

Sir Geoffrey Nice QC,
Independent Tribunal into Forced Organ Harvesting from Prisoners of Conscience in China.

15 January 2019,

Dear Sir Geoffrey,

We have been asked to advise the Tribunal on the extent to which Falun Gong constitutes a “religious group” under the Genocide Convention 1948,¹ and customary international law.² As well as addressing this point, in the light of the interim findings of the Tribunal, we have a number of other points which the Tribunal may wish to consider.

A. Is Falun Gong a religious group protected by the Genocide Convention 1948 and international customary law?

Defining “religion” is a fundamental problem in relation to the protection of religion or belief under international human rights regimes, regional human rights regimes, and the national protection of human rights.³

The Genocide Convention has a short list of protected groups, but the terms used are vague, and no definitional criteria are given. The terms used are not ones upon which there is a broad consensus. As the International Criminal Tribunal for Rwanda (ICTR) noted in *Rutaganda*: “the concepts of national, ethnical, racial and religious groups have been researched extensively and ... there are no generally and internationally accepted precise definitions thereof”.⁴ This has been categorised by Antonio Cassese as a “serious omission”.⁵ General customary law is therefore useful in adding further definition as regarding specific issues such as what constitutes a religious group per se. This issue has been mainly taken up by ICT for the former Yugoslavia and Rwanda - and so a major issue is whether decisions from these ad hoc bodies can be regarded as contributing to the interpretation of customary law on this point.⁶ We consider that, in this specific context, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the ICTR have significantly contributed to both the understanding of as well as the methods for determining what constitutes a protected group, both under the Genocide Convention and in customary international law.⁷

In *Jelsic*, the ICTY Trial Chamber suggested that it was possible to objectively determine religious groups, even if it were not possible to do so for national, ethnic or racial groups.⁸ In *Akayesu*,⁹ the Trial Chamber of the ICTR defined a religious group as one the members of which share the same religion, denomination, or mode of worship, or in the terms of the 1978 study by the UN Economic and Social Council cited by the ICTY Appeals Chamber in *Stakic*,¹⁰ “any religious community united by a single spiritual ideal”. Religious groups are taken to include theistic, non-theistic, and atheistic communities.¹¹ Petit and Ford, for instance, have indicated that the term covers Judaism, Islam, Buddhism, and Christianity.¹²

FACULTY OF HUMANITIES
AND SOCIAL SCIENCES
SCHOOL OF LAW

Headington Campus Headington
Oxford OX3 0BP UK

T +44 (0) 1865 488750

law@brookes.ac.uk

An emphasis on spiritual ideas may be seen as too narrow in that it risks excluding belief communities united by a rejection of spiritual ideas,¹³ and communities united by orthopraxy rather than orthodoxy, but it would seem to encompass Falun Gong comfortably. Falun Gong combines tenets of moral philosophy, spiritual practices, and an ultimate spiritual goal of enlightenment. The UN Special Rapporteur on Freedom of Religion or Belief has recognised Falun Gong practitioners as suffering violations of their freedom of religion or belief.¹⁴

There has been considerable divergence on the issue of the theory and method for determining whether or not a group is protected, including a religious groups.¹⁵ However, following a range of approaches employed by the ICTY/R, according to the most recent case of *Tolimir* group determinations are to be made on a case by-case basis, using a mixture of both subjective and objective criteria and taking into account all the circumstances of the case. This may include social, cultural, historical and political context. Importantly, the group must have a particular or distinct identity and be defined by its common characteristics. Although subjective factors, such as the stigmatisation of the group by the perpetrators on the basis of its perceived religious characteristics may be taken into consideration, subjective factors alone may not be sufficient for the purposes of group determination. Accordingly, it will often be necessary to take additional objective criteria into consideration in order to link subjective determinations to a group's pre-genocide existence in society.¹⁶

In determining whether or not a group constitutes a protected group, it is worth noting that *Tolimir* does not require that a group be stable and permanent *per se*. These criteria are not expressly part of the Genocide Convention, nor is there any evidence of *opinio juris* and widespread practice to suggest that they are part of customary law on protected groups. Whilst these factors are, *inter alia*, useful to take into account when determining whether a group falls into one of the groups protected under the Genocide Convention, the 'stable' and 'permanent' criteria have not been widely applied or reaffirmed in subsequent ICTY/R jurisprudence. As these criteria were discussed in *Akayesu* in relation to ethnic groups, as well as in relation to the specific facts of that case, it is suggested that they should not be over extended, nor too rigorously applied to subsequent cases that need to be assessed on their own particular facts in determining whether a genocide has occurred. As such, it is suggested that the approach in *Tolimir* should be followed so as to avoid an approach which is too restrictive, unworkable or artificial in practice, as this would fundamentally serve to undermine the object and purpose of the Genocide Convention by failing to recognise genocides against groups that have some objective existence in society. This is especially important given that discriminatory or genocidal policies generally serve to destabilise or annihilate groups at various stages of their objective existence and development within society. Furthermore, such an approach does not sit comfortably with general human rights standards and approaches, such as that embodied in the Universal Declaration of Human Rights, which recognise that not only religious, but also national, and ethnic characteristics, may be variable over time, without prejudicing group identity and membership. Arguably this is a matter that is best dealt with by viewing a close linkage between the Genocide Convention and international human rights law in the sense that they are mutually complementary, as envisaged by the International Court of Justice in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion* (July 2004), at para. 106.

A number of specific arguments against Falun Gong constituting a religious group may usefully be ruled out:

- Falun Gong shares some features with other religious groups, notably Buddhism and Taoism. This is not an obstacle to it being a religious group in its own right. Many well-

recognised religions share doctrines, traditions, or practices with preceding religious groups: for instance many forms of Christianity in relation to Judaism.

- The permeability of religious groups such as Falun Gong may seem to cast doubt upon whether such a group constitutes a stable and permanent group as envisaged in *Akeyesu*. Membership of Falun Gong, as a comparatively new religious movement, is disproportionately likely to be an individual voluntary commitment, rather than members coming to “belong to it automatically, by birth, in a continuous and often irremediable manner”.¹⁷ However, as noted above, the ‘stable and permanent’ criteria outlined in *Akeyesu* are neither necessary nor sufficient conditions for determining what constitutes a religious group. This is especially so when viewed against the backdrop of international human rights law, which provides detailed guidance on this issue, and which does not necessarily regard religious characteristics or groups as immutable, but rather to the contrary. Falun Gong is not an ethno-religion, where membership other than by birth is uncommon. If the Genocide Convention were to be limited to groups defined by birth, whose members possess common features permanently,¹⁸ as decisions such as *Akeyesu* suggest, there would be an argument that Falun Gong would fail to qualify. It would be difficult to square such a conception of group membership with the broader understanding of religious commitment in international law, which stresses the importance of voluntary commitment, and in particular the possibility of individuals joining and leaving a religious group. It would also be difficult to square with the inclusion of “religious group” as a distinct category under the Convention, despite attempts by the Soviet representative to treat it as subsumed by the national group.¹⁹ If the permeability of a group’s membership through conversion were an obstacle to that group being protected under the Genocide Convention, identification of forced conversion as a form of genocidal activity against a religious group would be impossible. Accordingly, while there may be an argument for requiring types of groups not explicitly covered by the Convention to be stable and permanent, albeit one which neglects the fragmentation of groups subject to long-term persecution,²⁰ an argument used to exclude political groups from the ambit of genocide, it is difficult to see this as excluding religious groups.²¹ The possibility of conversion into and out of Falun Gong, and the practical importance of conversion as a route to membership of the group, should not be seen as excluding the Falun Gong community from the protection of the Genocide Convention. To do so would be to adopt an approach which is artificial in the sense that it fails to recognise the objective existence of this religious group within international society. Such a disconnect would be out of kilter with general human rights protections, and would serve to undermine the object and purpose of the Convention, in particular to protect religious groups with an objective existence in society from physical and biological destruction.
- There is a complex interplay between individual members of Falun Gong and leadership structures.²² This is not an obstacle to it being a religious group. Even if Falun Gong were deemed to lack a single unifying organisation, this would be a characteristic shared with larger religious communities. Neither Christianity nor Islam, for instance, possess single definitive hierarchies across the entire religion. In the alternative, it might be argued that Falun Gong is so diverse as to constitute a family of separate religious groups. A taxonomy which divided Falun Gong into sub-groups would not necessarily remove those sub-groups from the protection of the Convention. As Hawley has recently shown, for instance, Shia Muslims may constitute a protected group.²³

- The relatively recent origins of Falun Gong are not an obstacle to it being a religious group.²⁴ It is clear that recently formed groups are capable of being protected by the Genocide Convention. In the *Krstic* case, for instance, the ICTY Trial Chamber recognised Bosnian Muslims as a national group, noting that “Originally viewed as a religious group, the Bosnian Muslims were recognised as a ‘nation’ by the Yugoslav Constitution of 1963”.²⁵
- The small membership of Falun Gong is not an obstacle to it being a religious group.²⁶ In relation to genocide, the Appeals Chamber in *Kristic*, for instance, acknowledged that absolute numbers of individuals targeted must be placed in the context of the size of the group of which they were members: “The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group”.²⁷
- Falun Gong has been characterised by the Chinese state as an evil cult, rather than a legitimate religion.²⁸ There is a line of authority for limiting the definition of a religious group to one “worthy of respect in a ‘democratic society’ and ... not incompatible with human dignity”.²⁹ This concept needs to be used with very considerable care, as it could easily be misused to remove protection from organisations who are disapproved of by the state.³⁰ It is unlikely that Falun Gong would fall into even this category of excluded belief systems. Additionally, it is not clear that the concept of “group” under the Genocide Convention recognises this exception. To allow the State to argue that the Convention did not apply because a group was not worthy of respect, or incompatible with human dignity, would introduce a significant potential for States to justify prima facie genocidal action by reference to the characteristics and practices of the targeted group.
- On a related point, it has been suggested that action against Falun Gong practitioners is based upon their political opinion, rather than their religion.³¹ Activities characterised as more likely to lead to ill-treatment of particular practitioners have included “the public practice of Falun Gong exercises, recruitment of new members, and dissemination of Falun Gong information”.³² Each of these activities is capable of falling within the international human rights protection of religion as a manifestation of religion – as noted in *Zhang v Ashcroft*,³³ to require a Falun Gong practitioner “to practise his beliefs in secret is contrary to our basic principles of religious freedom”.³⁴ Even if action were to be restricted to the subset of Falun Gong members who exercise their religion in this way, this could still constitute action against the group as a whole: per *Kristic*, “If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial”.³⁵

B. Additional issues.

We have noted practical difficulties with using the law of genocide to address the conduct of China. These difficulties are not addressed by reference to crimes against humanity. Gaps in the Genocide Convention may generally be filled by the law on crimes against humanity,³⁶ and fall within the ambit of the ICC under the Rome Statute.³⁷ Although genocide is defined as an international crime under Article 6 of the Rome Statute of the International Criminal Court, China is not party to Rome Statute, which renders the ICC’s elements of crimes against humanity not formally applicable. A more fruitful approach may be based upon China being a State Party to the Convention Against Torture (CAT).

Under CAT, China is obliged to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction” (CAT, article 1), and ensure that all acts of torture are offences under domestic criminal law (CAT, article 2). State parties such as China are required to submit periodic reports on measures taken to meet these obligations to the Committee Against Torture (CAT, article 19). The Committee’s most recent reflection on China’s periodic report was published in 2016. This report is notable in that the Committee urged a range of necessary measures to deal with the ongoing issue of deaths and torture in custody in China.

The UN Special Rapporteur on Torture had reported in 2006 that 66% of all alleged torture cases in Chinese detention camps involved Falun Gong practitioners.³⁸ The extensive recommendations of the Committee Against Torture to China may therefore be particularly significant for Falun Gong practitioners. Additionally, the Committee recommended that China ensure that the removal of organs of executed prisoners should only take place on the basis of informed consent and that China “should commission an independent investigation to look into claims that some Falun Gong practitioners may have been subjected to this practice”.³⁹

We hope this brief summary is useful to the work of the China Tribunal.

Yours sincerely,



Michael John-Hopkins

Professor Peter W Edge.
Professor of Law.

Dr. Michael John-Hopkins.
Senior Lecturer in Law.

¹ The People’s Republic of China signed the Convention on the Prevention and Punishment of the Crime of Genocide on 20 July 1949 and ratified it on 18 April 1983. Under Articles I and V of the Genocide Convention, China has affirmed that genocide is a crime under international law. As a Contracting Party China undertaken to prevent and punish the crime of genocide. In this context, undertaking to prevent is particularly important, e.g. the enactment of legislation necessary to give effect to the provisions of the Convention. China appears to be in breach of these undertakings as it has not defined or provided for the crime of genocide (nor war crimes and crimes against humanity) within its domestic law, namely Article 9 of Penal Code 1997, nor has it provided its courts with universal jurisdiction over crimes that could amount to genocide (nor war crimes or crimes against humanity).

² According to the ICJ in the *Bosnia Genocide Case* at para.161, the Genocide Convention reflects principles of customary international law, which are binding on States, above and beyond any convention obligation. However, because of China’s reservation, the ICJ does not have jurisdiction to deal with issues concerning the interpretation, application or fulfilment of the Genocide Convention in Relation to China. Furthermore, China has also placed pressure on other countries, Spain for example, to limit their application of universal jurisdiction for the crime of genocide - see K Gallagher ‘Universal Jurisdiction in Practice’ *Journal of International Criminal Justice* 7 (2009), 1087-1116. Whilst these issues may give rise to the ‘persistent objector rule’, whereby States of sufficient importance in the area of activity in question are not held to be bound by a rule of customary law owing to the fact that they have persistently and openly manifested their dissent to the existence of the rule, there is nevertheless widespread agreement that it only applies when the customary rule is in the process of emerging: see M John-Hopkins, *The Rule of Law in Crisis and Conflict Grey Zones*, (2017), pp.84 - 92. Accordingly, given that China *subsequently* entered its reservation to the Genocide Convention upon ratifying it in 1983, it is therefore highly doubtful that the persistent objector rule can be invoked in

relation to the customary status of genocide as a crime under international law with the universal duty to prevent and punish its commission.

³ See P. Edge and L. Vickers, *Review of Equality and Human Rights Law relating to religion or belief*, (Equality and Human Rights Commission Research Report 97: 2015) at 12-22.

⁴ *Rutaganda*, TC at para.56.

⁵ A Cassese, 'International Criminal Law', in *International Law* (Malcolm Evans ed., 2006) at 739

⁶ On this point see M John-Hopkins, "The Rule of Law in Crisis and Conflict Grey Zones" (2017, Routledge), pp.84 - 92 on the role that international courts and tribunals play as a subsidiary means of interpreting rules of treaty-based and customary law. Also, see *Krstic* para 541-80 where the Trial Chamber held that Article II of the Genocide Convention was declaratory of customary international law.

⁷ See M John-Hopkins, "The Rule of Law in Crisis and Conflict Grey Zones" (2017, Routledge), pp.84 - 92 on the role that international courts and tribunals play in progressively interpreting rules of treaty-based and customary law; and A Szpak, "National, ethnic, racial and religious groups protected against Genocide in the Jurisprudence of the ad hoc International Criminal Tribunals", (2012) *European Journal of International Law* 23(1), 155.

⁸ *Prosecutor v G Jelisic*, Trial Chamber 1999, paras 69 - 72. This objective determination may give weight to the alleged perpetrators perception of the group's character – see *Prosecutor v Nahimana et al.* Appeal Judgement, 2007, para. 496; *Krstic*, Trial Judgment, para. 557. The Trial Chamber in *Krstic* also noted that 'a group's cultural, religious, ethnical or national characteristics may also be identified within the socio-historic context which it inhabits', a point also highlighted in *Semanza*, TC, para. 317; *Baglishima*, TJ, para. 65.

⁹ *Prosecutor v J.-P. Akayesu*, Trial Chamber 1998 at para 512-515.

¹⁰ *Prosecutor v M. Stakic*, Appeal Judgement, 2006, at para 24.

¹¹ Szpak, *op.cit.*, at 159.

¹² R Petit and S Ford, "Exploring critical issues in religious genocide: Case studies of violence in Tibet, Iraq and Gujarat", (2007) *Case Western Reserve Journal of International Law* 40, 163

¹³ See further FGL Simoes, "Los grupos protegidos pela Convencao do Genocidio: perspectivas e desafios interpretativos", (2015) *Anuario Iberoamericano de Derecho Internaccional Penal* 3, 79.

¹⁴ Report of the Special Rapporteur on freedom of religion or belief, Addendum (2010) A/HRC/13/40/Add.1, at para. 74.

¹⁵ See further DL Nersessian, "The Razor's Edge: Defining and protecting human groups under the Genocide Convention", (2003) *Cornell International Law Journal* 36(2), at 307.

¹⁶ See for instance *Tolimir*, TJ, 2012 at para. 735. See further DL Nersessian, "The Razor's Edge: Defining and protecting human groups under the Genocide Convention", (2003) *Cornell International Law Journal* 36(2), at 326.

¹⁷ Szpak, *op.cit.*, at 160.

¹⁸ See 1978 ECOSOC Genocide Study, para. 56.

¹⁹ See LJ LeBlanc, "The United Nations Genocide Convention and Political Groups: Should the United States Propose an Amendment?", (1988) *Yale Journal of International Law* 13(2), 268 at 271.

²⁰ M. John-Hopkins and S Esterling, "The Creation and Protection of History Through the Prism of International Criminal Justice" (2018) *Journal of International Humanitarian Legal Studies* 9, 1-62.

²¹ Cf. DS Bettwy (2011) "The Genocide Convention and Unprotected Groups: Is the Scope of Protection Expanding under Customary International Law?," (2011) *Notre Dame Journal of International & Comparative Law: Vol. 2*(4).

²² See further A Junker, "Follower agency and charismatic mobilization in Falun Gong", (2014) *Sociology of Religion* 75(3), 418.

²³ E Hawlyer, "ISIS crimes against the Shia: The Islamic State's Genocide against Shia Muslims", (2017) *Genocide Studies International* 11(2), 160.

²⁴ Report of the Special Rapporteur on religious intolerance (1990) E/CN.4/1990/46 at para. 110.

²⁵ *Prosecutor v R. Krstic*, Trial Chamber 2001 at para. 559.

²⁶ Report of the Special Rapporteur on Religious Intolerance (1996), E/CN.4/1997/91 at para. 95.

²⁷ *Krstic*, para.12.

²⁸ See further Guobin Zhu, "Prosecuting 'Evil Cults': A critical examination of law regarding freedom of religious belief in Mainland China", (2010) *Human Rights Quarterly* 32(3), 471.

²⁹ *Campbell and Cosans v UK* (1982) 4 EHRR 293 at para.36. For its application in the UK context, see Edge and Vickers, *op.cit.*, at 17-18.

³⁰ See further PW Edge, *Legal responses to religious difference*, (2001) at 393-404.

³¹ For instance in *LL (Falun Gong, Convention Reason, Risk) China CG* [2005] UKAIT 00122 (9 August 2005). Compare *Zhao v Mukasey*, (2008) US Ct of Appeals, 9th Circuit, No. 07-75041.

³² Home Office, *Country Policy and Information Note: China: Falun Gong*, (2016) at para. 3.1.3.

³³ *Zhang v Ashcroft*, 388 F.3d 713 (2004).

³⁴ *Ibid*, at para. 30.

³⁵ *Krstic*, at para 12.

³⁶ : W Schabas, *Genocide in International Law* 117 (2nd ed. 2009).

³⁷ See generally United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, It., June 15–17, 1998, Rome Statute of the International Criminal Court, art. 7(1), U.N. Doc. A/CONF.183/9 (Jul. 17, 1998).

³⁸ Manfred Nowak, Mission To China: Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, March 10, 2006 (UN Doc. E/CN.4/2006/6/Add.6).

³⁹ Committee against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, *Concluding Observations on the Fifth Periodic Report of China*, (2016) CAT/C/CHN/Co/5 at para. 50.