

## **SUPPLEMENTARY ADVISORY OPINION**

### **EDWARD FITZGERALD QC**

1. This Opinion supplements our Opinion dated 29 January 2019 (“our Opinion”), which advised on a series of specific questions put to us by the International Tribunal into Forced Organ Harvesting from Prisoners of Conscience in China.
  
2. In this additional Opinion as requested by the Tribunal we:
  - 1) comment on the opinion of Datuk N. Sivananthan, Counsel to the International Criminal Court, dated 23 May 2019, forwarded to us by the Tribunal;
  - 2) address the issue of whether, if the Tribunal concludes that China has committed genocide in relation to organ harvesting, it would be possible for a case to be brought against China by the UK or another state or body before the International Court of Justice;
  
3. At the end of this Opinion we also draw attention to one further case dealing with the definition of a religion, which reinforces our view that Falun Gong falls within the definition of a religious group.

### **OPINION OF DATUK SIVANANTHAN**

#### **(a) Genocide**

4. We broadly agree with Datuk Sivananthan’s analysis of the law of genocide.

5. As stated at paragraph 18 of our Opinion, that there can be no serious doubt that Uighurs are both a national group and an ethnic group within the meaning of the Genocide Convention.
  
6. Datuk Sivananthan refers at his paragraph 24 to the distinction between destruction of a group in whole and destruction in part, and queries whether Uighurs in China could be regarded as a “substantial part” of the total number of Uighurs in the world, in order for an attempt to destroy Uighurs in China to qualify as attempting to destroy a substantial part of all the world’s Uighurs.
  
7. Population figures for numbers of Uighurs in different countries are readily available. Current statistics referenced on Wikipedia are:
  - 1) China : 11,303,355;
  - 2) Kazakhstan: 223,100;
  - 3) Uzbekistan: 55,220;
  - 4) Kyrgyzstan: 49,000;
  - 5) Turkey: 45,800;
  - 6) Saudi Arabia: 50,000;
  - 7) Australia: 5000-10,000;
  - 8) Pakistan: 3000;
  - 9) Russia: 3696;
  - 10) Canada: 1555;
  - 11) United States: 1000;
  - 12) Japan: 1000.

8. It is clear that a large majority of the world's Uighur population live in China. We therefore consider that there should be no dispute that (1) the Uighur population in China is a "substantial part" of the world Uighur population; (2) a "substantial part" of the Uighur population in China is also likely to satisfy the requirement of being a "substantial part" of the world Uighur population.
9. However we agree with Datuk Sivananthan (his paragraph 26) that there are serious issues with proving specific intent in relation to genocide and the Uighurs.
10. Harvesting organs for profit from Uighurs is not the same thing as intending to bring about the physical or biological destruction of Uighurs as a protected group in whole or in part.
11. The evidence which we have been shown by the Tribunal would seem to be that the Chinese Government wishes to destroy Uighurs as a separate cultural group, but not to physically destroy all or a substantial part of Uighurs as a group. As such it does not meet the intent requirement of the crime of genocide, since genocide, as Datuk Sivananthan points out ( his paragraph 23) involves physical or biological destruction of a group, and cultural destruction is not enough to prove the intent to destroy.
12. To meet the requirement of intent in the case of the Uighurs, the organ harvesting would either have to be on a massive scale such that it would be liable to bring about the physical disappearance of a substantial part of the population of Uighurs in China; or it would have to take place as part of a wider attempt to destroy the group, in which the organ harvesting was combined with mass murder, deprivation of necessities of life, and other acts of genocide.

13. A contrast can perhaps be drawn with the fatal medical experiments conducted by Dr Mengele and others at Auschwitz in the course of the Nazi attempt to exterminate the Jews. In that case the medical murder of the victims took place within the operation of a camp whose purpose was extermination of the inmates. We are aware of reports that many Uighurs are held in concentration camps, but we are not aware of allegations that these camps are extermination camps, such as those operated by the Nazis, or of any Chinese Government policy aimed at extermination, as opposed to cultural destruction and subjugation.
14. For these reasons we do not think that the evidence presently available supports a case of genocide committed by China against the Uighurs, although we would emphasize that the material we have seen on this issue is relatively limited.
15. In contrast, the evidence of genocide seems much stronger in the case of Falun Gong practitioners, particularly in relation to specific intent, in view of:
- 1) the existence of the 610 office expressly dedicated to the destruction of Falun Gong;
  - 2) the evidence we have been shown<sup>1</sup> since giving our original Opinion, indicating widespread and systemic use of Falun Gong prisoners for organ harvesting, and that;
  - 3) all Falun Gong prisoners have their blood group taken as a matter of routine subsequent to their initial detention.<sup>2</sup>
16. We consider that in the case of Falun Gong the context of the systematic attempt to destroy the group means that the evidence of organ harvesting, if accepted by the Tribunal as accurate, does fulfil the legal definition of genocide.

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<sup>1</sup> D. Matas, '*Evidence statement on organ transplant abuse in China*' by David Matas

<sup>2</sup> Ibid. page 4

**(b) Crimes against humanity**

17. We agree generally with Datuk Sivananthan's opinion in relation to crimes against humanity.

18. With regard to Datuk Sivananthan's paragraph 38 which considers the question of whether the forced organ harvesting from imprisoned Falun Gong prisoners and Uighers is part of a widespread and systematic attack, we now agree, in the light of the evidence we have been shown from the report of David Matas of the widespread, organized and systematic nature of forced organ harvesting, that such an attack is made out in the context of both Falun Gong and Uighur prisoners.

**(c) Torture**

19. We agree with Datuk Sivananthan's analysis at his paragraphs 41-43 that torture is a free-standing crime absolutely prohibited under international law, justiciable separately from Crimes Against Humanity, or the Genocide Convention, or the Rome Statute.

**(d) Jurisdiction**

20. We agree with Datuk Sivananthan's opinion on jurisdiction. We deal separately below with the question of jurisdiction of the International Court of Justice.

## INTERNATIONAL COURT OF JUSTICE

21. Article IX of the Genocide Convention provides that:

*“Disputes between the contracting parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute”.*

22. China is a party to the Genocide Convention. However it has entered a specific reservation in relation to Article IX, so a case against it in relation to an allegation of genocide cannot be referred to the International Court of Justice (“ICJ”) under the Genocide Convention itself.

23. Nor can the issue be referred to the ICJ by another country bilaterally outside the framework of the Convention, save in the extremely improbable event that China agreed to such a reference, as the long-established jurisprudence of the ICJ is that its contentious jurisdiction under Article 36 of its Statute is founded upon the consent of the parties ( See e.g. *Corfu Channel (Preliminary Objections)* ICJ Reports 1948, p. 15).

24. In addition to its contentious jurisdiction under Article 36, the ICJ exercises an advisory jurisdiction under Article 65 of its Statute. This provides that: *“The court may give an advisory opinion on any legal question at the request of whatever body may be authorised by or in accordance with the Charter of the United Nations to make such a request”.*

25. Thus the UN General Assembly can ask the ICJ for an advisory opinion, as, for example, in its recent Opinion on the Legal Consequences of the Separation of the Chagos Archipelago (25 February 2019), which was referred to the ICJ by majority vote of the General Assembly, opposed by the United Kingdom which currently occupies the Chagos Islands. In the exercise of this advisory jurisdiction, unlike the ICJ contentious jurisdiction, there is no longer a rule that affected states must consent to exercise of the advisory jurisdiction ( see *Western Sahara* case, ICJ reports 1975, p. 12).
26. Moreover, it should be noted that there is no veto by Permanent Members of the UN Security Council in relation to resolutions of the UN General Assembly. It is therefore theoretically possible that the UN General Assembly could refer the issue of genocide by China to the ICJ.
27. It is unclear whether “authorisation by or in accordance with the Charter of the United Nations” refers only to express authorisation or could include implied authorisation.
28. If authorisation includes implied authorisation it is arguable that such authorisation has also been given to the UN Human Rights Council by the UN Resolution which created that body, which is Resolution 60/251 of 15 March 2006.
29. Resolution 60/251 provides inter alia that the Human Rights Council “ *shall be responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner*”, and “ *should address situations of violations of human rights, including gross and systematic violations, and make recommendations therein. It should also promote the effective coordination and mainstreaming of human rights within the United Nations system.*”

30. The Human Rights Council does not enjoy a reputation as an effective body for the advancement of human rights. However it would seem theoretically possible that in a situation of widespread and intense international outrage at apparent genocide it might (depending on the accident of the Council's national membership at the particular time) refer a question of possible genocide to the ICJ, which would then presumably rule both on the legality of the reference, and, if it found that there was the necessary implied authorisation, also on the substantive issue.

31. China has not ratified the International Covenant on Civil and Political Rights. The UN Human Rights Committee, which is charged with monitoring the implementation of the ICCPR by states parties, therefore has no role in relation to Mainland China.<sup>3</sup>

#### ADDITIONAL AUTHORITY ON MEANING OF RELIGION

32. At paragraph 22 of our Opinion, we referred to L(China) v Secretary of State for Home Department [2004] EWCA Civ 1441, which is the only authority we are aware of to the effect that Falun Gong is not a religious group. At paragraph 23 of our Opinion we stated that the balance of authority and correct analysis is that it is such a group.

33. Our view on this point is strengthened by R(Hodkin) v Registrar of Births, Marriages and Deaths [2013] UKSC 77, which considers the definition of religion at paras. 31

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<sup>3</sup> It has a role in relation to Hong Kong, to which the ICCPR does apply by continuation of its previous extension to territory by the United Kingdom, by virtue of Article 39 of Hong Kong's Basic Law.

to 60, and in particular at para. 57, where it applies the broad definition previously adopted by the High Court of Australia in Church of the New Faith v Commr of Pay-Roll Tax (Victoria) (1983) 154 CLR ( see para. 20 of our Opinion).

34. In the light of this authoritative ruling on the issue by the Supreme Court, we consider that the Court of Appeal decision in L(China) can no longer be regarded as authority on this point, and that it is beyond doubt that Falun Gong is a religious group.

EDWARD FITZGERALD QC

Doughty Street Chambers

22 January 2019