

## **Genocide and The China Tribunal**

by David Matas

An opinion dated 23rd May 2019 of Datuk N. Sivananthan commissioned by The China Tribunal has been provided to me as a member of the ETAC steering committee for the Tribunal. This is my comment on that opinion.

### **Intent**

Paragraph 34 of the opinion states:

"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. Motive is not necessary and knowledge may be inferred from circumstantial evidence."

This principle must be kept in mind when considering genocide. Motive is not necessary. An individual may not be motivated to commit genocide and still be complicit in genocide. A person may not have a genocidal motive in killing practitioners of Falun Gong for their organs. Yet, the person could still be complicit in the genocide of Falun Gong through death by organ extraction.

Wilful blindness should suffice. A person can not say he/she did not know that the organs provided for transplantation were sourced from a living person killed through organ extraction and that the person killed was Falun Gong if the person involved in transplantation was wilfully blind to the source of the organs.

What wilful blindness means in a medical context was explored in the Nuremberg Medical Trial, the trial of the Nazi doctors. These doctors were not prosecuted for genocide, but they were prosecuted for crimes against humanity, which has a similar

mental element.

The Charter of the Tribunal defined crimes against humanity to be

"Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated."

There had to be an intent to commit an inhumane act against a civilian population. The Nazi doctors pleaded ignorance, that they did not know that those on whom they were experimenting were members of a civilian population. The Tribunal rejected that defense and convicted several doctors who used it.

That defence was used by Karl Brandt, Karl Gephardt, Karl Genzken and Siegfried Handloser. The Tribunal in its judgment in convicting all of crimes against humanity said about Brandt "Had he made the slightest investigation he could have ascertained that ...", about Gephardt "had he made the slightest inquiry of them ...", about Genzken "Had he made the slightest inquiry he would have discovered that ..." and about Handloser "Had the slightest inquiry been made the facts would have revealed that".

See <https://www.legaltools.org/doc/c18557/pdf/>

The Rome Statute for the International Criminal Court provides in Article 30(2)(b) that the mental element for the crimes over which the Court has jurisdiction, including genocide, encompasses

"In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events."

The legal opinion submitted to the Tribunal, in paragraph 22, states:

"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."

This is an odd position in light of the fact that Article 30 of the Rome Statute just quoted imposes the same intent requirement for all the crimes over which the Court has jurisdiction and makes no exception for genocide. The opinion cites in support of this deviation from the plain words of the Court statute an academic article by Alexander Greenawalt. See

<https://core.ac.uk/download/pdf/46713705.pdf>

The article states:

"However, even assuming all future genocide trials are before the ICC [International Criminal Court], the statutory framework only guides interpretation '[u]nless otherwise provided.' In this way, the statute provokes an interesting interpretive question. Although nothing in the statute [of the Court] explicitly provides for a distinct genocidal intent standard, one might argue that the origins and development of the prohibition against genocide provide an external source of interpretive authority that trumps the Rome Statute's mens rea provision."

The phrase "Unless otherwise provided" occurs in Article 30(1) of the Court statute.

The subarticle states:

"Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge."

The notion that the phrase "Unless otherwise provided" allows for an external source of interpretive authority to trump the Rome Statute can not be right. The phrase "Unless otherwise provided" must mean "unless otherwise provided in the Rome Statute or by the states parties to the Statute". It can not mean unless otherwise provided by someone else somewhere else. Such an interpretation would render the meaning of the statute uncertain since external interpretive sources vary.

The International Criminal Court has Elements of Crimes. In reference to intent for genocide the Elements state:

"Notwithstanding the normal requirement for a mental element provided for in Article 30, and recognizing that knowledge of the circumstances will usually be addressed in proving genocidal intent, the appropriate requirement, if any, for a mental element regarding this circumstance will need to be decided by the Court on a casebycase basis."

<https://www.icccpi.int/nr/rdonlyres/336923d8a6ad40ecad7b45bf9de73d56/0/elementsofcrimeseng.pdf>

The Elements of Crime could fit within the phrase "Unless otherwise provided" in Article 30(1) of the Rome Statute since the Elements of Crime were adopted by the states parties to the Rome Statute. The question then becomes what is the appropriate requirement for a mental element regarding knowledge of the circumstance in the case of killing of Falun Gong for their organs.

My answer is that the appropriate requirement for a mental element in the circumstances the Tribunal is considering is a variation on the reasoning of the judgment in the Nuremberg Medical Trials. The test should be this:

"If those involved in organ harvesting had made the slightest inquiry or internet search they would have discovered that ..."

This standard contrasts those involved in organ harvesting in China with Dr. James Shapiro of the University of Alberta Hospital, who did make inquiries and searches and refused to participate in a collaboration. The inquiries and searches he made anyone could have made.

The Greenawalt article, after the excerpt just quoted, adds:

"If so, the central question remains the same as before: Does 'intent' have a special meaning within the context of genocide?"

The article answers this question this way:

"In cases where a perpetrator is otherwise liable for a genocidal act, the requirement of genocidal intent should be satisfied if the perpetrator acted in furtherance of a campaign targeting members of a protected group and knew that the goal or manifest effect of the campaign was the destruction of the group in whole or in part."<sup>1</sup>

Knowledge, here, as elsewhere includes wilful blindness. That article answer is not that far different from the intent requirement set out in Article 30(2) of the Rome Statute.

Killing Falun Gong for their organs is an act in furtherance of a campaign targeting practitioners of Falun Gong. Those complicit in killing of Falun Gong for their organs would have to be wilfully blind not to know the goal or manifest effect of the campaign targeting practitioners of Falun Gong was the destruction of the group in whole or in part.

The opinion of Datuk N. Sivananthan further states:

"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

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<sup>1</sup> Page 2288

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 knowledgebased approach that has yet to be supported by any court rather than a purposebased 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."

This reasoning is consequential. It depends on acceptance of the proposition that the Rome Statute does not mean what it says, that the intent for genocide is different from the intent for other crimes under the jurisdiction of the Court, even though the Statute says that the intent for all crimes under the jurisdiction of the Court is the same. It further depends on acceptance of the proposition that the phrase "Unless otherwise provided" in Article 30(1) is not limited to what is provided in the Court Statute or by the states parties to the Statute, but can refer to what is provided by outsiders to the Court.

As previously noted, Court statute Article 30(2)(b) provides that intent encompasses both intent to cause the consequences and knowledge that the consequences will occur. The author of the opinion, in effect, amends the Court statute to say that intent for genocide is limited to intent to cause the consequences and excises from the statute its plain words that intent includes knowledge that the consequences will occur. Yet, there is nothing in the Court jurisprudence to which the author refers which supports that reading of the Statute.

The reasoning of the author of the opinion also rejects the proposed alternative of Professor Greenawalt whose article the opinion cites in support of the reasoning. The

proposed alternative of Professor Greenawalt is, as one can see, a knowledgebased approach.

The distinction between knowledge and purpose the author of the opinion seeks to make is not clear cut. People often have more than one intent in carrying forward any action. A person can intend both to make money out of the killing of innocents and intend to eradicate the group to which the innocents belong. Indeed, one intent reinforces the other, gives impetus to the other.

It is impossible to say that the only true genocidal killers are volunteers, those who get no benefit from the killings. If people are paid handsomely to eradicate a group, the intent to eradicate the group nonetheless exists.

My own view is the exact opposite of the author of this opinion. I consider it highly unlikely that the Court would deviate from the Court statute when determining genocidal intent. I consider highly unlikely that the Court would interpret the phrase "Unless otherwise provided" to mean more than what is otherwise provided by the Court Statute or the states parties to the Statute.

Moreover, even if the Court were to do so, I expect the Court would endorse the proposed alternative of Professor Greenawalt. I expect the Court would adopt a knowledge based approach to intent in the form articulated by Professor Greenawalt.

### **Time of death**

The opinion states in paragraph 21:

"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."

There has to be a distinction made between natural death before harvesting and induced death before harvesting. Induced brain death for the purpose of organ harvesting would still fall within the definition of genocide.

### **Opportunity to defend**

The author in paragraph 52 of the opinion writes:

"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."

This statement of lack of opportunity is not quite right. The accused were given the opportunity to defend themselves, but declined to do so. Substantial material which contains their public comments was also provided for the Tribunal's consideration.

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June 1, 2019