

Legal Advice for the Independent Tribunal into Forced Organ Harvesting from the Prisoners of Conscience in China (“the China Tribunal”)

Overview

The area of law in which this advice is sought upon is complex. As such, too much focus on simplifying the law for the purposes of this advice may run the risk of having important legal principles and legal thoughts on the subject matter overlooked in favour of simplicity, which in turn may result in an uninformed decision being made by the China Tribunal. The area of law is new and briddled with uncertainties, some of which have yet to be fleshed out by international jurisprudence. It is with that in mind that I provide this advice to be as concise and relevant as possible without sacrificing the important matters that must be considered by the China Tribunal in whatever findings it chooses to make.

In this advice, I will refer to various decisions of the International Criminal Tribunal for Former Yugoslavia, the International Criminal Tribunal for Rwanda as well as the International Criminal Court. It is important to note that these Tribunals or Court may have differing opinions on the various elements that constitute the international crimes for which this advice has been sought.

The approach in which the China Tribunal may take in considering the advice that is provided here is potentially two-fold. The first is to consider the role of the International Criminal Court moving forward and the application of the Rome Statute on the findings of fact that have been made or have yet to be made by the China Tribunal. The second is to consider customary international law as a whole by looking at the various conventions, treaties or judgments beyond just the realm of the ICC in determining whether there has been a breach of these customary international laws by the forced harvesting of organs from prisoners of conscience in China.

GENOCIDE

(a) The definition

1. **Article II** of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (“**the Genocide Convention**”) defines genocide as ¹ “*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.”*

2. The definition above has since been adopted *verbatim* in the Statute of the International Criminal Tribunal for the Former Yugoslavia (“**ICTY**”)², Statute of the International Criminal Tribunal for Rwanda (“**ICTR**”)³ and **Article 6** of the **Rome Statute** of the International Criminal Court (“**ICC**”)⁴. For the sake of brevity, we would not be discussing the prohibited acts **II (d)** or **II (e)** in this advice, as both of these acts are not relevant to the China Tribunal and its purpose.

¹ https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf

² http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf

³ http://legal.un.org/avl/pdf/ha/ict_r EF.pdf

⁴ https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

3. The **ICC Elements of Crimes**⁵ was created pursuant to **Article 9** of the **Rome Statute** and provides the list of elements for each of the prohibited acts **II (a)** to **II (e)** that are listed above. While these elements guide the ICC in its interpretation and application of **Article 6** of the **Rome Statute**, it is not mandatory for a tribunal operating independently of the ICC such as the ICTY to adopt the elements listed in the **ICC Elements of Crimes**.⁶ This is evident from the ICTY case of *Krstić* where the Appeals Chamber in the case had commented that the definition given by the **ICC Elements of Crimes** was only an auxiliary means of interpretation that did not appear in the Genocide Convention and was thus not mandated by customary international law. The crimes were said to be committed by the accused prior to the existence of the Rome Statute and as such, the elements listed in the **ICC Elements of Crimes** could not be used to support the Trial Chamber's conclusion at the risk of retrospective application of these elements.⁷
4. It ought to be noted that the definition of genocide is very specific but despite this, almost every word in its definition has had difficulties in its interpretation. Before discussing the meaning of the words above that have been used to define genocide, we must first explore the nature of genocide itself and understand the circumstances that fall within its general application.

(b) Nature of Genocide

5. It is stated under Article I of the Genocide Convention that genocide may be committed in times of peace or war. It is also not necessary to show that any of the acts committed had actually resulted in the whole or partial destruction of the protected group. What is important instead is the existence of a marked intent on the part of the perpetrator in committing such an act and not the result of the act itself. Besides that, there is no

⁵ <https://www.icc-cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/0/elementsofcrimeseng.pdf>

⁶ See 1 *The Rome Statute of the International Criminal Court: A Commentary* (Antonio Cassese, Paola Gaeta, John R.W.D Jones, eds, 2002), at p. 348

⁷ *Krstić*, ICTY A. Ch., 19 April 2004, para 224

formal need of a genocidal plan but the ICTY and ICTR has noted that it would be difficult to commit genocide without one.⁸

6. There is also no express requirement of scale either on the side of the perpetrator or the victim.⁹ While this is so, allowing individual perpetrators who commit isolated hate crimes against individual victims to fall within the definition of genocide may run the risk of diluting the significance and power of the term, which has often been reserved as a label for the most serious of crimes. There are two approaches that strive to resolve this issue. The first suggests that that the individual act may be done in the context of other manifest pattern of a similar conduct or the act itself could bring into effect the whole or partial destruction of the protected group (etc. the use of a nuclear weapon with genocidal intent).¹⁰ This approach has been accepted by the ICC and is reflected in the **ICC Elements of Crimes**, which states the following element in relation to each prohibited act:

The conduct took place in the context of a manifest pattern of similar conduct directed against the group or was conduct that could itself effect such destruction.

7. A pattern of crimes or concrete danger to the protected group should suffice¹¹ although it should be noted that the context that is required in the element above is one of similar conduct and not intent, meaning that the context in which the genocide exists does not need to be a genocidal one in itself.
8. The second approach is to require the individual to have knowledge that the commission of the act would or would likely to be in furtherance of an organised and widespread plan to conduct genocide. This alternative approach unlike the first one has yet to be accepted by any court.

⁸ Kayishema, ICTR T. Ch. III, 21 May 1999, para 94; Jelusic, ICTY T. Ch., 19 December 1999, para. 101

⁹Jelusic, ICTY T. Ch., 19 December 1999, para. 400

¹⁰ R. Cryer, H. Friman, D. Robinson, E. Wilshurst, 'An Introduction to Criminal Law and Procedure' 3rd edn, pg 219

¹¹ See supra note 10

9. For the Falun Gong and Uighur Muslims, a context as mentioned in the first approach clearly exists. The existence of the 6-10 Office in relation to the Falun Gong and the mass detention and violence exerted on both of these groups (if such findings were to be reached) clearly indicates the existence of a pattern of crimes and concrete danger to these groups. Having identified this context, the next step in our process of identifying whether or not genocide has occurred in relation to these groups is to discuss whether or not the Falun Gong and Uighur Muslims can be identified as protected groups for the purposes of the Genocide Convention.

(c) **The protected groups**

10. There has been debate as to whether the list of protected groups in the definition of the Genocide Convention, namely national, ethnical, racial and religious groups should be an exhaustive list. While all evidence tends to suggest that the list is meant to be exhaustive, there have been attempts to interpret the existing terms in an expansive manner to include other groups within the definition. The ICTR Trial Chamber in the *Akayesu* case interpreted the terms widely to include the protection of any stable and permanent group¹² but it should be noted that this interpretation was based on an arguable misreading by the Trial Chamber of the *travaux préparatoires* of the Genocide Convention. This interpretation by the *Akayesu* case has not been followed by any other Trial Chamber in the ICTY or the ICTR and has also not been followed by the ICC. The ICC and the Appeals Chamber of the ICTY and the ICTR has instead focused exclusively on the four groups mentioned in the definition.¹³ While there are national jurisdictions that have adopted a wider interpretation, it should be noted that other States are not mandated to follow this interpretation.

¹² Akayesu, ICTR T. Ch. 1, 2 September 1998, para 516

¹³ See supra note 10, page 211

11. It must be noted that at the time of writing there is no internationally recognised definition of any of these four groups. Prescribing a distinct definition for each group is difficult due to the inherently overlapping nature of these groups although there has been compelling argument in favour of identifying them separately.¹⁴ That being said, the ICTR in *Akayesu* had attempted to do so by prescribing the following definitions to each group¹⁵:

(i) National: ‘Collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties

(ii) Racial: ‘Hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors’

(iii) Ethnic: ‘A group whose members share a common language or culture’

(iv) Religious: ‘A religious group includes denomination or mode of worship or a group sharing common beliefs’

12. The definitions above ironically proved to be problematic for the Trial Chamber in *Akayesu* as the Tutsi shared a common language and culture with the Hutus thus putting the group outside the meaning of an ethnic group as defined by the Trial Chamber in *Akayesu*. This resulted instead in the Trial Chamber having to adopt the expansive interpretation as mentioned earlier above in order to include the Tutsi as a protected group under the Convention.¹⁶ This expansive interpretation as pointed out earlier is not legally defensible and the ICTR has since taken judicial notice of the fact that the Tutsi would have been considered an ethnic group on a correct interpretation of the Convention without having to resort to the expansive interpretation.¹⁷

¹⁴ Claus KreB, ‘The Crime of Genocide under International Law (2006) 6 International Criminal Law Review 461

¹⁵ *Akayesu*, ICTR T. Ch. 1, 2 September 1998, para 511-515

¹⁶ *Akayesu*, ICTR T. Ch. 1, 2 September 1998, para 702

¹⁷ *Karamera*, ICTR T. Ch.III, 11 December 2006, final paragraph

13. The arguably better approach taken by the Trial Chamber in *Krštić* is as follows¹⁸:

555. *European instruments on human rights use the term “national minorities”, while universal instruments more commonly make reference to “ethnic, religious or linguistic minorities”; the two expressions appear to embrace the same goals. In a study conducted for the Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1979, F. Capotorti commented that “the Sub-Commission on Prevention of Discrimination and Protection of Minorities decided, in 1950, to replace the word ‘racial’ by the word ‘ethnic’ in all references to minority groups described by their ethnic origin”. The International Convention on the Elimination of All Forms of Racial Discrimination defines racial discrimination as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin”. The preparatory work on the Genocide Convention also reflects that the term “ethnical” was added at a later stage in order to better define the type of groups protected by the Convention and ensure that the term “national” would not be understood as encompassing purely political groups.*

556. *The preparatory work of the Convention shows that setting out such a list was designed more to describe a single phenomenon, roughly corresponding to what was recognised, before the second world war, as “national minorities”, rather than to refer to several distinct prototypes of human groups. To attempt to differentiate each of the named groups on the basis of scientifically objective criteria would thus be inconsistent with the object and purpose of the Convention.*

557. *A group’s cultural, religious, ethnical or national characteristics must be identified within the socio-historic context which it inhabits. As in the *Nikoli* and *Jelisi* cases, the Chamber identifies the relevant group by using as a criterion the*

¹⁸ Krstic, ICTY T. Ch. I, 2 August 2001, para 555-556

stigmatisation of the group, notably by the perpetrators of the crime, on the basis of its perceived national, ethnical, racial or religious characteristics.

The approach above suggests that the groups act as four corner posts that sets the limits of an area in which a myriad of groups can find protection under the Convention.¹⁹

14. When it comes to the identification of the protected group and its members, a purely objective assessment that ignores the perpetrators own perceptions of race, religion, ethnicity and nationality is not desirable. It is also now settled that the assessment cannot be solely subjective.²⁰ A better assessment would be one that is made on ‘a case-by-case basis by reference to the objective particulars of a given social or historical context, and by the subjective perceptions of the perpetrators.’²¹

15. While the Uighur Muslims would clearly qualify as a protected group under the Genocide Convention, the same cannot be confidently said of the Falun Gong. The China Tribunal in assessing whether the Falun Gong qualifies as a protected group ought to note that the major issue is not whether the Falun Gong would objectively be considered a religious group. The arguably larger problem instead lies in the subjective perception of China and the perpetrators of the forced organ harvesting of Falun Gong practitioners. This is because the key element of genocide is the intent of its perpetrators and as such there must be evidence to show that the perpetrators themselves view the Falun Gong as a religious group in which it intends to destroy in whole or in part through the prohibited acts mentioned in Article II of the Genocide Convention. Without the perpetrators themselves first viewing the Falun Gong as a religious group, it would be difficult to find the intent necessary for a finding of genocide. Arguably, if the definition of a religious group as laid out in the case of *Akayesu* were to be followed, namely that a religious group is one that shares similar beliefs, then the Falun Gong would clearly be considered a protected group under the Convention.

¹⁹ Schabas, *Genocide*, 129

²⁰ Kayishema, ICTR T. Ch. II, 21 May 1999, para 98; Jelissic, ICTY T. Ch., 14 December 1999, paras 69-72

²¹ Semanza, ICTR T. Ch., 15 May 2003, para 317

16. Assuming that this hurdle is passed, it must next be shown that a prohibited act under Article II was committed with the intent to destroy in whole or in part the Falun Gong or Uighur Muslims. I shall discuss both of these elements further below and conclude how the forced organ harvesting of Falun Gong members and Uighur Muslims may or may not fall under the definition of genocide.

(d) The Prohibited Acts

17. Only the prohibited acts under **Article II** of the **Genocide Convention** may lead to a finding of genocide. For the purposes of the China Tribunal, the prohibited acts that bear the most relevance are the acts under **Art II (a)**, which is killing and **Art II (b)**, which is causing serious bodily or mental harm to members of the group. The prohibited act under **Art II (c)**, which is deliberately inflicting on the group conditions of life calculated to bring about the physical destruction in whole or in part will also be discussed briefly. Despite some of these acts referring to a group, the **ICC Elements of Crimes** state that the suffering of one victim should suffice.

18. **Article II (a)** is straightforward and involves the intentional killing of members of the group but it must be noted that there is no requirement for the killing to be premeditated. Genocide does not necessarily need conduct causing death, and under **Article II (b)**, conduct causing serious bodily or mental harm to members of the group but not death should suffice.

19. In *Kayishema*, it is held that what is meant by serious bodily or mental harm should be made on a case-by case basis.²² The District Court of Jerusalem has said that serious bodily or mental harm could be caused ‘by the enslavement, starvation, deportation and persecution of people... and by their detention in ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation, deprivation of their rights as human beings and to suppress them and cause them

²² Kayishema, ICTR T. Ch. II, 21 May 1999, para 09

inhumane suffering and torture.’²³ The mental or physical harm does not need to be permanent.²⁴

20. While **Article II (c)** may seem relevant for the China Tribunal’s purposes at first glance, it is not result-based as the earlier two prohibited acts and it requires the existence of calculated ‘conditions’ to achieve the result intended. The ‘conditions of life’ has been interpreted by the ICC Elements of Crimes to include the “the deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes.” Depending on the existence of special intent it may also include the forced migration of the protected group.²⁵

21. While the detention and violence inflicted on the Falun Gong members and the Uighur Muslims would clearly qualify as prohibited acts under the Convention, it must be remembered that the advice which is sought here is regarding the specific act of forced organ harvesting of these groups. An important distinction that has to be made by the China Tribunal then is whether the harvesting of the organs was done prior to the death of the victim or after the victim’s death. If the action was done after the death of the victims then the action of forcefully harvesting the organs from the body would itself likely not constitute a prohibited act for the purposes of the Genocide Convention. If on the other hand, the forced harvesting of organs was done prior to the death of the victims and it resulted in serious physical or mental harm or caused the victim’s death, it would qualify as a prohibited act and subject to the intention behind the harvesting of the organs, it may lead to a finding of genocide. If the latter situation is the case, then the most important element that must be proven next is the intent of the perpetrator.

(e) **Intent**

22. The crime of genocide is not limited to only those that organise and lead the genocide but may also encompass individuals in the rank or file that carry out the instructions,

²³ Attorney-General of Israel v. Eichmann (1968) 36 ILR 5 (DC) 340

²⁴ Akayesu, ICTR T. Ch. 1, 2 September 1998, 502

²⁵ See supra note 10, page 211

provided that they have the necessary intent.²⁶ The intent that is required for genocide is a special one and is unlike the normal intent exemplified in Article 30 of the Rome Statute, which is that the individual must mean to engage in the conduct or mean to cause the conduct or is aware that it will occur in the ordinary course of events. The special intent for genocide instead requires the intent to destroy in whole or in part the protected group. It should be noted that motive is not necessary for such intent to be found.²⁷

23. The intention to destroy is one that must relate to the physical or biological destruction of the group. Forcing social assimilation or destroying the cultural characteristics that shapes the group's identity is not enough in the absence of physical or biological destruction to prove the intent to destroy. Those actions may however be used as evidence in establishing the said intent. This is supported by the ICJ decision in *Bosnian Genocide*.²⁸
24. There is the added issue of what is meant by 'in whole or in part' with this aspect of intention being a cause of controversy namely because the fulfilment of this aspect is dependent upon a broad or narrow conceptualisation of the relevant group. Using the Uighur Muslims as an example, whether the intent is aimed at the whole or part of the group is dependent upon how wide or narrow the relevant group is conceptualised as, namely whether the intent to destroy is aimed at all Uighur Muslims throughout the world or simply towards Uighur Muslims in China. If it is the former, then the Uighur Muslims in China would simply be part of the targeted group whereas in the latter situation, the Uighur Muslims in China would be considered as the whole. This is important because 'part' is defined by the case laws of the ICTY and ICTR to mean something which is not less than 'substantial'. This has also been confirmed by the ICJ. If for example, it is the Uighur Muslims throughout the world that is the relevant group, the targeted Uighur Muslims in China may not qualify as a 'part' of the group due to its

²⁶ Kayishema, ICTR A. Ch./ 1 June 2001, para 170

²⁷ A. Greenawalt, 'Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation' (1999) 99 Columbia Law Review 2259, 2274-9

²⁸ Bosnian Genocide case, para 344

numbers not being large enough to qualify as ‘substantial’. The Appeals Chamber in *Krstic* has held that in determining what is ‘substantial’, both qualitative and quantitative factors must be taken into consideration such as whether the part of the group that is targeted plays an important role for the survival of the group or is significant because of its number.

25. All evidence should not be looked at individually and ought to be viewed together in deciding if there is such intent.²⁹ While direct evidence of intent is often not available, intent can be deduced from circumstantial evidence, which includes actions and words.³⁰ The case of *Akayesu* has suggested that intent may be deduced from the conduct of others³¹ but this approach has since been limited by the decision in *Stakic* to circumstances where the person has agreed to undertake criminal plans with these other individuals.³²
26. An important point that must be noted by the China Tribunal is that an intention to forcefully harvest the organs for the sake of profit is not the same as an intention to forcefully harvest the organs to bring about the physical or biological destruction in part or in whole of a protected group. In deciding whether genocide has been committed, the China Tribunal must make this distinction carefully. One may seek to argue that even if the harvesting of the organs were done for the sake of profit, the perpetrators would have knowledge that their actions would bring about the destruction in part or in whole of the group. However, this argument is reliant on a knowledge-based approach that has yet to be supported by any court rather than a purpose-based approach that has been adopted by the ICTY, ICTR and ICC. As such, it is highly unlikely that the perpetrators’ knowledge of the effect of their actions without any intention to cause such an effect would be sufficient to meet the requirement of intent under the Genocide Convention.

²⁹ *Stakic*, ICTY A. Ch., 22 March 2006, para 53

³⁰ *Seromba*, ICTR A. Ch., 12 March 2008, paras 177-82

³¹ *Akayesu*, ICTR T. Ch. I, 2 September 1998, para 523

³² *Stakic*, ICTY A. Ch., 22 March 2006, para 40

CRIMES AGAINST HUMANITY

(a) Definition

27. Unlike genocide or torture, Crimes against Humanity has no convention and its definition has been inconsistent over the years. However, the present definition in the Rome Statute under Article 7 is a good reflection of the current position under customary international law. The definition is as follows:

'any of the following acts when committed as part of the widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) **Murder;***
- (b) **Extermination;***
- (c) Enslavement;*
- (d) Deportation or forcible transfer of population;*
- (e) **Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;***
- (f) **Torture;***
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;*
- (h) **Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;***
- (i) **Enforced disappearance of persons;***
- (j) **The crime of apartheid;***

(k) *Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.*

An important point to note is that in the definition above, the requirement for armed conflict which was adopted in the ICTY statute is not present nor is there any reference to discrimination as stated in the statute of the ICTR.

28. The test of whether the attack is widespread or systematic is a disjunctive one meaning that only one of it needs to be proven.³³ While this is so, the requirement of an ‘attack directed against the civilian population’ mandates some minimal aspect of both ‘widespread’ and ‘systematic’ to be present.³⁴
29. The term ‘widespread’ has had various definitions and as a term generally connotes the “large-scale nature of the attack and the number of victims”.³⁵ While ‘widespread’ often refers to the combined effect of several inhumane acts, a single act with great magnitude would also suffice.³⁶ There is no set numerical limit to determine whether an attack would qualify as ‘widespread’ and as such the issue must be decided on the facts.
30. ‘Systematic’ has also had various definitions with earlier case law setting a high threshold as to what would qualify as ‘systematic’ to avoid non-widespread crimes from falling too easily under the label of Crimes against Humanity. In *Akayesu*, it had the following definition³⁷:

- (1) thoroughly organised;
- (2) following a regular pattern;

³³ *Akayesu*, ICTR T. Ch. 1, 2 September 1998, para 579

³⁴ *Haradinaj et al.*, ICTY T. Ch. I, 3 April 2008, para 122

³⁵ *Tadic*, ICTY T. Ch. II, 7 May 1997, para 206

³⁶ *Kordic and Cerkez*, ICTY T. Ch., 26 February 2001, para 176; *Blaskic*, ICTY T. Ch. I, 3 March 2000

³⁷ *Akayesu*, ICTR T. Ch. I, 2 September 1998, para 580

- (3) on the basis of common policy; and
- (4) involving substantial public or private resources

In *Blaskic*³⁸, it was defined instead as:

- (1) a plan or objective;
- (2) large scale or continuous commission of linked crimes;
- (3) significant resources; and
- (4) implication of high-level authorities.

Recent case law has been in support of the following definition: “organised nature of the acts of violence and the improbability of their random occurrence.”³⁹

- 31. ‘Attack directed against any civilian population’ is defined under Article 7(2) of the Rome Statute and involves the course of conduct involving the multiple commission of acts referred to above against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. While the attack against the civilian population is required to be widespread or systematic, a single act committed by an individual should constitute Crimes against Humanity provided that it forms part of the attack.
- 32. The requirement of multiple commission of acts is not particularly contentious but the necessity of the ‘policy’ element has been debated with much of the controversy surrounding differing opinion as to what ‘policy’ means. While the Rome Statute has adopted the ‘policy’ element, the ICTY Appeal Chamber in the *Kunarac* case has held that the existence of a plan or policy to commit these crimes does not need to be proven.⁴⁰ This has created different implications depending on whether the particular jurisdiction required a policy element or not. For the jurisdiction not requiring the

³⁸ *Blaskic*, ICTY T. Ch., 3 March 2000, para 203

³⁹ *Nahimana et al.*, ICTR A. Ch., 28 November 2007, para 920; *Al Bashir arrest warrant case*, ICC PTC I, 4 April 2009, para 81

⁴⁰ *Kunarac et al.*, ICTY A. Ch., 12 June 2002, para 98

‘policy’ element, the main principle that must be borne in mind is that unconnected random acts cannot constitute an ‘attack’. For jurisdictions requiring the element, a ‘policy’ need not be expressly stated or declared and should instead be prescribed its ordinary meaning rather than any connotation to an official strategy.⁴¹ An action by a State or Organisation is not required and its mere encouragement or endorsement should suffice.⁴²

33. The definition of ‘organisation’ has also been a contentious one with the broad approach of defining an organisation to include any organisation capable of inflicting mass crimes on the civilian population being supported by the case law of the ICC.⁴³ The narrower view involves only State or State-like organisations.
34. The final element that must be met before considering the prohibited acts and their definitions is knowledge of the attack. Case law suggests that awareness, wilful blindness or knowingly taking the risk should suffice in showing the existence of knowledge on the part of the accused.⁴⁴ Motive is not necessary and knowledge may be inferred from circumstantial evidence.⁴⁵

(b) Prohibited acts

35. This advice shall focus on the acts listed under Article 7 of the Rome Statute that are relevant. Some of these relevant prohibited acts are defined in the Rome Statute under Article 7(2). They are defined as follows:

(a) ***Extermination*** includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

⁴¹ See suprat note 10, page 239

⁴² Kupreskic, ICTY T. Ch. II, 14 January 2000, paras 554-5

⁴³ Bemba Gombo, ICC PTC II, 15 June 2009, para 81

⁴⁴ Tadic, ICTY T. Ch. II, 7 May 1997, para 657

⁴⁵ ICC Elements of Crimes, General Introduction para 3

Additional notes: Extermination unlike murder has an element of killing on a large scale.⁴⁶It also includes indirect means of causing such death.⁴⁷

- (b) **Torture** means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

Additional notes: As discussed further below.

- (c) **Persecution** means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

Additional notes: Requires some element of gravity compared to the other crimes against humanity⁴⁸ as well as the existence of discriminatory grounds. There is also a need for intent to target a person or group and not simply knowledge. The intention here differs from the one under genocide where the destruction of the group must be intended.

- (d) **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

⁴⁶ ICC Elements of Crimes

⁴⁷ War Crimes Commission, History, 194

⁴⁸ Kupreslic et al., ICTY T. Ch II, 14 January 2000, paras 619 and 621.

whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time;

Additional notes: The ICC Elements of Crimes has recognised because of the likelihood of many actors involved that the crime may committed in two ways, namely either⁴⁹:

a) by arresting, detaining or abducting a person, with knowledge that a refusal to acknowledge or give information would be likely to follow in the ordinary course of events; or

b) by refusing to acknowledge the deprivation of freedom or to provide information on the fate or whereabouts, with knowledge that such deprivation had occurred.

(e) The crime of apartheid means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

36. I have also attempted to define the relevant prohibited acts that are not defined by the ICC Elements of Crimes. They are the following:

(a) Murder

⁴⁹ G. Witschel and Wiebke Ruckert, 'Crimes Against Humanity of Enforced Disappearance of Persons' in Lee, Elements and Rules, 98-103

Murder involves a death caused by the perpetrator with the intent to kill or to inflict grievous bodily harm likely to cause death and is reckless as to whether death ensues.

(b) *Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law*

Involves detention in prison-like conditions and other serious forms of confinement and detention. Situations of house arrest may qualify as a prohibited act.⁵⁰ There is also a need for the imprisonment to be arbitrary. The UN Working Group on Arbitrary Detention has suggested three categories⁵¹:

- (1) absence of any legal basis for the deprivation of liberty;*
- (2) deprivation of liberty resulting from exercise of specified rights and freedoms;*
- (3) “when the total or partial non-observance of the international human rights norms relating to the right to a fair trial... is of such gravity as to give the deprivation of imprisonment an arbitrary character.”*

(c) *Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.*

(c) Final issues

37. The best approach to take is to first identify whether there is an attack on the civilian population and if this attack is ‘widespread’ or ‘systematic’. After concluding that such an attack exists, the next step would be to see if any of the prohibited acts have in fact been committed as part of such an attack by any individual.

⁵⁰ Hall, ‘Article 7’, 202

⁵¹ Report of the UN Working Group on Arbitrary Detention, UN Doc. E/CN.4/1998/44, para 8

38. For the Crimes against Humanity mentioned above that are not persecution or apartheid, there is no discriminatory element that is required and as such the act of forced organ harvesting from imprisoned Falun Gong members and Uighur Muslims or other groups should be viewed alongside the detention and other cruel and inhumane treatment of these groups to constitute a general attack on the civilian population as a whole. This would help in the fulfilment of the ‘widespread’ requirement as viewing them together may create the necessary context. A point of contention may arise in relation as to whether or not the number of victims would constitute a number large enough to satisfy the ‘widespread’ requirement.
39. Alternatively, the creation of the 6-10 office focused on the Falun Gong with its clear organised nature and existence of State support and endorsement alongside other State apparatus and policies that have been used in an inhumane manner on China’s other groups of civilians make a clear case for the fulfilment of the ‘systematic’ requirement under Article 7 of the Rome Statute.
40. As for the prohibited acts and the knowledge of the perpetrators of the attack is concerned, it is difficult to comment upon whether these requirements would be satisfied without further conclusive findings of fact.

TORTURE

(a) Is torture a ‘freestanding’ international crime justiciable separately from Crimes against Humanity under the Genocide Convention or ICC Statute or otherwise?

41. Torture is a ‘freestanding’ crime in the sense that there is an absolute prohibition of it under customary international law. It is justiciable separately from Crimes against Humanity or the Genocide Convention or the Rome Statute because it is a crime that does not need a transnational element. It is useful to note that China is a signatory of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment of Punishment of 1984 (CAT) and as such China is required as a State Party to criminalise

the offence of torture in its domestic law, including attempts, complicity and participation.⁵²

42. Torture as defined under Article 1 of the CAT has three objective elements:

1. It comprises of “any act by which severe pain or suffering, physical or mental is inflicted on a person”;
2. 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; and
3. It is committed “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

43. While State Parties must define torture as a separate offence in their domestic criminal law, it is not required for the definition of torture under CAT to be reproduced *verbatim* and this allows for a wider interpretation to be adopted.⁵³ It should be noted that under Article 1 it is stated that pain or suffering arising from lawful punishment or incidental to it is excluded from the definition of torture thus creating a potential loophole although Article 1(2) also states that it does not legitimise any act which would be in contravention of some other provision of international law. It is important to note that Article 7 of CAT also requires States to extradite to anywhere in the world for prosecution if it is not initiated by the State in its own jurisdiction. If the State fails to do so, the State must ‘submit the case to its competent authorities for the purpose of prosecution.’

JURISDICTION

⁵² Article 4, Convention against Torture

⁵³ See *supra* note 10, page 347.

44. Assuming the crimes above were committed and ignoring practical difficulties caused by China being a member of the Security Council, advice is also being sought on which courts could try the following parties:
- a) China as a state;
 - b) China state bodies or state-supported bodies; or
 - c) The individuals that committed the crimes above
45. It is my opinion that the question in relation to the first two parties namely a) and b) are redundant. This is because it would be not be possible for China as a state or its state-supported bodies to be tried by any existing court or have their criminality determined as the criminal prosecution for the crimes mentioned above can only be made against an individual. As such, this section of the advice would be focusing on the courts that would be able to try the individuals that are said to have committed the crimes above or to determine their criminality.
46. The starting point for criminal prosecution for the crimes mentioned above is at the domestic level and this is reflected in the ICC's fundamental principle of complementarity, where enforcement by the domestic courts should be the first resort and the ICC is to assume jurisdiction only when States fail to do so. However, enforcement of laws surrounding genocide, crimes against humanity or torture at a domestic level is often mired with practical difficulties and bias implementation. National prosecution may be highly selective and States have been shown to be unwilling in prosecuting their own nationals for these crimes. This is quite evident in the current situation involving China. It should be noted that China is a signatory to the Genocide Convention and the Convention Against Torture but not the Rome Statute. It is unclear to what extent China's domestic laws are reflective of the provisions of the Genocide Convention or the Convention Against Torture but it would be hard to imagine the State initiating its own prosecution against the perpetrators of these crimes.

47. It should be noted that national courts of other countries also possess universal jurisdiction in relation to crimes against humanity, genocide and torture as those crimes are defined in customary international law. This universal jurisdiction is supported by the principle that international crimes affect the international community as a whole.⁵⁴ As such, almost every national court would be able to try the perpetrators of these crimes.
48. However, there is an added element of immunity that must be considered when it comes to the commencement of a criminal prosecution at the level of national courts. This immunity may come in two forms namely functional immunity or personal immunity. Functional immunity protects conduct performed on behalf of the State and was considered in the case of *Pinochet*⁵⁵ involving a former head of state. Jurisprudence surrounding functional immunity since the case of *Pinochet* now suggests that such immunity does not afford protection for serious international crimes.⁵⁶
49. There is also personal immunity, which involves the complete immunity of certain office bearers such as present heads of states or diplomats in the carrying out of their representative functions. This form of immunity endures while the person remains in the position.⁵⁷ Unlike functional immunity, national courts have been hesitant to encroach upon personal immunity.⁵⁸
50. However, personal immunity may be waived by the consent of The State involved and as such personal immunity can be removed through Chapter VII Security Council decisions because of the consent that has been given by States to comply with such decisions. This is also seen with the ICC and State parties. Personal immunity of non-State parties before the ICC can also be removed in the event of a referral by the UN Security Council under Chapter VII. This hence affords the ICC the jurisdiction to try

⁵⁴ Colangelo, 'Legal Limits'

⁵⁵ R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3) [1999] 2 All ER 97, HL (Pinochet No.3)

⁵⁶ See supra note 10, page 549- 551

⁵⁷ See supra note 10, page 542

⁵⁸ Pinochet (No. 3), at 171 and 179; Qaddafi (2001) 125 ILR 456

cases involving non-State parties such as China. However, the China Tribunal must also take into account the fact that the earliest date that the ICC can have jurisdiction over the crimes in the Rome Statute is 1st July 2002 (Article 11 of the Rome Statute). This is important bearing in mind that the persecution of the Falun Gong began prior to that date.

51. Other types of courts that may try the perpetrators of the crimes mentioned above is a court established through an agreement between the United Nations and China or a court established by the United Nations through a Security Council resolution.

CONCLUSION

52. As discussed above, care must be taken by the China Tribunal in considering the various elements of these international crimes and there must be proper justification that must be made before concluding that any of these crimes have been committed. An important gap or weakness that currently exists in the proposed determination process of the China Tribunal is the lack of involvement of the accused and hence the lack of opportunity for the individuals accused of these crimes to defend themselves. This is especially important in situations where issues of criminality are raised.
53. It ought to be noted that in the event that there is no finding of genocide, crimes against humanity or torture, there are other forms of criminal offences that may be used to prosecute these perpetrators. An example would be the crimes listed under Article 3 of the Genocide Convention which are the conspiracy to commit genocide, direct and public incitement to commit genocide or attempt to commit genocide.
54. I hope that this advice has provided a helpful insight into these international crimes and I welcome any further queries that you may have.

Dated 23rd May 2019

SGD

Datuk N. Sivananthan
*Of Lincoln's Inn, Barrister
Counsel, International Criminal Court*