The ICC’s failure to investigate China on genocide is a vast moral failure

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Fatou Bensouda, the chief prosecutor at the International Criminal Court in The Hague, is a stickler when it comes to legal jurisdiction. When asked to rule on whether the People’s Republic of China should face the court over the brutal treatment of its Uighur minority, Bensouda’s ICC office [noted](https://www.icc-cpi.int/itemsDocuments/2020-PE/2020-pe-report-eng.pdf) that China is not party to the court’s founding treaty, and correspondingly concluded that its affairs can’t be scrutinized without further evidence connecting the situation to members of the ICC.

Sounds reasonable on the face of it. Yet Bensouda has been notably reluctant to grant the same understanding to the United States, which her court has happily [assailed](https://www.npr.org/2020/03/05/812547513/international-criminal-court-allows-investigation-of-u-s-actions-in-afghanistan) for its actions in Afghanistan and in CIA black sites in Europe — even though it, too, is not an ICC member state. The Trump administration responded by placing Bensouda and others involved on the U.S. [sanctions](https://www.npr.org/2020/09/02/908896108/trump-administration-sanctions-icc-prosecutor-investigating-alleged-u-s-war-crim) list of “specially designated nationals.”

Despite Bensouda’s resistance, the court’s mandate to investigate China’s actions is clearer than its ongoing investigation of U.S. forces, based on the court’s own rules. Backed by [precedents](https://www.lawfareblog.com/unpacking-recent-uighur-icc-complaint-against-chinese-leaders) from 2018 and 2019, China’s illegal mass [transfer](https://www.nytimes.com/2020/07/06/world/asia/china-xinjiang-uighur-court.html) of Uighurs from ICC member states Tajikistan and Cambodia into Xinjiang, where they were detained and subjected to further crimes, establishes ICC jurisdiction to rule on China’s actions.

The ICC can step in only where national legal systems fail to undertake prosecutions. Though the U.S. government already [investigated](https://www.nytimes.com/2005/05/22/world/asia/army-faltered-in-investigating-detainee-abuse.html) the situation in Afghanistan and prosecuted [several](https://www.brookings.edu/blog/order-from-chaos/2020/03/11/the-trump-administration-misplayed-the-international-criminal-court-and-americans-may-now-face-justice-for-crimes-in-afghanistan/) individuals, Bensouda found these efforts insufficient — but seems to have nothing to say of Chinese courts’ active [corroboration](https://www.nytimes.com/2019/08/31/world/asia/xinjiang-china-uighurs-prisons.html) in Uighur oppression. And while the U.S. case allegedly [relates](https://www.cfr.org/article/iccs-probe-atrocities-afghanistan-what-know) to about 80 victims for war crimes more than 15 years ago, China stands accused of atrocities against more than a million victims in an ongoing campaign of systematic [torture](https://time.com/5467628/china-uighur-congress-torture/), [rape](https://www.washingtonpost.com/opinions/2019/10/21/chinas-attacks-uighur-women-are-crimes-against-humanity/?itid=lk_inline_manual_9), forced [labor](https://www.jpolrisk.com/beyond-the-camps-beijings-long-term-scheme-of-coercive-labor-poverty-alleviation-and-social-control-in-xinjiang/) and involuntary [sterilization](https://jamestown.org/product/sterilizations-iuds-and-mandatory-birth-control-the-ccps-campaign-to-suppress-uyghur-birthrates-in-xinjiang/). There can be no doubt that the court’s dodging jurisdiction of the Uighur issue represents a vast moral and institutional failure.

There is mounting evidence that China’s campaign of repression against Uighurs and other Turkic minorities fits the United Nations’ [legal definition](https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf) of genocide — the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group,” including killing, bodily harm, “group conditions of life calculated to bring about its physical destruction” and more.

Though the Uighurs have long been [targeted](http://cup.columbia.edu/book/the-uyghurs/9780231147583) by the Chinese state, in the past four years the Uighur homeland has transformed into the world’s most advanced [high-tech](https://www.hrw.org/video-photos/interactive/2019/05/02/china-how-mass-surveillance-works-xinjiang) surveillance state, as officials seek to fulfill Chinese Communist Party leader Xi Jinping’s [command](https://www.nytimes.com/interactive/2019/11/16/world/asia/china-xinjiang-documents.html) to use the "organs of dictatorship” and show “absolutely no mercy” in cracking down on perceived threats from Turkic minorities. [Hundreds](https://www.bbc.com/news/world-asia-china-54277430)of “reeducation” camps across the region detained more than a million Uighurs for a harrowing regimen of forced cultural cleansing.

Then there is the horrifying attempt to sterilize the Uighurs en masse: According to Chinese government documents, Xinjiang authorities planned to subject at least 80 percent of women of childbearing age in four southern minority prefectures to birth [prevention](https://foreignpolicy.com/2020/07/01/china-documents-uighur-genocidal-sterilization-xinjiang/) procedures. Despite the region making up only 1.8 percent of China’s population, 80 percent of China’s new IUD placements were performed in Xinjiang in 2018. Unsurprisingly, Uighur birthrates have [plummeted](https://jamestown.org/program/sterilizations-iuds-and-mandatory-birth-control-the-ccps-campaign-to-suppress-uyghur-birth-rates-in-xinjiang/). If these blood-curdling [accounts](https://www.haaretz.com/world-news/.premium.MAGAZINE-a-million-people-are-jailed-at-china-s-gulags-i-escaped-here-s-what-goes-on-inside-1.7994216) coming out of Xinjiang aren’t evidence enough, [footage](https://www.abc.net.au/news/2019-09-23/video-uyghurs-shaved-blindfolded-xinjiang-train-station-china/11537628) of shaved, bound and blindfolded Uighurs being loaded onto or from trains, and the seizure of [13 tons](https://apnews.com/article/fff5fc7925f09916bf6b9d5f79bb4132) of human hair believed to be shorn from Uighur scalps — evoking echoes of the Holocaust — should be.

Indeed, an [increasing](https://www.aljazeera.com/news/2020/10/22/china-rejects-canada-report-accusing-beijing-of-uighur-genocide) [number](https://www.foreign.senate.gov/press/ranking/release/menendez-cornyn-introduce-bipartisan-resolution-to-designate-uyghur-human-rights-abuses-by-china-as-genocide) of [observers](https://ipac.global/ipac-calls-on-international-criminal-court-to-accept-case-investigating-suspected-genocide-against-uyghur-muslims/) are formally [recognizing](https://foreignpolicy.com/2020/07/15/uighur-genocide-xinjiang-china-surveillance-sterilization/) the grim reality of genocide. But not the ICC.

Theoretically, the ICC has left the door open for accusers to return with further evidence. But the greater need is for the court to show a backbone and sense of proportionality. Its track record leaves little room for optimism — more than [$2 billion](https://asp.icc-cpi.int/en_menus/asp/bureau/WorkingGroups/budget/Pages/default.aspx) spent and just [eight convictions](https://www.icc-cpi.int/about), all in [Africa](https://www.bbc.com/news/world-africa-48907866).

Facing [accusations](https://abcnews.go.com/Politics/pompeo-slams-international-court-trump-approves-economic-sanctions/story?id=71198898) of corruption and politicization, the court is at a turning point as [elections](https://www.reuters.com/article/us-warcrimes-icc-prosecutor-idUSKBN2861X6) for the next chief prosecutor loom. The successful candidate will direct the agenda of the court for years to come. President-elect Joe Biden will have to weigh how to approach America’s fraught relationship with the ICC at this pivotal time. [Reports suggest](https://foreignpolicy.com/2020/11/25/biden-likely-lift-sanctions-icc-prosecutor-fatou-bensouda/) he will lift President Trump’s sanctions shortly after taking office. That would be a mistake.

The Trump sanctions offer an opportunity to both the Biden administration and the ICC. Biden must make clear to the ICC and our allies that the first step toward any improvement in U.S. relations with the court must be the institution’s thorough investigation of the world’s largest ongoing atrocity.

Biden has a chance to help restore the ICC’s credibility and deliver some small hope for justice to China’s Uighurs. He would be foolish not to take the opportunity.