and torture, such as beatings, electrocution, interrogations, deprivation of food, water, and safe shelter, and finally threats of execution.<sup>257</sup>

In mid-December 2022, Russian Prime Minister Mikhail Mishustin issued an order allocating up to €2.5 billion for the resettlement of Ukrainian residents from the Kherson region to Russia.<sup>258</sup> Ukrainian officials explain that occupation authorities may be planning to deport more than 100,000 residents from the occupied Kherson region to fifty-seven regions in Russia, including the Far East, and place them in civilian roles.<sup>259</sup>

Rossiyskaya Gazeta, a newspaper owned by the Russian government, stated that 5,000 Ukrainians were processed at the camp in the Russian-controlled village of Bezimenne, near Novoazovsk and underwent checks to prevent nationalists dressed as refugees from infiltrating Russia.<sup>260</sup> Satellite images captured by U.S.-based Maxar Technologies showed the tented camps set up in Bezimenne.<sup>261</sup>

Ukrainians seeking shelter are being forcibly ushered into vehicles with Russian plates; taken to the Russian border where they are interrogated by Russian customs officers—their belongings including phones, bags, and passports searched and checked; and then taken to

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<sup>251</sup> HUMAN RIGHTS WATCH, “WE HAD NO CHOICE” FILTRATION AND THE CRIME OF FORCIBLY TRANSFERRING UKRAINIAN CIVILIANS TO RUSSIA, *supra* note 241.

<sup>252</sup> AMNESTY INTERNATIONAL, *Russia’s unlawful transfer of civilians a war crime and likely a crime against humanity – new report* (10 Nov. 2022), <https://www.amnesty.org/en/latest/news/2022/11/ukraine-russias-unlawful-transfer-of-civilians-a-war-crime-and-likely-a-crime-against-humanity-new-report>.

<sup>253</sup> HUMAN RIGHTS WATCH, “WE HAD NO CHOICE” FILTRATION AND THE CRIME OF FORCIBLY TRANSFERRING UKRAINIAN CIVILIANS TO RUSSIA, *supra* note 241.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* See also *Ukrainian children stolen by Russia: how many have been taken, who is behind it, whereabouts of children*, *supra* note 242.

<sup>256</sup> AMNESTY INTERNATIONAL, *Russia’s unlawful transfer of civilians a war crime and likely a crime against humanity – new report*, *supra* note 252.

<sup>257</sup> *Id.*

<sup>258</sup> Oleksandra Vakulina, *Moscow is allegedly preparing to deport some 100,000 Ukrainians to Russia*, EURONEWS (15 Jan. 2023), <https://www.euronews.com/2023/01/15/moscow-is-allegedly-preparing-to-deport-some-100000-ukrainians-to-russia>.

<sup>259</sup> *Id.*

<sup>260</sup> Piotr Sauer, *Hundreds of Ukrainians forcibly deported to Russia, say Mariupol women*, THE GUARDIAN (4 Apr. 2022), <https://www.theguardian.com/world/2022/apr/04/hundreds-of-ukrainians-forcibly-deported-to-russia-say-mariupol-women>.

<sup>261</sup> *Id.*

distribution camps.<sup>262</sup> Russian troops are confiscating identity documents and electronic devices, demanding passwords before interrogating civilians.<sup>263</sup> One Mariupol woman recalled that as an official went through her phone, she was questioned extensively about the Ukrainian army; if she had any acquaintances in the military; and her thoughts on Ukraine, Putin, and the conflict.<sup>264</sup>

Representatives of the two self-proclaimed republics in the Donbas stated they set up a “tent city” of thirty tents for Mariupol residents that has a capacity of up to 450 people.<sup>265</sup> Mariupol Mayor Vadkym Boichenko compared these kidnappings to those committed by Nazis during World War II.<sup>266</sup> Russia is forcing civilians through filtration camps, putting them on trains and sending them to various economically depressed cities to work for free.<sup>267</sup> Furthermore, during filtration procedures for women and girls, concerns of sexual abuse have arisen.<sup>268</sup>

During Russia’s two wars in Chechnya, at least seventy thousand civilians perished and more than two hundred thousand Chechens passed through similar filtration camps.<sup>269</sup> Researchers describe this process as not only an excruciating process for the disappeared but a form of collective punishment imposed on their families as well: “One woman, referring to a male relative who had been taken away, told the researchers, ‘He’s nowhere—not among the living, not among the dead.’”<sup>270</sup>

### ***B. Kidnapping and Detention of Journalists and Local Officials***

The U.N. Human Rights Monitoring Mission in Ukraine documented at least forty-eight local officials detained by Russian authorities.<sup>271</sup> By kidnapping and detaining local mayors, journalists, and active members of local communities, individuals who have authority in the community, Russia is hoping to squash the resilience of local populations and force them to submit to collaboration with their occupiers.<sup>272</sup>

Russian authorities have targeted journalists and their families to rescript what is currently being reported. Journalist Viktoria Roshchyna was taken by unidentified men while working in occupied areas in the east on 15 March 2022.<sup>273</sup> Six days later she was released along with a hostage-style video that recorded her denying being held captive and thanking Moscow for “saving

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<sup>262</sup> Olena Hrazhdan, *Deported Ukrainians Seek Justice*, INST. FOR WAR & PEACE REPORTING (6 Sept. 2022), <https://iwpr.net/global-voices/deported-ukrainians-seek-justice>.

<sup>263</sup> RFE/RL’s Tatar-Bashkir Service, *Amid Intensified Fighting, Reports Continue To Surface Of Ukrainians Forcibly Relocated To Russia*, RADIOFREEEUROPE/RADIOLIBERTY (17 Apr. 2022), <https://www.rferl.org/a/ukraine-refugees-forcibly-resettled-russia/31807244.html>.

<sup>264</sup> Sauer, *supra* note 260.

<sup>265</sup> *Id.*

<sup>266</sup> *Russia is kidnapping children in Ukraine, says US embassy*, SOUTH CHINA MORNING POST (23 Mar. 2022), <https://www.scmp.com/news/world/russia-central-asia/article/3171461/russia-kidnapping-children-ukraine-says-us-embassy>.

<sup>267</sup> *Id.*

<sup>268</sup> *UN Says ‘Credible’ Reports Ukraine Children Transferred to Russia*, AL JAZEERA (8 Sept. 2022), <https://www.aljazeera.com/news/2022/9/8/un-says-credible-reports-ukraine-children-transferred-to-russia>.

<sup>269</sup> David Kortava, *Inside Russia’s “Filtration Camps” in Eastern Ukraine*, THE NEW YORKER (3 Oct. 2022), <https://www.newyorker.com/magazine/2022/10/10/inside-russias-filtration-camps-in-eastern-ukraine>.

<sup>270</sup> *Id.*

<sup>271</sup> Jen Kirby, *When Russian troops arrived, their relatives disappeared*, VOX (12 Apr. 2022), <https://www.vox.com/23012456/ukraine-russia-war-disappearances-kidnappings>.

<sup>272</sup> *Id.*

<sup>273</sup> Matt Murphy & Robert Greenall, *Ukraine War: Civilians abducted as Russia tries to assert control*, BBC (25 Mar. 2022), <https://www.bbc.com/news/world-europe-60858363>.

her life.”<sup>274</sup> Similarly, Melitpol journalist, Svetlana Zalizetskaya, stated Russian forces took her seventy-five-year-old father hostage in retaliation for her refusal to cooperate and retract her criticism of the invasion.<sup>275</sup>

The head of the Ukrainian National Union of Journalists, Sergiy Tomilenko, claimed that these detentions were part of a “wave of information cleansing” to intimidate journalists and other public figures.<sup>276</sup> One public figure was Mayor Ivan Fedorov who was taken from a city crisis center and reported that other detainees were being tortured.<sup>277</sup> He stated that while he was not touched physically, “seven armed men were enough to make their position clear” and “in the next cell someone was being tortured—there were screams which generated plenty of psychological pressure.”<sup>278</sup>

### *C. Torture*

Ukrainians are being held without legal grounds while being subjected to beatings, torture, rape, and arbitrary execution.<sup>279</sup> Civilians are taunted, faced with death threats, and beaten unconscious.<sup>280</sup> The severity of the punishment that Russian officials impose may be contingent upon the potential military background and, above all, a detainee’s political views—“specifically the degree to which he expressed ‘support of state sovereignty.’”<sup>281</sup> A tactic, referred to as “the elephant,” involves “placing a gas mask over the detainee’s head and blocking the air flow.”<sup>282</sup> There have been multiple accounts of public castrations and also one detainee having “bandera,” the name of Ukrainian nationalist and Nazi collaborator, Stephen Bandera, carved into his chest prior to killing him.<sup>283</sup>

One woman reported that she spent over six months in captivity where she and other detainees were treated like animals.<sup>284</sup> She stated that Russian authorities tortured girls with electric currents and beat them with hammers, and “that’s the lightest thing.”<sup>285</sup> She reported that the authorities wanted to cut off the tattoos of anyone who had them and scalded them with boiling water “just because [they] are there . . . because [they] speak Ukrainian.”<sup>286</sup>

These are not isolated incidents and there is strong belief that similar methods of torture are being conducted at present.<sup>287</sup> Reports from Ukrainian authorities and international human

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<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> Charlene Rodrigues, *Ukrainians allege abuse, beatings at Russian ‘filtration’ camps*, AL JAZEERA (6 Dec. 2022), <https://www.aljazeera.com/news/2022/12/6/ukrainians-allege-abuse-beatings-at-russian-filtration-camps>.

<sup>280</sup> *Id.*

<sup>281</sup> Kortava, *supra* note 269.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> Clarissa Ward, et al., *This teacher was tortured by the Russians and held for six months before returning to her town in Ukraine in a prisoner swap*, CNN (21 Oct. 2022), <https://www.cnn.com/2022/10/21/europe/ukraine-civilians-kidnapped-filtration-russia-intl/index.html>.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> Anthony Deutsch, et al., *Scale of alleged torture, detentions by Russian forces in Kherson emerges*, REUTERS (12 Jan. 2023), <https://www.reuters.com/world/europe/scale-alleged-torture-detentions-by-russian-forces-kherson-emerges-2023-01-12/>.

rights specialists that torture continues are supported by interviews with alleged victims.<sup>288</sup> War crimes investigators have witnessed tools for torture in the basement of one of the largest detention facilities in Kherson in a visit in December 2022 and observed tools for waterboarding at a courthouse detention center.<sup>289</sup>

#### *D. Forcibly Transferring Children of the Group*

The U.S. Department of Defense reported in October 2022 that Russian forces are abducting children in Ukraine by either deliberately splitting the children from their parents or taking them from schools, orphanages, and hospitals.<sup>290</sup> The U.S. Department of Defense's Europe Office and the U.S. Embassy in Kyiv reported that Russia has been kidnapping children from their homes since at least July 2022.<sup>291</sup> According to the U.N., in July 2022 alone, 1,800 Ukrainian children were transferred to Russia.<sup>292</sup> At least 1,000 children from the liberated Kherson area alone are reported to have been taken during the eight-month occupation.<sup>293</sup> Their whereabouts are still unknown.<sup>294</sup>

In addition to schools and orphanages, authorities are pillaging hospitals for children to abduct and bring back to Russia.<sup>295</sup> In response to the other kidnappings, staff at the Kherson hospital began fabricating the children's documents and medical records to make it appear that the children were too ill to travel or to be moved.<sup>296</sup> Dr. Olga Pilyarska, head of intensive care, stated they were scared that the Russians would find out, but knew that they needed to save the children at any cost.<sup>297</sup>

Once the children are kidnapped, they are subsequently put up for adoption in isolated regions of Russia, primarily in the far eastern region of the country.<sup>298</sup> Children arriving in Russia are often held in orphanages or sent to foster families throughout Russia regardless of whether or not their parents or other family members are alive.<sup>299</sup> Russia "has prepared a register of suitable Russian families for Ukrainian children, and pays them for each child who gets citizenship — up to \$1,000 for those with disabilities. It holds summer camps for Ukrainian orphans, offers "patriotic education" classes and even runs a hotline to pair Russian families with children from Donbas."<sup>300</sup> Other children have been taken into Belarus where they face torture and beatings at

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<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> Jerusalem Post Staff, *Russia abducting Ukrainian children, putting up for adoption in Russia*, THE JERUSALEM POST (17 Oct. 2022), <https://www.jpost.com/international/article-719837>.

<sup>291</sup> *Id.*

<sup>292</sup> UN Says 'Credible' Reports Ukraine Children Transferred to Russia, *supra* note 268.

<sup>293</sup> Sam Mednick, *Ukrainians hid orphaned children from Russian deportation*, AP NEWS (2 Dec. 2022), <https://apnews.com/article/russia-ukraine-health-europe-orphans-f283aa4d22fdab59a43a16ca0be54baf>.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> Jerusalem Post Staff, *supra* note 290.

<sup>299</sup> Michela Moscufo, Britt Clennett, & Angus Hines, *Ukrainian Families Reunite with Children they say Russia Kidnapped but Put Up For Adoption*, ABC NEWS (23 Nov. 2022), <https://abcnews.go.com/International/ukrainian-families-reunite-children-russia-kidnapped-put-adoption/story?id=93798931>.

<sup>300</sup> Sarah el Deeb, et. al., *How Moscow grabs Ukrainian kids and makes them Russian*, AP NEWS (13 Oct. 2022), <https://apnews.com/article/ukrainian-children-russia-7493cb22c9086c6293c1ac7986d85ef6>.

Belarusian orphanages.<sup>301</sup> Children have been pressured to “forget” their parents, being told that their families abandoned them or were dead.<sup>302</sup>

In August 2022, Russia’s Department for Family and Children in the Krasnodar region released a statement indicating that more than 1,000 children taken from Ukraine had been adopted to families in Russia.<sup>303</sup> Some of the families were located in the Altai Territory, located more than 2,000 miles from Ukraine.<sup>304</sup> Daria Herasymchuk, the top children’s rights official of Ukraine, announced in November 2022 that 10,764 Ukrainian children had been reported by family members as deported to Russia.<sup>305</sup>

Maria Lvova-Belova, the Presidential Commissioner for Children’s Rights in Russia, is a key figure in the abduction of children from Ukraine and their placement among foster families and orphanages throughout Russia.<sup>306</sup> Lvova-Belova has openly advocated for stripping the Ukrainian identities of children and teaching them to love Russia instead.<sup>307</sup> Vladimir Putin has applauded her actions in the removal of children from Ukraine.<sup>308</sup> She is sanctioned by the U.S., Europe, the U.K., Canada, and Australia.<sup>309</sup>

Forcibly transferring the children of a group is one of the acts of genocide under the Genocide Convention.<sup>310</sup> Coupled with the requisite intent to commit genocide—the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group”—this act could qualify as genocide.<sup>311</sup>

### *E. War Crimes*

All parties to the armed conflict in Ukraine are subject to international humanitarian law, including the Geneva Conventions, and customary international law.<sup>312</sup> Armed forces that have effective control of an area are subject to the international law of occupation from the Hague Convention 1907 and the Geneva Conventions.<sup>313</sup> Article 8 of the Rome Statute governs war crimes, which entail grave breaches of the Geneva Conventions of 12 August 1949 and other serious violations of the laws and customs applicable in international armed conflict, as well as serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949 and

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<sup>301</sup> Michela Moscufo, Britt Clennett, & Angus Hines, *Ukrainian Families Reunite with Children they say Russia Kidnapped but Put Up For Adoption*, ABC NEWS (23 Nov. 2022), <https://abcnews.go.com/International/ukrainian-families-reunite-children-russia-kidnapped-put-adoption/story?id=93798931>.

<sup>302</sup> Robyn Dixon & Natalia Abbakumova, *Ukrainians Struggle to Find and Reclaim Children Taken by Russia*, THE WASHINGTON POST (24 Dec. 2022), <https://www.washingtonpost.com/world/2022/12/24/ukraine-stolen-children-maria-lvova-belova/>.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Maria Lvova-Belova Brought Children from Donetsk People’s Republic to Russia*, PRESIDENT OF RUSSIA (7 Oct. 2022), <http://en.kremlin.ru/events/administration/69571> (last visited 7 Jan. 2023).

<sup>307</sup> Dixon & Abbakumova, *supra* note 302.

<sup>308</sup> *Id.*

<sup>309</sup> el Deeb, et. al., *supra* note 300.

<sup>310</sup> Genocide Convention, *supra* note 60, at art. II(e).

<sup>311</sup> *Id.* See also Editorial Board, *Russia’s abductions of Ukrainian children are a genocidal crime*, THE WASHINGTON POST (27 Dec. 2022), <https://www.washingtonpost.com/opinions/2022/12/27/russia-genocide-ukraine-children>.

<sup>312</sup> *Ukraine: Executions, Torture During Russian Occupation*, HUMAN RIGHTS WATCH (18 May 2022), <https://www.hrw.org/news/2022/05/18/ukraine-executions-torture-during-russian-occupation>

<sup>313</sup> *Id.*

other serious violations of the laws and customs applicable in armed conflicts not of an international character.<sup>314</sup> Among the listed war crimes under Article 8(2) are unlawful deportation or transfer or unlawful confinement as well as torture or inhuman treatment.<sup>315</sup>

International organizations, including Amnesty International<sup>316</sup> and the Organization for Security and Co-operation in Europe (“OSCE”)<sup>317</sup>, have described Russia’s use of the filtration and deportation system as a war crime. The U.S. Department of State has called on Russia to allow independent observers access to filtration facilities and to forced deportation relocation areas.<sup>318</sup> It is paramount that the International Committee of the Red Cross (“ICRC”) and the U.N. Human Rights Monitoring Mission in Ukraine have “unimpeded access to all individuals detained in relation to [this] war.”<sup>319</sup> The extent of the atrocity that Russia has inflicted upon Ukraine is constantly growing with more evidence coming to light each day.

#### ***F. Cases of Ukrainian Deportations and the Article 7(1)(d) Elements***

##### ***Case A: Forced transportation and attempted deportation of Timofey Lopatkina***<sup>320</sup>

*Element 1.* In mid-March 2022, 17-year-old Timofey Lopatkina acted as guardian over his siblings during Russian airstrikes of Mariupol that began after his mother sent them there on holiday. A local doctor arranged to take them out of Mariupol but still within Ukraine. At an intra-national checkpoint, pro-Russian forces intervened, denying Lopatkina admission and then sending him to a hospital in the self-proclaimed Donetsk People’s Republic (“DPR”). He was there for about two months. Had he turned 18 he would have been conscripted into the Russian military.

*Element 2.* Lopatkina, his mother, and all his siblings were Ukrainian citizens.

*Element 3.* At the checkpoint, the pro-Russian forces refused to recognize Lopatkina and his siblings’ documents—photocopies of official papers identifying them and their parents.

*Element 4.* Since at least 24 February 2022, Russia continues to commit a widespread and systematic attack against the Ukrainian civilian population. According to Lopatkina’s mother Olga, Lopatkina and his siblings were “paraded” on Russian state television and told their mother did not love them. Timofey was also told by local officials that a DPR court would strip his parents of their guardianship, sending his siblings to a Russian orphanage. Russian ombudswoman Maria Lvova-Belova said the large-scale adoptions are to help

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<sup>314</sup> Rome Statute, *supra* note 5, at art. 8(2).

<sup>315</sup> *Id.* art. 8(2)(a)(vii).

<sup>316</sup> AMNESTY INTERNATIONAL, *Russia’s unlawful transfer of civilians a war crime and likely a crime against humanity – new report*, *supra* note 252.

<sup>317</sup> Paladino, *supra* note 242.

<sup>318</sup> *Remarks at the Ukraine Accountability Conference by Uzra Zeya, Under Secretary For Civilian Security, Democracy, and Human Rights*, U.S. DEPARTMENT OF STATE (14 July 2022), <https://www.state.gov/remarks-at-the-ukraine-accountability-conference/>.

<sup>319</sup> U.S., *UN Demand Access To Russian ‘Filtration’ Sites In Ukraine Amid War-Crimes Fears*, RADIOFREEEUROPE/RADIOLIBERTY (8 Sept. 2022), <https://www.rferl.org/a/us-un-demand-access-russian-filtration-camps-ukraine-/32023811.html>.

<sup>320</sup> el Deeb, et. al., *supra* note 300.

“preserve [children’s] right to live under a peaceful sky.” However, Lvova-Belova highlighted the clear role nationalism plays in these adoptions stating that children sang the Ukrainian national anthem before adoption but have “transformed into a love of Russia.”

*Element 5.* Along with the comments Timofey was told by officials about revoking Olga’s parental rights, Olga herself also sent the documentation to Russian and Ukrainian officials repeatedly. DPR authorities eventually told Olga she could retain custody of her children, but only if she went to Donetsk herself to retrieve them. However, since no facts or evidence changed between the time of Olga’s initial contact with DPR authorities to when she was offered the ultimatum to retrieve her kidnapped children, the facts tend to prove that the DPR authorities were aware that Olga was Lopatkina’s mother and legal guardian long before they took action to reunite them.

*Case B: Kidnapping, deportation, and detention of Viktoria Andrusha*<sup>321</sup>

*Element 1.* As Russian troops withdrew from the Chernihiv region of Ukraine, they forcibly transferred schoolteacher Viktoria Andrusha with them on 25 March 2022. They took her because she was admittedly disclosing Russian troop movements within her neighborhood to her friends in the Ukrainian military. Andrusha’s family learned via unofficial channels that she was in a civilian detention facility in Kursk, Russia. She was later transferred to Bryansk, Russia and was released in early October 2022.

*Element 2.* Andrusha, as well as her family, are Ukrainian citizens. Andrusha was lawfully working in an elementary school at the time of her arrest.

*Element 3.* Andrusha performed her monitoring of Russian tanks arriving and departing from the living room and attic of her house. This was the same house where she was arrested. To have strong enough evidence to know Andrusha was relaying information to Ukrainian troops or officials, those seeking to arrest her would know the reporting was done from her established residence. This is evident by the arresting officers doing a house-by-house search of Andrusha’s neighborhood, knowing the suspect lived in the neighborhood.

*Element 4.* Since at least 24 February 2022, Russia continues to commit a widespread and systematic attack against the Ukrainian civilian population. Andrusha was held in a boiler room in Kursk with about twenty others.

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<sup>321</sup> Joshua Yaffa, *A Ukrainian Prisoner of War’s Long Journey Home*, THE NEW YORKER (27 Oct. 2022), <https://www.newyorker.com/news/dispatch/a-ukrainian-prisoner-of-wars-long-journey-home>. See also *Russia: Forcible Disappearances of Ukrainian Civilians; Detainees Unlawfully Transferred to Russia, Possibly Held as Hostages*, HUMAN RIGHTS WATCH (14 July 2022), <https://www.hrw.org/news/2022/07/14/russia-forcible-disappearances-ukrainian-civilians>.

- Element 5.* While detained, the Russian guards knew Andrusha was a civilian. They would make her and other prisoners learn and recite the Russian national anthem, telling her “[y]ou’re a schoolteacher. Now you’re the one who has to pass the test.”

*Case C: Kidnapping, deportation, and detention of Yevgeny Malyarchuk*<sup>322</sup>

- Element 1.* In late March 2022, Yevgeny Malyarchuk, a Ukrainian businessman, was held at gunpoint by DPR militants in Mariupol and was arrested without charges. He served 100 days in a penal colony functioning as a “filtration camp” in Yelenovka near Donetsk, DPR.
- Element 2.* Malyarchuk is a Ukrainian citizen, employed in Ukraine, and native to Mariupol.
- Element 3.* When arrested, Malyarchuk’s car, used to evacuate civilians, was filled with relief supplies and labeled “volunteers.” The civilians wore no uniforms, and Malyarchuk himself has never served in any military force.
- Element 4.* Since at least 24 February 2022, Russia continues to commit a widespread and systematic attack against the Ukrainian civilian population. According to Malyarchuk, many of the ~3,000 other POWs were civilians, including fellow Ukrainian businessmen, and directors of IT companies.
- Element 5.* At some point towards the end of Malyarchuk’s detainment, the responsibility of the penal colony switched from DPR officials to Russian guards and Russian secret service (“FSB”). This indicates an intentional, coordinated transfer of authority between the DPR troops and officials with Russia regarding detainment of civilians.

*Case D: Forced deportation and detention of Ihor*<sup>323</sup>

- Element 1.* On 17 March 2022, Ihor, a farmer in a village in the Kharkiv region, was forcibly bused alongside 60 other civilian men to a filtration camp in the Russian city of Belgorod. Ihor was released relatively soon after, and fled to Moscow, then Belarus, and finally Poland.
- Element 2.* Ihor is a native Ukrainian citizen, who owns farmland in the village from which he was taken.
- Element 3.* After the markets in Ihor’s village gave away their food to prevent Russian looting, Russian troops wandered to people’s houses. They

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<sup>322</sup> Igor Sevryugin (trans.), *100 days of captivity in the ‘DNR’. What did the Ukrainian volunteer go through?*, CURRENT TV (22 July 2022), <https://www.currenttime.tv/a/posudu-ispolzovali-po-krugu-odni-i-te-zhe-tarelki-na-250-300-chelovek-ih-nikto-ne-myl-ukrainskiy-volonter-o-100-dnyah-plena-v-dnr-/31954690.html>. See also Meera Suresh, *Ukrainian Businessman Ate Off Unwashed Plate Used By 300 Others To Survive 100 Days In DPR Prison*, INT’L BUS. TIMES (22 July 2022), <https://www.ibtimes.com/ukrainian-businessman-ate-unwashed-plate-used-300-others-survive-100-days-dpr-prison-3583326>.

<sup>323</sup> Ihor’s last name and village’s name were not disclosed for safety reasons. Daria Shulzhenko, *Kharkiv Oblast resident forcibly deported to Russia: ‘It’s not a country, it’s a prison’*, THE KYIV INDEPENDENT (18 Apr. 2022), <https://kyivindependent.com/national/kharkiv-oblast-resident-forcibly-deported-to-russia-its-not-a-country-its-a-prison>.



demanded homeowners give them food. On at least one occasion, a villager refused, ordering the Russians to “leave the yard of his house” and was shot immediately.

*Element 4.* Since at least 24 February 2022, Russia continues to commit a widespread and systematic attack against the Ukrainian civilian population. When Ihor and other residents would ask if they could be taken to a non-shelled Ukrainian city, they were told by the Russian occupiers the buses would “go to Russia, [y]ou must go to Russia.”

*Element 5.* Upon arrival in Ihor’s village, Russian troops checked the town’s administrative documents to learn the identities of all local Ukrainians who fought in the Donbas, before executing them. This was before Ihor and the remaining men were then loaded onto the buses for Russia. Therefore, at this point the Russians knew the men they deported were civilians.

*Case E: Forced transportation and attempted deportation of Kira Obedinsky<sup>324</sup>*

*Element 1.* In late March 2022, 12-year-old Kira Obedinsky was injured when fleeing Mariupol with her late-father’s girlfriend, Anya, on foot. After Anya accidentally kicked a landmine, causing them both serious injuries, Russian troops arrived on scene. They sent the two to a hospital in Manhush, Ukraine. They were then separated, and Obedinsky was transferred to a hospital in Donetsk for unclear reasons.

*Element 2.* Obedinsky is a Ukrainian citizen, and she and her late father (Ukrainian National Water Polo captain Yevhen Obedinsky) resided in Mariupol.

*Element 3.* All Obedinsky’s paperwork at the hospital(s) indicated she was a Ukrainian citizen.

*Element 4.* Since at least 24 February 2022, Russia continues to commit a widespread and systematic attack against the Ukrainian civilian population. The first hospital Obedinsky was taken to was about 20 minutes away from Mariupol. The second hospital was nearly two hours away, and across disputed state lines. There does not appear to be a clear reason why Obedinsky was transferred away from Anya, one of her few remaining adult contacts. According to Pavel Kirilenko, head of the Donetsk Regional Military Administration, Obedinsky had all her Ukrainian documentation taken from her and she was promised *new Russian documents* would be sent to Russia soon.

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<sup>324</sup> Phil Black, et al., *Injured, alone and destined for a Russian orphanage, a 12-year-old Ukrainian girl is recruited for Moscow’s information war*, CNN (17 Apr. 2022), <https://www.cnn.com/2022/04/17/europe/ukrainian-girl-russian-orphanage-intl-cmd/index.html>. See also Matthew Harder, *Eugene Obendinskiy, Ex-Captain of Ukrainian Water Polo Team, Killed in Bombing*, SWIM SWAM (30 Mar. 2022), <https://swimswam.com/eugene-obendinskiy-ex-captain-of-ukrainian-water-polo-team-killed-in-bombing/>. See also Sandi Sidhu, et al., *After epic journey, orphaned Ukrainian girl is reunited with grandfather*, CNN (28 Apr. 2022), <https://www.cnn.com/2022/04/28/europe/ukrainian-orphan-girl-grandfather-reunited-mariupol-intl/index.html>.

*Element 5.* Despite Obedinsky’s Ukrainian grandfather being willing to legally adopt her, he was informed by hospital staff in Donetsk that Kira, upon recovery, was to be sent to an adoption facility in Russia, despite knowing of his attempts to retrieve her.

***G. Cases of Ukrainian Enforced Disappearances and the Article 7(1)(i) Elements***

*Case A: Forced transportation and attempted deportation of Timofey Lopatkina*<sup>325</sup>

*Element 1(a).* Lopatkina and his siblings were attempting to evacuate Mariupol, but pro-Russian forces at a checkpoint sent them to a hospital in the DPR (even though they were not injured) and refused to recognize their legal guardianship documentation.

*Element 2(a).* Russia and the DPR considered Lopatkina and his siblings “orphans” even though their parents were still alive. The DPR then assumed a custodial role rather than working to reunite the children who (in Lopatkina’s case) were actively trying to reach their mother. The DPR refused to recognize Lopatkina’s legal guardianship documentation.

*Element 3(a).* Officials told Lopatkina the DPR courts could strip his mother of her guardianship.

*Element 4.* The attempted deportation of the children was supported by state-run television which paraded the children to audiences as orphans. Lopatkina and his siblings were told they were there because their birth families did not love them.

*Element 5.* Officials told Lopatkina that after DPR courts made him legally an orphan, he would be sent to a DPR school and likely (as he was nearly eighteen) enlisted in the DPR military.

*Element 6.* Children taken by Russian or DPR authorities are often then adopted by Russian families. These families intend to raise the children in Russia, as Russians, until at least age eighteen.

*Element 7.* Since at least 24 February 2022, Russia continues to commit a widespread and systematic attack against the Ukrainian civilian population. Thousands of Ukrainian children, either made orphans by the war or non-orphans whose parents have fled, remain in Russia and its “adoption” system.

*Element 8.* Officials told Lopatkina the DPR courts could strip his mother of her guardianship. He was also told his siblings would be sent to orphanages in Russia, furthering the cycle.

*Case B: Kidnapping, deportation, and detention of Viktoria Andrusha*<sup>326</sup>

*Element 1(a).* Andrusha was arrested by Russian troops at her house on 25 March 2022.

*Element 2(a).* In May and July 2022, Russian officials denied Andrusha was being held in a civilian jail in Kursk when asked in-person by the family’s

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<sup>325</sup> el Deeb, et. al., *supra* note 300.

<sup>326</sup> Yaffa, *supra* note 321. See also *Russia: Forcible Disappearances of Ukrainian Civilians*, *supra* note 321.

- attorney, Leonid Krikum. The state never officially recognized Andrusha's detainment while in their custody.
- Element 3(b).* When Krikum inquired about Andrusha at the Kursk prison, it took two hours for him to be told "we have no such person." Andrusha was at the prison on the day her attorney inquired about her.
- Element 4.* The Russian troops who arrested Andrusha were acting on behalf of the Russian government who launched a full-scale invasion of Ukraine in February 2022.
- Element 5.* The prison's warden and local staff who denied Andrusha's presence to Krikum were employed by the Russian state. Additionally, Krikum noticed a large amount of Russian military-police cars at the civilian prison. They worked with local guards to monitor the inmates.
- Element 6.* Andrusha was never tried before a court, nor was there ever any intention to do so. Her captors gave her family no notice of any plan to acknowledge her detention, let alone release her. From the beginning, the intended length of her detention was indefinite.
- Element 7.* Since at least 24 February 2022, Russia continues to commit a widespread and systematic attack against the Ukrainian civilian population. As of 3 October 2022, the OHCHR has found over 15,000 civilian casualties in Ukraine.
- Element 8.* Despite Andrusha reporting Russian troop movements in her neighborhood to Ukrainian military contacts from the attic of her home, she was a civilian, acting as a civilian in wartime. Moreover, she was held in a Russian civilian prison along with many other Ukrainian civilians.

*Case C: Kidnapping, deportation, and detention of Yevgeny Malyarchuk*<sup>327</sup>

- Element 1(a).* Malyarchuk, a civilian, was arrested in Mariupol in March 2022 and taken to Olemivka in the DPR.
- Element 2(a).* Before Malyarchuk's release, he and other inmates were forced to sign protocols that they had no complaints about the inhuman conditions they faced.
- Element 3(b).* The signing of the protocols directly led to the release of Malyarchuk (and others). They were required to state they had no complaints regarding their illegal detainment, while the detainment was ongoing.
- Element 4.* Pro-Russian authorities arrested Malyarchuk and Russian troops guarded the penal colony where he was held.
- Element 5.* The forms declaring Malyarchuk had no complaints were given to him by soldiers after they called his name out, indicating they wanted him to sign it.
- Element 6.* Malyarchuk was never told how long he would be held and did not even realize he was being released until it happened. After his release, he has tried and failed to get information on his friends held

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<sup>327</sup> Sevryugin, *supra* note 322. See also Suresh, *supra* note 322.

at the same facility, indicating a plan of prolonged, if not indefinite, holdings.

*Element 7.* Since at least 24 February 2022, Russia continues to commit a widespread and systematic attack against the Ukrainian civilian population. According to Malyarchuk, many of the ~3,000 other POWs were civilians, including fellow Ukrainian businessmen, and directors of IT companies.

*Element 8.* Soldiers continuously interrogated him, hoping to get him to acknowledge he was a soldier in the Ukrainian military. This failed and Malyarchuk was not interrogated the entire 100 days he was in captivity, such as when he spent three days in solitary confinement. Nonetheless, Russian forces seemed content to continue holding him.

*Case D: Forced deportation and detention of Ihor*<sup>328</sup>

*Element 1(a).* Ihor and about sixty others from his village were taken by bus to Belgorod, Russia by Russian troops.

*Element 2(a).* Other than being told they “must go to Russia,” Ihor and the villagers received no information as to where specifically they were going. Additionally, requests from villagers to evacuate to Ukrainian cities outside the war zone were simply ignored. Likewise, after fleeing the filtration camp, when crossing a checkpoint to get to Belarus, Ihor and the woman he was driving were locked in a small room for seven hours by Russian guards and received no explanation afterwards.

*Element 3(a).* In Belgorod, the Russians set up a temporary filtration camp. At this point, no information as to where they were going was provided.

*Element 4.* Ihor and the villagers were taken by Russian soldiers. Each villager was questioned by a member of Russia’s Federal Security Service when brought across the border.

*Element 5.* The soldiers never told the villagers where they were going.

*Element 6.* Many villagers lied and said they had family contacts in Belgorod, simply so the Russians would leave them there. The Russians did so, but those without contacts were presumably taken further into Russia, prolonging their abduction indefinitely.

*Element 7.* Since at least 24 February 2022, Russia continues to commit a widespread and systematic attack against the Ukrainian civilian population. Ihor’s abduction was done under the pretense that after Russia had destroyed his village, the civilians needed to be evacuated to Russia for safety. The U.S. State Department estimates at least 900,000 Ukrainians have so far been forcibly moved into Russia since February 2022.

*Element 8.* The soldiers first went through the village’s administrative records to determine who the veterans fighting against Russia in the Donbas

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<sup>328</sup> Shulzhenko, *supra* note 323.

were and executed them. After killing them, the soldiers knew that the villagers they were abducting were civilians.

*Case E: Forced transportation and attempted deportation of Kira Obedinsky*<sup>329</sup>

- Element 1(a).* Obedinsky was taken from the local hospital treating her and her late-father's girlfriend's injuries to a distant one in the DPR. She was supposed to be sent to a Russian orphanage after recovering.
- Element 2(a).* Russia claims that Ukraine has hindered their ability to assist countless children, including Obedinsky, in "evacuating" them to Russia.
- Element 3(a).* After her grandfather, Oleksander, contacted the hospital in the DPR where Kira was held, he was invited to travel to the DPR to claim her. However, Oleksander argued this ignored the reality of traveling through a war-torn nation across disputed state lines. Reuniting himself with his granddaughter would have been a much easier process before Russian troops sent her across Ukraine into the DPR.
- Element 4.* The Russian Federation assisted in getting Obedinsky a new Russian passport and Russian documentation, even though she was not, nor did she ever try or want to become, a Russian citizen.
- Element 5.* The hospital informed Oleksander that unless he came to collect his granddaughter, ignoring that the gravity of their separation was caused by Russian troops, Obedinsky would be sent to a Russian orphanage.
- Element 6.* Though Obedinsky was an orphan by this time, she was not Russian. Russia's efforts to get Obedinsky out of Ukraine and also Russian documentation suggests they intended to keep Obedinsky in Russia indefinitely.
- Element 7.* Since at least 24 February 2022, Russia continues to commit a widespread and systematic attack against the Ukrainian civilian population. Thousands of Ukrainian children, either made orphans by the war, like Obedinsky, or non-orphans whose parents have fled remain in Russia and its "adoption" system.
- Element 8.* No explanation was given as to why Obedinsky was separated from her late-father's girlfriend at the initial hospital. Obedinsky was continuously moved further away from her home in Mariupol, first to the DPR, and then preparations were made for her to be sent to Russia indefinitely.

## **VII. INDIVIDUALS BEARING THE GREATEST RESPONSIBILITY**

The ICC may prosecute any individual that is alleged to have committed a crime within its jurisdiction.<sup>330</sup> The ICC focuses on those who bear the greatest responsibility for the crimes,

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<sup>329</sup> Black, et al., *supra* note 324. See also Harder, *supra* note 324. See also Sidhu, et al., *supra* note 324.

<sup>330</sup> *Understanding the International Criminal Court*, INT'L CRIM. CT. 14 (2020), <https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf> (last visited 7 Jan. 2022).

including those who hold official government positions.<sup>331</sup> An individual is not exempt from prosecution because of their official position at the time the crimes were committed.<sup>332</sup> Additionally, a person in authority may be held responsible for crimes committed by individuals under their command.<sup>333</sup> Amnesty is neither a defense before the ICC nor it can bar the ICC from asserting its jurisdiction.<sup>334</sup> The ICC is a judicial institution, rather than a political institution.<sup>335</sup> The ICC's decisions are based on legal criteria and rendered by impartial judges based on the Rome Statute and other legal texts.<sup>336</sup>

### *A. People's Republic of China*

The People's Republic of China (PRC) is governed by the National People's Congress, composed of individuals elected from provinces, autonomous regions, municipalities directly under the Central Government, special administrative regions, and deputies elected from the armed forces.<sup>337</sup> The permanent body of the National People's Congress is the Standing Committee of the National People's Congress.<sup>338</sup> These two bodies are the main legislative bodies in the Chinese government.<sup>339</sup> The National People's Congress of China also elects the President and Vice President of the People's Republic of China.<sup>340</sup> The President appoints and removes the Premier, Vice Premiers, State Councillors, Ministers in charge of ministries or commissions, and the Auditor General and the Secretary General of the State Council.<sup>341</sup>

The CCP is also an integral part of the Chinese government.<sup>342</sup> The CCP is organized under its own program and its own Constitution.<sup>343</sup> The CCP elects members to its highest leading bodies, the National Congress of the Party and the Central Committee.<sup>344</sup> The Central Committee of the Party has the power to make decisions on major national policies.<sup>345</sup> The Party organization of a department or locality may make suggestions to the Central Committee with regard to such policies but shall not make any decision or express their views outside the Party without authorization.<sup>346</sup> The Central Committee then elects members to the Political Bureau and the Standing Committee of the Political Bureau.<sup>347</sup> Between sessions of the Central Committee, the Political Bureau exercises the powers and functions of the Central Committee.<sup>348</sup>

The most responsible individuals within China for the commission of extraordinary renditions, non-exhaustively, include:

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<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> *Id.*

<sup>337</sup> *China's De Jure Structure*, UYGHUR TRIBUNAL 3 (2021), [https://uyghurtribunal.com/wp-content/uploads/2022/09/Explanatory-documents-version\\_12.06.2021.pdf](https://uyghurtribunal.com/wp-content/uploads/2022/09/Explanatory-documents-version_12.06.2021.pdf) (last visited 7 Jan. 2022).

<sup>338</sup> *Id.* at 5.

<sup>339</sup> *Id.* at 3.

<sup>340</sup> *Id.* at 7.

<sup>341</sup> *Id.*

<sup>342</sup> *Id.* at 11.

<sup>343</sup> *Id.*

<sup>344</sup> *Id.*

<sup>345</sup> *Id.* at 12.

<sup>346</sup> *Id.*

<sup>347</sup> *Id.*

<sup>348</sup> *Id.* at 13.

### 1. *Xi Jinping, President*

Xi Jinping has been the president of China since 2013.<sup>349</sup> The president of China has the power to proclaim a state of emergency, proclaim a state of war, and issue mobilization orders.<sup>350</sup> His powers over foreign policy include appointing representatives abroad and ratifying or abrogating treaties and agreements with foreign nations.<sup>351</sup> China has signed 34 bilateral extradition treaties around the world, which have been instrumental in deporting Uyghurs back to China.<sup>352</sup> Xi Jinping is also the Chairman of the Central National Security Commission, General Secretary of the CCP, and Chairman of the Central Military Commission.<sup>353</sup> Through these positions, Xi Jinping directs the armed forces of China.<sup>354</sup> Xi Jinping declared that the Uyghur presence and their “radical Islam” was a crucial national crisis.<sup>355</sup> Through his various political positions, Xi Jinping has the power to negotiate and sign off on agreements for extraordinary renditions from foreign nations and command the military in executing extraordinary renditions.

### 2. *Chen Quanguo, Communist Party Secretary of the XUAR*

Chen Quanguo was Communist Party Secretary of Tibet Autonomous Region from 2011 to 2016 and has been Communist Party Secretary of the Xinjiang Uyghur Autonomous Region since 2016. Upon entering this position, Chen issued a sweeping order: “Round up everyone who should be rounded up.”

### 3. *Chen Wenqing, Former, MSS*

Chen Wenqing was the Minister of State Security (“MSS”) from 2015 to 2022.<sup>356</sup> As the Minister of State Security, he decided on major issues within the department.<sup>357</sup> The MSS has cooperated with other global intelligence agencies, issuing lists of Uyghurs it was hunting in 2003, 2007, and 2012. These lists have resulted in the detention and refoulement of human rights activists, among others.<sup>358</sup> Chen Wenqing’s successor is Chen Yixin.<sup>359</sup>

### 4. *Wang Yi, Minister of Foreign Affairs*

Wang Yi was appointed as Minister of Foreign Affairs in 2013.<sup>360</sup> The Ministry of Foreign Affairs directs China’s embassies and consulates.<sup>361</sup> China’s embassies and consulates have played

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<sup>349</sup> *Id.* at 19.

<sup>350</sup> *Id.* at 7.

<sup>351</sup> *Id.*

<sup>352</sup> JARDINE, GREAT WALL OF STEEL, *supra* note 210, at xlii.

<sup>353</sup> *China’s De Jure Structure*, *supra* note 337, at 8.

<sup>354</sup> *Id.*

<sup>355</sup> Austin Ramzy & Chris Buckley, ‘Absolutely No Mercy’: Leaked Files Expose How China Organized Mass Detentions of Muslims, THE NEW YORK TIMES (16 Nov. 2019), <https://www.nytimes.com/interactive/2019/11/16/world/asia/china-xinjiang-documents.html>.

<sup>356</sup> Peter Mattis, *Chen Wenqing: China’s New Man for State Security*, THE NATIONAL INTEREST (23 Oct. 2015), <https://nationalinterest.org/feature/chen-wenqing-china%E2%80%99s-new-man-state-security-14153>.

<sup>357</sup> *China’s De Jure Structure*, *supra* note 337, at 10.

<sup>358</sup> JARDINE, GREAT WALL OF STEEL, *supra* note 210, at xl.

<sup>359</sup> Kevin Yao et al., *China Names Chen Yixin as State Security Minister*, REUTERS (30 Oct. 2022), <https://www.reuters.com/world/china/china-names-chen-yixin-state-security-minister-parliament-2022-10-30/>.

<sup>360</sup> *The US-China Business Council*, Foreign Minister Wang Yi, <https://www.uschina.org/foreign-minister-wang-yi> (last visited 27 Dec. 2022).

<sup>361</sup> JARDINE, GREAT WALL OF STEEL, *supra* note 210, at xli

an active role in surveilling and intimidating Uyghurs worldwide.<sup>362</sup> China's embassies have denied Uyghurs the renewal of their expiring passports, directing them to return to China, or denied their legal status abroad.<sup>363</sup>

## ***B. Russian Federation***

The Russian Federation governmental power is distributed across *oblasti* (regions), *kraya* (territories), *okruga* (autonomous districts), and two Federal Cities.<sup>364</sup> The head of the Russian government is the President.<sup>365</sup> The President of the Russian Federation determines the foreign policy of the State, represents the State in international relations, and is the Commander-in-Chief of the armed forces.<sup>366</sup> The President of the Russian Federation has the power to appoint the Chairman of the Government of the Russian Federation, informally known as the Prime Minister, with the agreement of Russia's legislative body, the State Duma.<sup>367</sup> The President of the Russian Federation also has the constitutional powers to form and head a Security Council, approve the Russian Federation's military doctrine, and appoint federal ministers.<sup>368</sup> The dominant political party in the Russian Federation is United Russia.<sup>369</sup> United Russia is a conservative, nationalist party that strongly supports President Putin.<sup>370</sup> The most responsible individuals within Russia for the commission of extraordinary renditions, non-exhaustively, include:

### ***1. Vladimir Putin, President***

Vladimir Putin has been president of Russia since 2012.<sup>371</sup> As president, he is also the Supreme Commander-in-Chief and the Chairman of the Security Council in Russia.<sup>372</sup> Vladimir Putin is responsible for launching the war of aggression against Ukraine.<sup>373</sup> Officials from Russia's presidential administration are overseeing and coordinating filtration camps for Ukrainians.<sup>374</sup> The officials in Putin's administration that are coordinating the filtration camps are known as the "siloviki," an elite class of security officials, including Nikolai Patrushev, Sergey Naryshkin, and Aleksandr Bortnikov.<sup>375</sup>

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<sup>362</sup> *Id.*

<sup>363</sup> *Id.* at xlii.

<sup>364</sup> UKRAINE TASK FORCE, RUSSIAN WAR CRIMES AGAINST UKRAINE: THE BREACH OF INTERNATIONAL HUMANITARIAN LAW BY THE RUSSIAN FEDERATION, app. C at 5 (The Global Accountability Network, 2d ed. Dec. 2022), [https://www.globalaccountabilitynetwork.org/\\_files/ugd/a982f0\\_a20440cdc50f4f33824d80348c25f0a4.pdf](https://www.globalaccountabilitynetwork.org/_files/ugd/a982f0_a20440cdc50f4f33824d80348c25f0a4.pdf).

<sup>365</sup> *The political system of the Russian Federation: President and Government*, THE STATE DUMA (9 Nov. 2018), <http://duma.gov.ru/en/news/28748/> (last visited 8 Jan. 2022).

<sup>366</sup> *Id.*

<sup>367</sup> Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] art. 83 (Russ.).

<sup>368</sup> *Id.*

<sup>369</sup> UKRAINE TASK FORCE, *supra* note 364, app. C at 16.

<sup>370</sup> *Id.*

<sup>371</sup> *Id.* at app. C part 2 at 4.

<sup>372</sup> *Id.*

<sup>373</sup> *Id.*

<sup>374</sup> Claire Parker, *New findings expose machinery of Russia's 'filtration' of Ukrainians*, THE WASHINGTON POST (1 Sept. 2022), <https://www.washingtonpost.com/world/2022/09/01/russia-ukraine-filtration-forced-transfer/>.

<sup>375</sup> Anton Troianovski, *The Hard-Line Russian Advisers Who Have Putin's Ear*, THE NEW YORK TIMES (30 Jan. 2022), <https://www.nytimes.com/2022/01/30/world/europe/putin-top-advisers-ukraine.html>.



## 2. *Alexander Bortnikov, FSB Director*

Aleksandr Bortnikov has been the director of Russia's Federal Security Service ("FSB"), the successor of the Soviet Union's KGB, since 2008.<sup>376</sup> He is also the Chairman of the National Anti-Terrorism Committee and a permanent member of the Security Council of Russia.<sup>377</sup> As Director of the FSB, Bortnikov oversees the entirety of the FSB.<sup>378</sup> The filtration camps and processing centers are largely run by the FSB.<sup>379</sup> Western intelligence believes that before Russia invaded Ukraine, the FSB had already planned to establish and operate a filtration camp system to kill politically undesirable Ukrainians while shipping the rest to Russia.<sup>380</sup>

## 3. *Sergei Shoigu, Minister of Defense*

Sergei Shoigu has been the Minister of Defense in Russia since 2012.<sup>381</sup> As Minister of Defense, Shoigu is responsible for the Russian Armed Forces.<sup>382</sup> Shoigu oversees all military activity occurring in Ukraine.<sup>383</sup> Sergei Shoigu announced a plan to build three to five large cities with populations between 300,000 and 1 million people.<sup>384</sup> Oleksiy Danilov, Ukraine's Secretary of the National Security and Defense Council, believes that Shoigu planned for Ukrainians to build these cities.<sup>385</sup> Shoigu wrote in an article that citizens from the "Commonwealth of Independent States," should be brought in to do this work.<sup>386</sup> Danilov believes that Shoigu hinted in the article that Ukrainians were to work as forced labor to accomplish this goal.<sup>387</sup>

## 4. *Nikolai Patrushev, Secretary of the Security Council*

Nikolai Patrushev has been Russia's Secretary of the Security Council since 2008.<sup>388</sup> Russia's Security Council is responsible for formulating Russia's security policy and interprets intelligence from Russian sources and networks abroad.<sup>389</sup> As Secretary of the Security Council, Patrushev exerts much influence over Putin.<sup>390</sup> He is one of Putin's closest advisors.<sup>391</sup>

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<sup>376</sup> UKRAINE TASK FORCE, *supra* note 364, app. C part 2 at 117.

<sup>377</sup> *Id.*

<sup>378</sup> *Id.*

<sup>379</sup> Lillis, Atwood, & Bertrand, *supra* note 248.

<sup>380</sup> *Id.*

<sup>381</sup> UKRAINE TASK FORCE, *supra* note 364, app. C part 2 at 44.

<sup>382</sup> *Id.* at 45.

<sup>383</sup> *Id.* at 44.

<sup>384</sup> Denys Karlovskyi, *Kremlin Wanted to Send Ukrainians to Concentration Camps in Siberia and Force Them to Build Cities – Danilov*, PRAVDA (21 Apr. 2022), <https://www.pravda.com.ua/eng/news/2022/04/21/7341244/> (last visited 8 Jan. 2022).

<sup>385</sup> *Id.*

<sup>386</sup> *Id.*

<sup>387</sup> *Id.*

<sup>388</sup> UKRAINE TASK FORCE, *supra* note 364, app. C part 2 at 123.

<sup>389</sup> Susanne Sternthal, *As one of Vladimir Putin's closest advisers on Ukraine, Nicolai Patrushev spreads disinformation and outlandish conspiracy theories*, THE CONVERSATION (7 June 2022), <https://theconversation.com/as-one-of-vladimir-putins-closest-advisers-on-ukraine-nicolai-patrushev-spreads-disinformation-and-outlandish-conspiracy-theories-183699>.

<sup>390</sup> Paul Kirby, *Ukraine conflict: Who's in Putin's inner circle and running the war?*, BBC NEWS (3 Mar. 2022), <https://www.bbc.com/news/world-europe-60573261>.

<sup>391</sup> *Id.*

5. *Sergey Naryshkin, Director of the Foreign Intelligence Service*

Sergey Naryshkin has been the director of Russia's Foreign Intelligence Service since 2016.<sup>392</sup> Naryshkin oversees the agency that assists in implementing measures taken by the state in the interest of ensuring Russia's security.<sup>393</sup> Naryshkin is in the *siloviki*, Putin's inner circle of advisors.<sup>394</sup> Within the *siloviki*, Naryshkin is one of Putin's closest advisors.<sup>395</sup>

6. *Maria Lvova-Belova, Commissioner for Children's Rights*

Maria Lvova-Belova is the Commissioner for Children's Rights responsible for Russian State interventions towards children in Ukraine, including the expedited citizenship program for children forcibly moved from Ukraine to Russia, and started the non-profit group "Into the Hands of Children," which is a division of Russian Humanitarian Mission (RHO), an organization which provides humanitarian aid in more than 10 countries.<sup>396</sup> However, as of 6 April 2022, all funds received as donations for RHO may be used for "Into the Hands of Children," regardless of whether another purpose is stated in the "purpose of payment" field of the donation.<sup>397</sup>

## VIII. THE U.S. EXTRAORDINARY RENDITION PROGRAM

The U.S. has an infamous extraordinary renditions program. This white paper acknowledges this history and argues that just as the individuals in Russia and China with the greatest responsibility for extraordinary renditions from States Parties should be subject to the Rome Statute for any extraordinary renditions from States Parties to the Rome Statute, similarly situated individuals in the U.S., or any country not party to the Statute that engage in extraordinary renditions from States Parties, must also be subject to it.<sup>398</sup>

In 1992, the U.S. Supreme Court established the principle that federal courts are able to assert personal jurisdiction over a defendant abducted from abroad in *United States v. Alvarez-Machain*.<sup>399</sup> The Court held that the act of kidnapping or abducting a foreign national from abroad would create no jurisdictional impediment to the trial's proceedings.<sup>400</sup> The U.S. received backlash for the ruling from the media and from neighboring countries including Canada and Latin American states, among others.<sup>401</sup> The Chinese press also notably condemned the U.S.'s decision.<sup>402</sup> The U.S. Supreme Court's ruling ultimately reaffirmed the U.S.'s judicial policy of

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<sup>392</sup> UKRAINE TASK FORCE, *supra* note 364, app. C part 2 at 127.

<sup>393</sup> Federal'nyĭ Zakon O Vneshnyĭ Razvedke [Federal Law on Foreign Intelligence] 1995, art. 1.

<sup>394</sup> Troianovski, *supra* note 375.

<sup>395</sup> Paul Kirby, *supra* note 390.

<sup>396</sup> *Don't stay away. Join the campaign of the Commissioner for Children's Rights under the President of the Russian Federation "Into the hands of children". Let's help the children of Donbass and Ukraine together!*, RUSSIAN HUMANITARIAN MISSION, <https://rh.m.agency/ne-ostavaytes-v-storone-detyam-v-ruki-pomozhem-detyam-donbassa-i-ukrainy-vmeste/> (last visited 2 Jan 2023).

<sup>397</sup> *Id.*

<sup>398</sup> Such jurisdiction would be subject to the ICC's admissibility criteria, including the gravity analysis.

<sup>399</sup> *United States v. Alvarez-Machain*, 504 U.S. 655 (1992). *See also* Jonathan A. Bush, *How Did We Get Here? Foreign Abduction After Alvarez-Machain*, STAN. L. REV. (1993).

<sup>400</sup> *Id.*

<sup>401</sup> *Id.*

<sup>402</sup> *Id.*

non-inquiry into the methods employed to bring a criminal into the jurisdiction of the U.S. courts.<sup>403</sup>

The U.S. is notorious for its extraordinary rendition program in which foreign nationals suspected of involvement in terrorism have been transferred to third party countries to be detained or interrogated by U.S. personnel, or on behalf of the U.S. by foreign agents.<sup>404</sup> These U.S. detainees are often moved to countries where the U.S. Government views federal and international legal safeguards as no longer applicable.<sup>405</sup> The U.S., like Russia and China, is not a party to the Rome Statute and does not consider itself within the jurisdiction of the ICC.<sup>406</sup> The U.S.'s interactions with the ICC have always been tumultuous, relying on the current President's own agenda and whether or not supporting the ICC aligns with his base.<sup>407</sup>

The U.S., however, has ratified CAT and has established a federal statute against extraordinary rendition.<sup>408</sup> Despite its responsibility to preserve human rights, the U.S. has further argued that human rights law cannot be applied to the war on terror and that relevant norms are not applicable to its extraterritorial conduct.<sup>409</sup> The U.S. has attempted to elude these norms and avoid the due process rights of prisoners completely by sending detainees to be tortured under other governments outside of the jurisdiction of the U.S. Courts.<sup>410</sup>

The U.S. has infamously detained foreign nationals in “black sites” — secret prisons outside of the U.S. — in order to forego the legal procedures necessary for detaining a suspected criminal.<sup>411</sup> Suspects held in these “black sites” have often been subjected to harsh treatment, including “enhanced interrogation techniques” that would be deemed illegal if practiced inside the U.S.<sup>412</sup> Uyghurs have been among those captured and sent to Guantanamo.<sup>413</sup> The U.S. has previously argued for the establishment and continued practice of these programs, deeming them “irreplaceable” in combating terrorism.<sup>414</sup> The U.S. Guantanamo Bay Detention Camp is notable for its brutal treatment of prisoners, having subjected some of them to waterboarding, among other forms of torture.<sup>415</sup> The CIA obtained these prisoners secretly and extrajudicially, with many of the prisoners kept in Guantanamo Bay having never been charged with a crime, depriving them of due process indefinitely.<sup>416</sup> While the U.S. continues the operation of Guantanamo Bay, it presents a double front by decrying what it deems to be unlawful practices committed by foreign

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<sup>403</sup> Edmund S. McAlister, *The Hydraulic Pressure of Vengeance: United States v. Alvarez-Machain and the Case for a Justifiable Abduction*, DEPAUL L. REV. (1994).

<sup>404</sup> See Sadat, *supra* note 70.

<sup>405</sup> *Fact Sheet: Extraordinary Rendition*, *supra* note 13.

<sup>406</sup> *The States Parties to the Rome Statute*, INT'L CRIM. CT., <https://asp.icc-cpi.int/states-parties> (last visited 7 Jan. 2022).

<sup>407</sup> Mark Kersten, *Biden and the ICC: Partial Cooperation, Selective Justice*, ALJAZEERA (5 Mar. 2021), <https://www.aljazeera.com/opinions/2021/3/5/biden-and-the-icc-partial-cooperation-selective-justice>.

<sup>408</sup> *Extraordinary Rendition FAQs*, ACLU, <https://www.aclu.org/other/extraordinary-rendition-faqs> (last visited 7 Jan. 2022).

<sup>409</sup> Jeremiah Lee, *Rendered Meaningless: The Rule of Law in the US 'War on Terror'*, JURIST (27 Mar. 2006), <https://www.jurist.org/commentary/2006/03/rendered-meaningless-rule-of-law-in-us/>.

<sup>410</sup> *Id.*

<sup>411</sup> Jane Mayer, *The Black Sites*, THE NEW YORKER (5 Aug. 2007), <https://www.newyorker.com/magazine/2007/08/13/the-black-sites>.

<sup>412</sup> *Id.*

<sup>413</sup> JARDINE, *GREAT WALL OF STEEL*, *supra* note 210.

<sup>414</sup> Mayer, *supra* note 411.

<sup>415</sup> Letta Taylor & Elisa Epstein, *Legacy of the “Dark Side”*, HUMAN RIGHTS WATCH (9 Jan. 2022), <https://www.hrw.org/news/2022/01/09/legacy-dark-side>.

<sup>416</sup> Shamsi, *supra* note 15.

countries.<sup>417</sup> Although some U.S. Presidents have promised to close Guantanamo Bay, it remains open.<sup>418</sup> After the U.S. Supreme Court ruling of *Hamdan v. Rumsfeld*, in which it decreed that all detainees had to be treated “in a manner consistent with the Geneva Conventions,” of which the U.S. is a party, President Bush announced the emptying of CIA prisons to Guantanamo Bay.<sup>419</sup> Thirty-five prisoners still remain in custody, with twelve having been charged with war crimes in the military commissions system — ten awaiting trial and two convicted.<sup>420</sup> Three detainees are being held indefinitely and another twenty are recommended for transfer to another country.<sup>421</sup>

## IX. ATTEMPTED EXTRAORDINARY RENDITIONS

As technology advances and innovations are employed against people, international criminal law must evolve to capture the crimes that domestic law is unable or unwilling to bring to justice. In modern times, attempts at extraordinary rendition are not just perpetrated on the ground, but also online. In some cases, individuals are coerced and forced across international borders into countries where they face persecution without a perpetrator ever setting foot on the ground of the originating state. Perpetrators are technologically savvy and often state-sponsored, organized, and systematic. Some States, such as the U.S., make a distinction between kidnapping and pressure when determining whether to act against a State.<sup>422</sup> However, this section argues that when a State not Party to the Rome Statute is reaching into States Parties and coercing people through extreme pressure tactics (whether on the ground or online) to travel to that State not Party (even if they never do travel), where such persons likely face persecution, this practice may qualify as an attempted deportation.

Regarding criminal liability for attempted crimes within the jurisdiction of the ICC, Rome Statute Article 25(3)(b) & (d) states, in pertinent part:

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(b) Orders, solicits or induces the commission of such a crime which in fact occurs *or is attempted*;

(d) In any other way contributes to the commission *or attempted commission* of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

<sup>417</sup> Taylor & Epstein, *supra* note 415.

<sup>418</sup> Ben Fox, *Joe Biden’s silence on Guantanamo Bay frustrates closure advocates as prison turns 20*, PBS NEWS HOUR (10 Jan. 2022), <https://www.pbs.org/newshour/politics/joe-bidens-silence-on-guantanamo-bay-frustrates-closure-advocates-as-prison-turns-20>.

<sup>419</sup> Mayer, *supra* note 411.

<sup>420</sup> Almukhtar et al., *The Guantánamo Docket*, *supra* note 15.

<sup>421</sup> *Id.*

<sup>422</sup> Zach Doefman, *The Disappeared; China’s global kidnapping campaign has gone on for years. It may now be reaching inside U.S. borders*, FOREIGN POLICY (29 Mar. 2018), <https://foreignpolicy.com/2018/03/29/the-disappeared-china-renditions-kidnapping/>.

(ii) Be made in the knowledge of the intention of the group to commit the crime;<sup>423</sup>

So long as at least part of the *actus reus* of the crime of deportation takes place on the territory of a State Party, the ICC may exercise jurisdiction.<sup>424</sup> The *actus reus* of the crime of deportation is the first element of the crime and states: “The perpetrator deported or forcibly, transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts.”<sup>425</sup> In 2019, the Pre-Trial Chamber III of the ICC considered the crime of attempted deportation in the case of the Rohingya.<sup>426</sup> The Court explained “the victims’ behavior or response as a consequence of a coercive environment is required to be established for the completion of the crime. *If the victims refused to leave the area despite the coercive environment* or they did not cross an international border, *it would constitute forcible transfer or an attempt to commit the crime of deportation.*”<sup>427</sup> Likewise, a coercive environment can be and has been created by States not Party online. As such, the ICC should recognize, based on the reasoning in its 2019 Rohingya ruling, that the crime of attempted deportation may be perpetrated not only on the ground, but also online.

### A. China’s Attempted Extraordinary Renditions

The global scale of China’s transnational repression campaign is unparalleled.<sup>428</sup> Freedom House’s conservative catalog of direct, physical attacks since 2014 covers 214 cases originating from China—far more than any other country.<sup>429</sup> These egregious and high-profile cases are only the tip of the iceberg of a much broader system of surveillance, harassment, and intimidation that leaves many overseas Chinese and exile minorities feeling that the CCP is watching them and constraining their ability to exercise basic rights *even when living in a foreign democracy*.<sup>430</sup> These tactics affect millions of Chinese and minority populations from China in at least thirty-six countries.<sup>431</sup> Political dissidents, human rights activists, journalists, and former insiders accused of corruption are specifically targeted.<sup>432</sup>

However, these attacks are not only perpetrated on the ground, they are also perpetrated online. The CCP transnationally pressures and controls the overseas population of Chinese and minority communities.<sup>433</sup> A recent case study conducted by the Wilson Center found that, in relation to the Uyghur population, there were 5,532 cases of intimidation, 1,150 cases of detention within in their host country, and a further 424 cases of Uyghur people being deported, extradited, or rendered back to China.<sup>434</sup> Additionally, 108 deportations have been logged as well as incidents of coercion being inflicted on 89 Uyghurs to return to the XUAR, 11 renditions, and 9

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<sup>423</sup> Rome Statute, *supra* note 5, at art. 25(3).

<sup>424</sup> See *supra* notes 162-69.

<sup>425</sup> ELEMENTS, *supra* note 6, at art. 7(1)(d).

<sup>426</sup> ICC-01/19-27, *supra* note 164, at ¶ 52.

<sup>427</sup> *Id.* (emphasis supplied).

<sup>428</sup> *China: Transnational Repression Origin Country Case Study*, FREEDOM HOUSE (2021), <https://freedomhouse.org/report/transnational-repression/china>.

<sup>429</sup> *Id.*

<sup>430</sup> *Id.*

<sup>431</sup> *Id.*

<sup>432</sup> *Id.*

<sup>433</sup> *Id.*

<sup>434</sup> JARDINE, GREAT WALL OF STEEL, *supra* note 210.

extraditions.<sup>435</sup> It is suggested that these figures illustrate only a fraction of what is actually occurring.<sup>436</sup> The primary evidence indicates that the atrocities are likely much more extensive than is officially reported.<sup>437</sup>

### *1. Transnational Repression of Uyghur Activists*

The 2022 OHCHR Report identifies the Uyghur diaspora community as being particularly affected by family separations and enforced disappearances.<sup>438</sup> There have been allegations of reprisals and intimidations against those seeking information about their family members or expressing concern publicly.<sup>439</sup> There are numerous examples of the CCP reaching abroad to threaten activists and their families for speaking out against the government for allegedly perpetrating atrocities. Transnational repression has increased where Beijing has employed a range of tactics to pursue foreign critics. These tactics include cyberattacks, physical threats, and denial of consular services which have resulted in thousands of Uyghurs stranded without passports.<sup>440</sup>

For example, The New York Times followed the story of one individual, Tahir Imin, who is an activist abroad, speaking out against the Uyghur genocide.<sup>441</sup> Those who claim to be Chinese police threatened Tahir Imin, even since he moved to the U.S.<sup>442</sup> Specifically, people who identified themselves as Chinese police flooded Imin's inbox with threatening messages.<sup>443</sup> Tahir Imin also got word that his mother and brother were arrested on bogus charges—a common occurrence for families of Uyghur activists abroad.

As another example, Dolkun Isa became an activist fighting for the enforcement of equal rights for the Uyghur people as a university student in China.<sup>444</sup> After facing multiple issues with the authorities, such as struggling to obtain the necessary licensing to open up a school as well as being questioned by local police, Isa fled to Turkey where he continued his activism.<sup>445</sup> This started to draw a lot of attention as the bond between China and Turkey strengthened.<sup>446</sup> Isa applied for asylum in Germany and moved to Germany in November 1996.<sup>447</sup> This followed years of harassment from the PRC, including the Chinese Government issuing an international warrant of arrest in 1997 against Isa.<sup>448</sup> In these charges, Isa was accused of murder, terrorism, and criminal conduct.<sup>449</sup> Interpol placed Isa's name on the "red notice" and his name remained on the list for 21

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<sup>435</sup> *Id.*

<sup>436</sup> *Id.*

<sup>437</sup> *Id.*

<sup>438</sup> 2022 OHCHR REPORT, *supra* note 198, at ¶ 129.

<sup>439</sup> *Id.*

<sup>440</sup> Bradley Jardine, *China's repression of Uyghurs extends far beyond its own borders*, THE NEW STATESMAN (16 May 2022), <https://www.newstatesman.com/world/asia/china/2022/05/chinas-repression-of-uyghurs-extends-far-beyond-its-own-borders>.

<sup>441</sup> Max Fisher, *As Dictators Target Citizens Abroad, Few Safe Spaces Remain*, THE NEW YORK TIMES (4 June 2021), <https://www.nytimes.com/2021/06/04/world/europe/repression-uyghurs-belarus.html>.

<sup>442</sup> *Id.*

<sup>443</sup> *Id.*

<sup>444</sup> Dolkun Issa, *Full Statement*, UYGHUR TRIBUNAL (June 2021), <https://uyghurtribunal.com/wp-content/uploads/2021/06/04-1450-JUN-21-UTFW-021-Dolkun-Isa-English-1.pdf>.

<sup>445</sup> *Id.*

<sup>446</sup> *Id.*

<sup>447</sup> *Id.*

<sup>448</sup> *Id.*

<sup>449</sup> *Id.*

years.<sup>450</sup> Isa was detained on numerous occasions in Switzerland, South Korea, Italy and the U.S.<sup>451</sup> Only in 2018 was his name removed from the red notice list.<sup>452</sup>

In July 2021, activist Idris Hasan fled from Turkish authorities and was later detained in Morocco.<sup>453</sup> He was accused of being a member of a Uyghur terrorist organization by the Chinese government as they issued a red notice through Interpol for his arrest—a common accusation made against Uyghur activists.<sup>454</sup> Interpol found no evidence supporting China’s claims; noted its bylaws do not allow for persecution on a political, religious, or economic grounds; and suspended the red notice.<sup>455</sup>

## 2. *China’s Mass Surveillance Technologies*

The extensive scope of China’s transnational repression is a result of a broad and ever-expanding definition of who should be subject to extraterritorial control by the CCP.<sup>456</sup> The Chinese implemented an Integrated Joint Operations Platform (“IJOP”) where the police and other officials could communicate with each other.<sup>457</sup> This system is used for mass surveillance as the program collects data on people and flags those that it deems to be potential threats. Some of the flagged people are detained and are sent to political education camps and other facilities.<sup>458</sup> Many of the surveillance practices followed by the Chinese government are against its own law as well as in violation of the internationally guaranteed rights: the right to presumption of innocence until proven guilty, the right to privacy, and the freedom of association and movement. This practice has also impacted other rights such as the right to freedom of expression and religion.

Human Rights Watch reverse engineered the IJOP and found that Chinese authorities have a massive amount of personal data, including features such as the color of a person’s car and a person’s height.<sup>459</sup> This is fed to the IJOP central system, and the data is linked to a person’s national identification card number.<sup>460</sup> Chinese authorities consider many forms of common, legal and non-violent behavior suspicious.<sup>461</sup> This behavior can include “not socializing with neighbors” and “often avoiding using the front door”.<sup>462</sup> The platform also considers the use of 51 network tools as suspicious, including many virtual private networks and encrypted communication tools such as WhatsApp and Viber.<sup>463</sup>

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<sup>450</sup> *Id.*

<sup>451</sup> *Id.*

<sup>452</sup> *Id.*

<sup>453</sup> Jardine, *China’s repression of Uyghurs extends far beyond its own borders*, *supra* note 440.

<sup>454</sup> *Id.*

<sup>455</sup> *Id.*

<sup>456</sup> HUMAN RIGHTS WATCH, CHINA’S ALGORITHM OF REPRESSION (1 May 2019), <https://www.hrw.org/report/2019/05/01/chinas-algorithms-repression/reverse-engineering-xinjiang-police-mass>.

<sup>457</sup> *Id.*

<sup>458</sup> *Id.*

<sup>459</sup> *Id.*

<sup>460</sup> *Id.*

<sup>461</sup> *Id.*

<sup>462</sup> *Id.*

<sup>463</sup> *Id.*

### 3. Accountability in the U.S.

In 2014, the CCP launched “Operation Fox Hunt” to target Chinese nonconformists around the world.<sup>464</sup> The U.S. classified the operation as an “extralegal repatriation effort.”<sup>465</sup> The FBI arrested 5 individuals who were caught attempting to force former Chinese municipal workers, who were residing in the U.S., to return to China.<sup>466</sup> The defendants were charged with attempting to “harass, coerce, and stalk” the former Chinese municipal worker, and current U.S. resident, to return to China.<sup>467</sup> The defendants attempted to coerce the U.S. resident back to China by using his father to encourage him to come back to China and by threatening his family.<sup>468</sup> The defendants used social media to attempt to lure the U.S. resident by following his daughter, conducting surveillance, and sending threatening messages via social media.<sup>469</sup>

On 20 October 2022, the U.S. Attorney’s Office for the Eastern District of New York unsealed an eight-count indictment charging seven PRC nationals with participating in a scheme to forcibly repatriate a PRC national residing in the U.S.<sup>470</sup> Two of them were arrested on the same day.<sup>471</sup> As a part of “Operation Fox Hunt,” the defendants were accused of conducting surveillance of and engaging in a campaign to harass and coerce a U.S. resident to return to the PRC.<sup>472</sup> Assistant Attorney General Matthew G. Olsen explained, “These cases highlight the threat the PRC government poses to our institutions and the rights of people in the United States . . . We will not tolerate these brazen operations: the harassment and attempted repatriation by force of individuals living in the U.S.; the effort to corrupt our judicial system . . . .”<sup>473</sup>

#### ***B. Russia’s Attempted Extraordinary Renditions***

Russia has a very similar concept of cyber sovereignty to China. Cyber sovereignty can be broadly defined as “the ability to create and implement rules in cyberspace through state governance.”<sup>474</sup> Most states have some form of cyber sovereignty over the internet to protect citizens’ privacy online and to reduce disinformation and cybercrimes. This allows the government’s use of digital information technology to repress citizens and allows the Kremlin to surveil, control, and isolate its internet from the rest of the world.<sup>475</sup>

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<sup>464</sup> Masood Faivar, *FBI Arrests Five People in China’s ‘Operation Fox Hunt’*, VOA NEWS (28 Oct. 2020), [https://www.voanews.com/a/usa\\_fbi-arrests-five-people-chinas-operation-fox-hunt/6197702.html](https://www.voanews.com/a/usa_fbi-arrests-five-people-chinas-operation-fox-hunt/6197702.html).

<sup>465</sup> *Id.*

<sup>466</sup> *Id.*

<sup>467</sup> *Id.*

<sup>468</sup> *Id.*

<sup>469</sup> *Id.*

<sup>470</sup> U.S. Dep’t of Justice Press Release No. 22-1141, *Two Arrested and 13 Charged in Three Separate Cases for Alleged Participation in Malign Schemes in the United States on Behalf of the Government of the People’s Republic of China*, (24 Oct. 2022), <https://www.justice.gov/opa/pr/two-arrested-and-13-charged-three-separate-cases-alleged-participation-malign-schemes-united>.

<sup>471</sup> *Id.*

<sup>472</sup> *Id.*

<sup>473</sup> *Id.*

<sup>474</sup> Emily Tavener, *Russian Cyber Sovereignty: Global Implications of an Authoritarian RuNet*, AMERICAN UNIVERSITY CENTER FOR SECURITY, INNOVATION, AND NEW TECHNOLOGY (1 Feb. 2022), <https://www.american.edu/sis/centers/security-technology/russian-cyber-sovereignty.cfm>.

<sup>475</sup> *Id.*



The Russian government took a number of legal steps to create the authoritarian and isolated RuNet.<sup>476</sup> In 2014, Russia established a data localization law.<sup>477</sup> Data localization policies escalate state access to information on dissidents, can result in the state economically coercing foreign companies, and can also serve as a means of coercing organizations to support the political regime.<sup>478</sup> Criticism of the Russian government is criminalized and enforced through the unfettered surveillance of citizens' online activities.<sup>479</sup> Some countries tried to mimic the localization restrictions that Russia established while others, such as China, opted for more restrictive laws.<sup>480</sup>

Russia uses its laws on overseas technology companies as a blatant tool of coercion.<sup>481</sup> The Russian government attempts to get these technology companies, such as Wikimedia, to place their content creators and editors in Russian territory where the Russian security forces can reach and detain them.<sup>482</sup> Multiple editors from Wikimedia have had their personal information leaked online in order to intimidate them and expose them to violence.<sup>483</sup>

Russian-installed authorities in occupied regions of Ukraine have blocked access to major social media networks including Google, YouTube, Facebook, and Instagram, as well as to Ukrainian news and independent media.<sup>484</sup> The Google search engine was disabled in the Donetsk, Kherson, and Luhansk regions on 22 July 2022, reasoning that Google was "openly propagating terrorism and violence against Russians."<sup>485</sup> Russia continues to shut off Ukrainian cellular networks, forcing the residents of Kherson to use Russian mobile service providers, which enable the Russian authorities to surveil, intercept, and block Kherson residents from communicating with the outside world.<sup>486</sup>

### 1. Foreign Agent Legislation

Since 2012, Russia has required that any organizations engaging in political activity and receiving funding from abroad to register as foreign agents.<sup>487</sup> Since the start of Russia's war in Ukraine, the Russian government has expanded this law.<sup>488</sup> First, in March 2022, the Russian government criminalized the dissemination of "deliberately false" information, holding a

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<sup>476</sup> The internet within Russia. *See generally* Justin Sherman, *Reassessing RuNet: Russian internet isolation and implications for Russian cyber behavior*, ATLANTIC COUNCIL (12 July 2021), <https://www.atlanticcouncil.org/in-depth-research-reports/issue-brief/reassessing-runet-russian-internet-isolation-and-implications-for-russian-cyber-behavior/>.

<sup>477</sup> This law required Russian and foreign companies to establish a data localization parlance, where a principal copy of its data must be stored in Russia but where other copies can exist outside of Russia. *See* Justin Sherman, *Russia is weaponizing data laws against foreign operations*, BOOKINGS (27 Sept. 2022), <https://www.brookings.edu/techstream/russia-is-weaponizing-its-data-laws-against-foreign-organizations/>.

<sup>478</sup> *Id.*

<sup>479</sup> Tavener, *supra* note 474.

<sup>480</sup> Sherman, *Russia is weaponizing data laws against foreign operations*, *supra* note 477.

<sup>481</sup> *Id.*

<sup>482</sup> *Id.*

<sup>483</sup> *Id.*

<sup>484</sup> Natalia Krapiva, *Update; Digital rights in the Russia-Ukraine conflict*, ACCESSNOW (18 Aug. 2022), <https://www.accessnow.org/digital-rights-ukraine-russia-conflict>.

<sup>485</sup> *Id.*

<sup>486</sup> *Id.*

<sup>487</sup> Clare Sebastian, *As Russia struggles in Ukraine, repression mounts at home*, CNN (1 Dec. 2022), <https://www.cnn.com/2022/12/01/europe/russia-foreign-agents-repression-intl/index.html>.

<sup>488</sup> *Id.*

maximum sentence of fifteen years in prison.<sup>489</sup> Then, on 1 December 2022, the Russian government expanded the definition of “foreign agents” to include those that “received support from foreign entities and (or) is under foreign influence.”<sup>490</sup> “Support” from foreign sources is defined as not only financial support, but “organizational and methodological, or scientific and technical help.”<sup>491</sup> The Russian government defined “foreign influence” as “exacting an influence on an individual by coercion, persuasion or other means.”<sup>492</sup>

Russia’s foreign agent legislation targets nonprofits, news organizations, journalists, and activists.<sup>493</sup> It also targets both citizens in Russia and Russian activists abroad.<sup>494</sup> For example, former oil-tycoon Mikhail Khodorkovsky and ex-world class chess champion Garry Kasparov, both vocal critics of the Kremlin, were labeled as “foreign agents” by the Russian Justice Ministry.<sup>495</sup> Those designated as foreign agents face police raids, restrictions on their activities, fines, and potential criminal prosecution.<sup>496</sup>

To enforce these laws inside occupied Ukrainian territories, Ukrainians can be punished for subscribing to Ukrainian news sources.<sup>497</sup> The Russian-appointed administration of Zaporizhzhia Oblast announced that it would conduct “preventive spot checks of citizens’ mobile phones” for evidence that the citizens subscribe to Ukrainian media.<sup>498</sup> The administration announced that for the first violation of this order, Ukrainian citizens would be given a warning.<sup>499</sup> For the second violation, Ukrainian citizens would be fined.<sup>500</sup> For “cases of serious violations of the law on foreign agents’ activity,” the Ukrainian citizens “will be subject to criminal prosecution.”<sup>501</sup> As of January 2023, no available sources indicate further expected changes to Russia’s foreign agent legislation.

## 2. *Transnational Repression*

Unlike China, according to a 2021 Freedom House Report, “the [Russian] government does not use coercive measures against the Russian diaspora as a whole.”<sup>502</sup> Rather, the Russian government focuses on maintaining control over domestic information by repressing activism and ensuring that exile dissidents do not reach a domestic audience.<sup>503</sup> However, the head of the

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<sup>489</sup> *Id.*

<sup>490</sup> *Id.*

<sup>491</sup> *Id.*

<sup>492</sup> *Id.*

<sup>493</sup> *Russia tightens legislation on ‘foreign agents’*, DEUTSCHE WELLE (29 June 2022), <https://www.dw.com/en/russia-tightens-legislation-on-foreign-agents/a-62307066>.

<sup>494</sup> *Russia adds Kasparov and Khodorkovsky to ‘foreign agents’ list*, REUTERS (20 May 2022), <https://www.reuters.com/world/europe/russia-adds-kasparov-khodorkovsky-foreign-agents-list-2022-05-20/>

<sup>495</sup> *Id.*

<sup>496</sup> U.S. Mission to the United Kingdom, *How Russia’s ‘foreign agents’ law silences dissent*, U.S. EMBASSY & CONSULATES IN THE UNITED KINGDOM (12 Aug. 2021), <https://uk.usembassy.gov/news-how-russias-foreign-agents-law-silences-dissent/>.

<sup>497</sup> Tetiana Lozovenko, *Russians penalise residents of occupied territories for subscribing to Ukrainian media outlets*, UKRAIINNSKA PRAVDA (27 Oct. 2022), <https://www.pravda.com.ua/eng/news/2022/10/27/7373758/>.

<sup>498</sup> *Id.*

<sup>499</sup> *Id.*

<sup>500</sup> *Id.*

<sup>501</sup> *Id.*

<sup>502</sup> FREEDOM HOUSE, *RUSSIA: TRANSNATIONAL REPRESSION ORIGIN COUNTRY CASE STUDY* (2021), <https://freedomhouse.org/report/transnational-repression/russia>.

<sup>503</sup> *Id.*

Chechen Republic, Ramzan Kadyrov, “represents a significant exception by employing a brutal direct campaign to control the Chechen diaspora.”<sup>504</sup> Russia utilizes several methods of physical transnational repression and is “responsible for assaults, detentions, unlawful deportations, and renditions in eight countries, mostly in Europe.”<sup>505</sup> Furthermore, the report states twenty of the thirty-two documented cases of physical Russian transnational repression “have a Chechen nexus.”<sup>506</sup> Additionally, the Kremlin’s transnational repression extends to former insiders that defect to a NATO member state and cooperate with their intelligence agencies.<sup>507</sup> Representing “only a snapshot” according to Freedom House, between 2014 and 2021, Russia perpetrated forty-one public, direct, and physical, transnational repression attacks.<sup>508</sup>

In addition to physical transnational repression, Russia also utilizes digital transnational repression by using online harassment, disinformation, and smear campaigns to silence those that are critical of the government.<sup>509</sup> While some attacks originate from regime supporters, Russia has organized “groups of trolls to be unleashed against critics in concerted campaigns.”<sup>510</sup>

A very common tactic of transnational repression used by the Kremlin is assassinations.<sup>511</sup> For example, Russia used radiation poisoning to assassinate former intelligence officer Alexander Litvinenko in 2006 and used a nerve agent in the attempted assassination of former intelligence officer Sergei Skripal in 2018.<sup>512</sup> Furthermore, there are many unexplained deaths of high-profile Russians in exile.<sup>513</sup> While the Russian government denies their role in these deaths, many of the deaths were caused by rare radioactive isotopes and nerve agents that are only used by the Russian government.<sup>514</sup> In 2021, UN experts believe that Russia attempted to assassinate Alexei Navalny, a Russian leader who openly opposes Putin and the Russian government.<sup>515</sup> Navalny was hospitalized in Germany, where doctors determined that he was poisoned with Novichok, a Russian nerve agent.<sup>516</sup> In 2022 alone, about two dozen notable Russians have mysteriously and unexpectedly died.<sup>517</sup> While the assassinations and attempted assassinations are aimed at Russia’s elite, they serve as a reminder of the potential consequences of disloyalty to the Kremlin.<sup>518</sup>

Many Chechen dissidents abroad have also been assassinated.<sup>519</sup> In 2009, Sulim Yamadayev, a former Chechen military commander, was assassinated in Dubai.<sup>520</sup> Additionally,

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<sup>504</sup> *Id.*

<sup>505</sup> *Id.*

<sup>506</sup> *Id.*

<sup>507</sup> *Id.*

<sup>508</sup> Yana Gorokhovskaia and Isabel Linzer, *Defending Democracy in Exile*, FREEDOM HOUSE, 9 (2022), [https://freedomhouse.org/sites/default/files/2022-05/Complete\\_TransnationalRepressionReport2022\\_NEW\\_0.pdf](https://freedomhouse.org/sites/default/files/2022-05/Complete_TransnationalRepressionReport2022_NEW_0.pdf).

<sup>509</sup> Marcus Michaelsen, *THE DIGITAL TRANSNATIONAL REPRESSION TOOLKIT, AND ITS SILENCING EFFECTS*, FREEDOM HOUSE (2022), <https://freedomhouse.org/report/special-report/2020/digital-transnational-repression-toolkit-and-its-silencing-effects>.

<sup>510</sup> *Id.*

<sup>511</sup> FREEDOM HOUSE, *RUSSIA: TRANSNATIONAL REPRESSION ORIGIN COUNTRY CASE STUDY*, *supra* note 502.

<sup>512</sup> *Id.*

<sup>513</sup> *Id.*

<sup>514</sup> *Id.*

<sup>515</sup> *Russia responsible for Navalny poisoning, rights experts say*, UNITED NATIONS NEWS (1 Mar. 2022), <https://news.un.org/en/story/2021/03/1086012>.

<sup>516</sup> *Id.*

<sup>517</sup> Elaine Godfrey, *Sudden Russian Death Syndrome*, THE ATLANTIC (2022), <https://www.theatlantic.com/ideas/archive/2022/12/russian-tycoon-pavel-antov-dies-putin-ukraine/672601/>.

<sup>518</sup> *Id.*

<sup>519</sup> FREEDOM HOUSE, *RUSSIA: TRANSNATIONAL REPRESSION ORIGIN COUNTRY CASE STUDY*, *supra* note 502.

<sup>520</sup> *Id.*

Umar Israilov, a witness against the Chechen regime, was assassinated in Austria.<sup>521</sup> In 2016, two Chechens were assassinated in Turkey.<sup>522</sup> In August of 2019, a Chechen was assassinated in Berlin. In 2020, one critic of the Chechen regime was assassinated in France, a second critic was assassinated in Sweden, and a third critic was assassinated in Austria.<sup>523</sup> While there is strong evidence connecting these assassinations to Kadyrov, they likely also required cooperation and engagement from the Kremlin.<sup>524</sup>

Along with political assassinations, the Kremlin also abuses the Interpol red notice.<sup>525</sup> Russia is responsible for 38% of all public red notices in the world, compared to the U.S.'s 4.3% and China's 0.5%.<sup>526</sup> Russia has used this method to detain asylum seekers residing in the U.S. for several years.<sup>527</sup>

Russia also uses hacking campaigns as a tactic of transnational repression.<sup>528</sup> Russian dissidents abroad experience surveillance and sophisticated hacking campaigns against them, like those used by the Russian government against national security threats.<sup>529</sup> In 2017, Russia targeted thousands of people in about 160 different countries, including Ukraine, Syria, Georgia, and the U.S.<sup>530</sup>

### 3. *Persecution of Journalists*

Russia has harassed and persecuted journalists in States Parties to the Rome Statute (or States that have granted the ICC jurisdiction).<sup>531</sup> Evidence shows journalists have been harassed, tortured, and abducted.<sup>532</sup> Furthermore, there have been dozens of murders and attempted murders of Russian journalists by Russian forces, both in Russia and Ukraine, for reporting on Russia's invasion of Ukraine.<sup>533</sup> Additionally, Russian forces have detained hundreds of journalists in Russia for reporting on protests against the invasion of Ukraine.<sup>534</sup> One journalist, Ivan Safronov, was sentenced to twenty-two years in prison on charges of "high treason" for sharing "state secrets" after reporting on Russia's military.<sup>535</sup> In Ukraine, journalists have been targeted by the

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<sup>521</sup> *Id.*

<sup>522</sup> *Id.*

<sup>523</sup> *Id.*

<sup>524</sup> *Id.*

<sup>525</sup> *Id.*

<sup>526</sup> *Id.*

<sup>527</sup> *Id.*

<sup>528</sup> *Id.*

<sup>529</sup> *Id.*

<sup>530</sup> David Greene, AP: 'Digital Hit List' Provides Evidence Of Hackers' Links To Kremlin, NATIONAL PUBLIC RADIO (2017), <https://www.npr.org/2017/11/02/561521906/ap-digital-hit-list-provides-evidence-of-hackers-links-to-kremlin>.

<sup>531</sup> *Human Rights Committee Considers Report of the Russian Federation in the Absence of a Delegation, Experts Raise Issues on the Persecution of Journalists and the Arrests of Protesters*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (2022), <https://www.ohchr.org/en/news/2022/10/human-rights-committee-considers-report-russian-federation-absence-delegation-experts>. See also NOURA AL-JIZAWI ET AL., PSYCHOLOGICAL AND EMOTIONAL WAR: DIGITAL TRANSNATIONAL REPRESSION IN CANADA, (The Citizen Lab, 2022), [https://citizenlab.ca/wp-content/uploads/2022/03/Report151-dtr\\_022822.pdf](https://citizenlab.ca/wp-content/uploads/2022/03/Report151-dtr_022822.pdf).

<sup>532</sup> *Human Rights Committee Considers Report of the Russian Federation in the Absence of a Delegation, Experts Raise Issues on the Persecution of Journalists and the Arrests of Protesters*, *supra* note 531.

<sup>533</sup> *Id.*

<sup>534</sup> *Id.*

<sup>535</sup> *Id.*

Russian military.<sup>536</sup> As of 4 May 2022, seven journalists have been killed since the Russian invasion of Ukraine.<sup>537</sup> Additionally, there were numerous reports that journalists were kidnapped, attacked and killed, or refused safe passage between cities and regions by Russian forces.<sup>538</sup>

In Russian-occupied Crimea, journalists critical to the Russian-imposed Crimean government have been arrested and imprisoned within Russia.<sup>539</sup> One reporter, Irina Danilovych, was held in the basement of the Russian FSB headquarters for eight days, following years of harassment from Russian authorities.<sup>540</sup> At least fourteen of Crimea's bloggers and reporters were sentenced to six years in prison for terrorism charges and are currently held in Russian prisons.<sup>541</sup> Another Crimean journalist, Vilen Temeryanov, was charged with participating in a terrorist organization after working for a Russian exile media outlet.<sup>542</sup> He faces a possible sentence of twenty years in jail.<sup>543</sup> Another journalist working for the same media outlet, Remzi Bekirov, was sentenced to nineteen years in jail for similar charges.<sup>544</sup>

Soon after Russia invaded Ukraine, Russia released a list of 131 Canadian politicians and civil society activists banned from Russia.<sup>545</sup> Among those listed was a Canadian journalist and policy analyst, Marcus Kolga.<sup>546</sup> Kolga and many other critics of Russia have been targeted through online and offline transnational repression.<sup>547</sup> Whenever Kolga speaks of Russia's human rights violations, he is subjected to online trolling, disinformation, and smear campaigns.<sup>548</sup> To discredit and silence him, he receives online death threats by some of the most popular media outlets.<sup>549</sup> This has translated to offline death threats by those that follow the information that the Kremlin puts out.<sup>550</sup> Russia has also used these tools to target and intimidate Russian diasporas and other critics of the Russian government.<sup>551</sup>

Similar to Kolga, a Syrian immigrant in Canada, Amir, was targeted by Russia for his pro-democracy political advocacy for Syria.<sup>552</sup> In 2011, Amir began to support and host media websites promoting democracy in Syria.<sup>553</sup> In 2012, Amir's email account was hijacked.<sup>554</sup> Additionally, in 2013, Amir's web-hosting business was victim to a Distributed Denial of Service attack, where

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<sup>536</sup> *Ukraine: Journalists targeted and in danger, warn top rights experts*, UNITED NATIONS (2022), <https://news.un.org/en/story/2022/05/1117462>.

<sup>537</sup> *Id.*

<sup>538</sup> *Id.*

<sup>539</sup> Russia has stepped up harassment of journalists in Crimea since invading Ukraine, REPORTERS WITHOUT BORDERS (12 Sept. 2022), <https://rsf.org/en/russia-has-stepped-harassment-journalists-crimea-invading-ukraine>.

<sup>540</sup> *Id.*

<sup>541</sup> *Id.*

<sup>542</sup> *Id.*

<sup>543</sup> *Id.*

<sup>544</sup> *Id.*

<sup>545</sup> Noura Aljizawi & Siena Anstis, *The Effects of Digital Transnational Repression and the Responsibility of Host States*, LAWFARE (27 May 2022), <https://www.lawfareblog.com/effects-digital-transnational-repression-and-responsibility-host-states>.

<sup>546</sup> *Id.*

<sup>547</sup> *Id.*

<sup>548</sup> *Id.*

<sup>549</sup> *Id.*

<sup>550</sup> *Id.*

<sup>551</sup> *Id.*

<sup>552</sup> NOURA AL-JIZAWI ET AL., *supra* note 531, at 26

<sup>553</sup> *Id.*

<sup>554</sup> *Id.*

hackers disrupt the ability for the public to access a website, perpetrated by Russian hackers. Amir suffered significant financial impacts due to this attack.<sup>555</sup>

## X. COMPLICITY IN EXTRAORDINARY RENDITION PROGRAMS

This section examines complicity in China and Russia's extraordinary renditions programs by States Parties to the Rome Statute. It includes specific analysis of Rome Statute Articles 25 and 30. This section discusses specific examples of potential complicity by individuals in states which have detained or deported Uyghurs at the behest of China. It further discusses the potential complicity of third-party organizations facilitating the adoption of Ukrainian children by individuals in and outside of Russia, as Russia has kidnapped and deported several thousand Ukrainian children and put them up for adoption.

### A. *Complicity Under the Rome Statute*

Criminal complicity in assisting principal perpetrators can extend very far through many different types of networks, and where the complicity cascade ends can be impacted greatly by political prerogatives rather than legal imperatives.<sup>556</sup> Several sections of the Rome Statute describe forms of complicity. First, under Article 25(3)(c), a person can be held criminally responsible for aiding, abetting, providing the means for, or otherwise assisting in the commission of a crime when done so for the purpose of facilitating such a crime.<sup>557</sup> Aiding and abetting is the weakest form of complicity captured in the act, and the minimum requirements for these acts captured in Art. 25(3)(c) may be difficult to determine.<sup>558</sup> While Article 30 establishes a general *mens rea* requirement for criminal responsibility if not otherwise provided, in Article 25 there is higher subjective and lower objective threshold to establish complicity.<sup>559</sup>

The Rome Statute does not require that assistance from an individual complicit in a crime be either direct or substantial.<sup>560</sup> Unlike the International Law Commission's 1996 Draft Code, the Rome Statute does not limit aiding and abetting by requiring that the assistance "facilitate in some significant way" the commission of the crime or "directly and substantially" assist the commission of the crime.<sup>561</sup> The assistance need not be tangible or have 'a causal effect on the crime'— "[m]oral support and encouragement" is sufficient.<sup>562</sup> Mere presence at the scene of the crime could be sufficient if the presence had a legitimizing or encouraging effect on the principal perpetrators.<sup>563</sup> Assistance provided arguably only has to meet a very low threshold to meet the objective element of accomplice liability under the Rome Statute.<sup>564</sup> The subjective element would

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<sup>555</sup> *Id.*

<sup>556</sup> Andrew Clapham, *On Complicity*, LE DROIT PENAL A L'ÉPREUVE DE 'INTERNATIONALISATION' (10 Apr. 2002), <https://ssrn.com/abstract=1392988>, at 13.

<sup>557</sup> Rome Statute, *supra* note 5, at art. 25(3)(c).

<sup>558</sup> Kai Ambos, *Article 25: Individual Criminal Responsibility*, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, Second Edition ¶ 15 (Dec. 14 2011), <https://ssrn.com/abstract=1972186>.

<sup>559</sup> *Id.* at ¶ 19.

<sup>560</sup> Clapham, *supra* note 556, at 11.

<sup>561</sup> Ambos, *supra* note 558, at ¶ 15.

<sup>562</sup> Clapham, *supra* note 556, at 11; Ambos, *supra* note 558, at ¶ 16.

<sup>563</sup> *Id.*

<sup>564</sup> Clapham, *supra* note 556, at 12.

require a purpose to facilitate a crime together with knowledge that the action will assist in the offense.<sup>565</sup>

Second, a person who in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose may be held criminally liable through Article 25(3)(d).<sup>566</sup> Those who in any way contribute to the commission of a crime by a group of persons acting with a common purpose must either intend to further the illegal activity or purpose of the group, or know of the intention of the group to commit the crime.<sup>567</sup> An individual can be complicit for group criminality through Article 25(3)(d). The existence of a common purpose among the group must be established, which can be accomplished with evidence of references to any meetings during which group members agree on aspects of the plan or public statements where group members express intentions of the group.<sup>568</sup> Unlike 25(3)(c), 25(3)(d) deals with contributions to a group performed when the contributor had knowledge of the group's intention to commit crimes instead of liability for contributions to a specific crime.<sup>569</sup>

Third, the Article 25(3)(b) encompasses ordering, soliciting, or inducing the commission of a crime.<sup>570</sup> There needs to be a superior-subordinate relationship to find that a crime has been ordered, but physical or psychological pressure could be enough to be considered soliciting or inducing the commission of a crime.<sup>571</sup>

Incitement is limited to the crime of genocide.<sup>572</sup> Therefore, an individual is responsible for incitement of extraordinary renditions when accompanied with the intention to directly prompt or provoke genocide.<sup>573</sup> Incitement to commit genocide does not require the commission or attempted commission of the actual crime of genocide, because the act of incitement is itself considered sufficiently blameworthy to be punished.<sup>574</sup>

Current international law developments have focused on individual rather than corporate criminal liability.<sup>575</sup> While individuals acting on behalf of a corporation themselves could be prosecuted, the prosecution of corporations as entities themselves would require amendments to the Rome Statute.<sup>576</sup> Corporate activity will only fall into ICC scrutiny if the conduct is part of a situation under the jurisdiction of the court through a proper referral or investigation.<sup>577</sup> Arguably, the corporate officers of an NGO could similarly be held criminally liable for complicity in atrocities investigated or referred to the Prosecutor.

### *1. Complicity in China's Extraordinary Rendition Program*

As explained above, although China does not fall under the jurisdiction of the ICC, the deportation of Uyghurs has been perpetrated from States Parties to the Rome Statute, giving the

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<sup>565</sup> *Id.*

<sup>566</sup> Rome Statute, *supra* note 5, at art. 25(3)(d).

<sup>567</sup> *Id.* at art. 25(3)(d).

<sup>568</sup> Marina Aksenova, *Corporate Complicity in International Criminal Law: Potential Responsibility of European Arms Dealers for Crimes Committed in Yemen*, 30 WASH. INT'L L. J. 255 (2021), at 265.

<sup>569</sup> *Id.*

<sup>570</sup> Rome Statute, *supra* note 5, at art. 25(3)(b).

<sup>571</sup> *Id.*

<sup>572</sup> *Id.* at art. 25(3)(e).

<sup>573</sup> Ambos, *supra* note 558, at ¶ 30.

<sup>574</sup> *Id.* at ¶ 29.

<sup>575</sup> Aksenova, *supra* note 568, at 258.

<sup>576</sup> David Scheffer, *Corporate Liability under the Rome Statute*, 57 HARV. INT'L. L. J. 35, 38 (2016).

<sup>577</sup> *Id.*

ICC authority over these actions when at least part of the *actus reus* of the crime of deportation takes place on the territory of a State Party and continue into China.<sup>578</sup> Therefore, States that either directly assist in human rights violations by facilitating deportations of Uyghur people or by providing rhetorical support for the Chinese campaign could be complicit.<sup>579</sup>

One report has found 336 fully verified detentions and renditions of Uyghurs living outside of China's borders with an upper estimate of 1,576 cases.<sup>580</sup> Evidence submitted to the ICC Office of the Prosecutor has identified Chinese authorities forcefully deporting Uyghurs from Tajikistan, a party of the Rome Statute.<sup>581</sup> In Tajikistan, Chinese authorities have been responsible for unlawful acts such as arrests, enforced disappearances, and abductions.<sup>582</sup> Tajik police have also been used to carry out raids on places where Uyghurs are identified as living and working.<sup>583</sup> The evidence submitted includes witness testimonies accusing officials of threatening people to become informers, or create problems involving visas and other legal paperwork in order to have Uyghurs deported.<sup>584</sup> According to the East Turkistan Government in Exile, over the past ten to fifteen years, the population of Uyghurs living in Tajikistan has decreased from around 3,000 to approximately one-hundred.<sup>585</sup> Tajikistan has further held a role in facilitating the extraordinary rendition of Uyghurs from Turkey to China.<sup>586</sup> In August 2019, three Uyghurs were identified as being deported from Turkey to China through Tajikistan.<sup>587</sup>

Cambodia, another state party to the Rome Statute, has been reported to have fallen under the Chinese pressure to “detain and illegally extradite” Uyghurs residing in their country.<sup>588</sup> In 2009, the Cambodian government notoriously detained and deported twenty-two Uyghurs seeking asylum in a shelter run by the U.N.’s refugee agency in Phnom Penh.<sup>589</sup> Cambodia’s raid on the refugee agency remains “particularly deplorable” due to Cambodia being one of the few Asian countries Party to the Refugee Convention and CAT.<sup>590</sup> Days after the Cambodian government

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<sup>578</sup> See *supra* notes 162-69. *The States Parties to the Rome Statute*, *supra* note 406.

<sup>579</sup> Bradley Jardine, *The Arab World Isn't Just Silent on China's Crackdown on Uighurs. It's Complicit*, TIME (2 Mar. 2022), <https://time.com/6160282/arab-world-complicit-china-repression-uighurs/>.

<sup>580</sup> Bradley Jardine & Lucille Greer, *Beyond Silence: Collaboration Between Arab State and China in the Transnational Repression of Uyghurs*, UYGHUR HUMAN RIGHTS PROJECT (24 Mar. 2022), <https://oxussociety.org/beyond-silence-collaboration-between-arab-states-and-china-in-the-transnational-repression-of-uyghurs/>.

<sup>581</sup> Stephanie van den Berg, *Lawyers Urge ICC to Probe Alleged Forced Deportations of Uyghurs from Tajikistan*, REUTERS (10 June 2021), <https://www.reuters.com/world/asia-pacific/lawyers-urge-icc-probe-alleged-forced-deportations-uyghurs-tajikistan-2021-06-10/>.

<sup>582</sup> East Turkistan Government in Exile, *PRESS RELEASE: Evidence of Chinese Operatives in Tajikistan Rounding up Uyghurs and Deporting them Submitted to ICC Prosecutors to Establish Jurisdiction*, East Turkistan Government in Exile (10 June 2021), <https://east-turkistan.net/press-release-evidence-of-chinese-operatives-in-tajikistan-rounding-up-uyghurs-and-deporting-them-submitted-to-icc-prosecutors-to-establish-jurisdiction/>.

<sup>583</sup> Bruce Pannier, *Tajikistan Accused of Helping China in Campaign Against Uyghurs*, RADIOFREEEUROPE/RADIOLIBERTY (15 June 2021), <https://www.rferl.org/a/31309627.html>.

<sup>584</sup> Davidson, *supra* note 215.

<sup>585</sup> East Turkistan Government in Exile, *supra* note 582.

<sup>586</sup> Pannier, *supra* note 583.

<sup>587</sup> *Id.*

<sup>588</sup> *Id.*

<sup>589</sup> Aun Chhengpor, *ICC Prosecutor Says Cambodia's Uyghur Deportation Insufficient to Initiate Investigation*, VOA NEWS (17 Dec. 2020), <https://www.voacambodia.com/a/icc-prosecutor-says-cambodia-uyghur-deportation-insufficient-to-initiate-investigation/5703104.html>.

<sup>590</sup> *China: Forcibly Returned Uighur Asylum Seekers at Risk*, HUMAN RIGHTS WATCH (22 Dec. 2009), [www.hrw.org/news/2009/12/22/china-forcibly-returned-uighur-asylum-seekers-risk](http://www.hrw.org/news/2009/12/22/china-forcibly-returned-uighur-asylum-seekers-risk).



improperly deported the Uyghurs, Xi Jinping, then Vice President of China, signed 14 trade deals with Cambodia, worth a combined total of \$850 million.<sup>591</sup>

In Afghanistan, a state party to the Rome Statute, Uyghurs have begun fearing that they will be deported to China and placed in internment camps due to new discussions of Taliban and Chinese cooperation in combating the East Turkestan Islamic Movement (“ETIM”), an extremist terrorist organization.<sup>592</sup> The Chinese government considers any Uyghur living in Afghanistan to be a member of ETIM, meaning that in seeking to foster relations with China, or gain needed economic support, the Taliban may continue their history of deporting Uyghurs to China.<sup>593</sup> The Taliban notably deported thirteen Uyghurs to China following a meeting in 2000 between Taliban leader Mullah Omar and Chinese Ambassador to Pakistan Lu Shulin.<sup>594</sup> The Afghan government in 2015, separate from Taliban rule, was responsible for the deportation of Israel Ahmet.<sup>595</sup>

While not States Parties to the Rome Statute, some Arab states are actively assisting in the transnational repression and deportation to China of Uyghur people.<sup>596</sup> In Egypt, Morocco, Qatar, Saudi Arabia, Syria, and the UAE 109 cases have been confirmed with an upper estimate that 292 Uyghurs have been detained or deported to China since 2004.<sup>597</sup> These estimates are limited to public reporting by investigative reporters, which likely represent a small fraction of the total detentions and renditions other countries have been complicit in.<sup>598</sup>

## 2. *Complicity in Russia’s Extraordinary Rendition Program*

Ukraine has accepted ICC jurisdiction “for the purpose of identifying, prosecuting and judging the perpetrators *and accomplices* of acts committed in the territory of Ukraine” from 21 November 2013, onwards.<sup>599</sup>

Neither Ukraine nor Russia both has not adopted the Hague Adoption Convention monitoring the adoption of children.<sup>600</sup> There is no guarantee that the adoption has followed proper safeguards and procedures to verify the adoptability of the child and the eligibility of the adoptive parents.<sup>601</sup> Countries allowing for the adoption of children from Russia ultimately may be accepting victims from Ukraine.<sup>602</sup> States Parties to the Rome Statute that continue to adopt children from Russia then run the risk of being complicit in Russia’s crimes in Ukraine.<sup>603</sup>

In the context of the forced migration of Ukrainian children, the ICC should be able to prosecute individuals acting on behalf of third-party proxies which facilitate the forced migration

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<sup>591</sup> Reuters Staff, *supra* note 224.

<sup>592</sup> Kashgarian, *Uyghurs From Afghanistan Fear Deportation to China*, *supra* note 219.

<sup>593</sup> *Id.*

<sup>594</sup> *Id.*

<sup>595</sup> *Id.*

<sup>596</sup> Jardine, *The Arab World Isn’t Just Silent on China’s Crackdown on Uighurs. It’s Complicit*, *supra* note 579.

<sup>597</sup> Jardine & Greer, *supra* note 580.

<sup>598</sup> *Id.*

<sup>599</sup> *Declaration by the Government of Ukraine*, accessible at Ukraine, INTERNATIONAL CRIMINAL COURT, <https://www.icc-cpi.int/ukraine> (last visited 13 Jan. 2023) (emphasis supplied).

<sup>600</sup> *Intercountry Adoption—United States Department of State*, US DEPARTMENT OF STATE BUREAU OF CONSULAR AFFAIRS, <https://travel.state.gov/content/travel/en/Intercountry-Adoption.html/> (last visited 7 Jan. 2023).

<sup>601</sup> Rob Kuznia, Blake Ellis, & Daniel A. Medina, *Americans Have Rushed to Rescue Ukrainian Orphans. One Mission Led to a Child Trafficking Probe*, CNN (22 Apr. 2022), <https://www.cnn.com/2022/04/22/us/ukraine-orphans-rescue-missions-invs/index.html>.

<sup>602</sup> *Id.*

<sup>603</sup> *Id.*

of children. Under 25(3)(c), an individual can only be held liable for assistance which has an effect on the commission of a crime.<sup>604</sup> Therefore, third party proxy organizations which facilitate the forced migration of a child from Ukraine to Russia could be held liable through 25(3)(c).

It is reported that there is a strong relationship between the Russian Federation and non-profit organizations leading the migration effort in the region.<sup>605</sup> As such, individuals should consider the complicity of humanitarian organizations in the illegal forced migration of the estimated 200,000 to 700,000 Ukrainian children since 24 February 2022.<sup>606</sup> For example, the charitable non-profit Into the Hands of Children under Russian Humanitarian Mission has claimed responsibility for the migration of at least 2,000 children.<sup>607</sup> Organizations which collaborate with the Russian Humanitarian Mission, and in particular the leadership members of such organizations, should consider their risk of complicity in the forced migration of Ukrainian children.<sup>608</sup>

## XI. CONCLUSION

China's extraordinary rendition of Uyghurs from the territory of States Parties to the Rome Statute and Russia's extraordinary rendition of Ukrainians from the territory of Ukraine, a State which has accepted the jurisdiction of the ICC, may constitute the crime against humanity of deportation under Rome Statute Article 7(1)(d). In the cases where non-States Parties deport or forcibly transfer lawfully present persons from a State Party and the first element of the crime under Article 7(1)(d) is satisfied on the territory of a State Party (or one which has granted the ICC jurisdiction), the ICC should logically follow its decision in its 2018 Rohingya ruling, despite the territorial reversal, and find it has jurisdiction in such cases.

This white paper reiterated that selective justice, or even the appearance of such, threatens the rule of law. Just as forty-three States Parties rightly referred the grave "Situation in Ukraine" for investigation in March and April 2022, States Parties should similarly exercise their political will and refer the crimes actively being committed on the territory of States Parties by China to be investigated by the ICC. Since the ICC Prosecutor will gather evidence of Ukrainians being sent to Russia, it should also gather evidence of Uyghurs being sent to China from the territory of States Parties to the Rome Statute.

The U.S. has an infamous extraordinary renditions program. This white paper acknowledged this history and argued that just as the individuals in Russia and China with the greatest responsibility for extraordinary renditions from States Parties should be subject to the Rome Statute for any extraordinary renditions from States Parties to the Rome Statute, similarly situated individuals in the U.S., or any country not party to the Statute that engage in extraordinary renditions from States Parties, must also be subject to it.

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<sup>604</sup> Aksenova, *supra* note 568, at 271.

<sup>605</sup> *Ukrainian children stolen by Russia: how many have been taken, who is behind it, whereabouts of children*, *supra* note 242.

<sup>606</sup> Dixon & Abbakumova, *supra* note 302; *Russia's Abductions of Ukrainian Children are a Genocidal Crime*, *supra* note 311; *Ukrainian children stolen by Russia: how many have been taken, who is behind it, whereabouts of children*, *supra* note 242.

<sup>607</sup> *Ukrainian children stolen by Russia: how many have been taken, who is behind it, whereabouts of children*, *supra* note 242.

<sup>608</sup> *Don't stay away. Join the campaign of the Commissioner for Children's Rights under the President of the Russian Federation "Into the hands of children". Let's help the children of Donbass and Ukraine together!\**, RUSSIAN HUMANITARIAN MISSION, <https://rhm.agency/ne-ostavaytes-v-storone-detyam-v-ruki-pomozhem-detyam-donbassa-i-ukrainy-vmeste/>, (last visited 15 Jan. 2023).