

## **Legal Options to combat organ transplant abuse in China**

*(Remarks prepared for delivery to the World Uyghur Congress Conference, Brussels, Belgium December 10, 2019)*

by David Matas

I have been asked to give a ten to fifteen minute presentation on legal options available to counter the practice of organ harvesting in China with prisoner of conscience victims, along with analysis and recommendations for next steps. My exposure to the issue dates from 2006 when David Kilgour and I wrote a report on the killing of practitioners of the spiritually based set of exercises Falun Gong for their organs. Over the course the ensuing years, once we came to the conclusion that the abuse was happening, we have worked as best we can to stop and remedy it.

For today I have identified twenty one different legal options - twelve international and nine local. I have fifteen minutes at most, which means a little more than thirty seconds an option. I intend, within that time frame, to go through all twenty one. I realize many of you have English as a second or even third language. So I intend to proceed slowly.

The result may be that some of my suggestions seem cryptic. In the written version of this text, which I intend to make generally available, I have elaborated on each of these options sufficiently that they will, I hope, be clear.

### **International options**

1) the International Criminal Court through a referral by the United Nations Security Council

The International Criminal Court has jurisdiction over situations in which crimes within the jurisdiction of the Court appear to have been committed which have been referred to the

Court by the Security Council.<sup>1</sup> One of the crimes within the jurisdiction of the Court is crimes against humanity. The China Tribunal has found without doubt that organ harvesting of prisoners of conscience is happening in China.<sup>2</sup>

While China does have a veto in the Security Council, that is not the immediate problem. A veto becomes unnecessary unless there is a vote. A vote can not happen unless there is a proposal. So far no state has made such a proposal.

There are fifteen member states of the Security Council and five likely candidates to make such a proposal - the United Kingdom, France, the United States, Germany and Belgium. All five states, either individually or through the European Union, have already raised concerns at the United Nations Human Rights Council about the human rights violations against Uyghurs in Xinxiang.<sup>3</sup> Germany has also raised the issue of organ transplant

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<sup>1</sup> Article 13

<sup>2</sup> Paragraphs 187, 188, 189

[https://chinatribunal.com/wp-content/uploads/2019/07/ChinaTribunal -SummaryJudgment\\_17June2019.pdf](https://chinatribunal.com/wp-content/uploads/2019/07/ChinaTribunal-SummaryJudgment_17June2019.pdf)

<sup>3</sup> For the European Union see

<https://extranet.ohchr.org/sites/hrc/HRCSessions/RegularSessions/41Session/Pages/Statements.aspx?SessionId=30&MeetingDate=03/07/2019%2000:00:00>

For the United Kingdom, see

<https://extranet.ohchr.org/sites/hrc/HRCSessions/RegularSessions/42Session/Pages/Statements.aspx?SessionId=31&MeetingDate=17/09/2019%2000:00:00>

For the United States see

<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/446/59/PDF/G1844659.pdf?OpenElement>

abuse.<sup>4</sup>

2) the International Court of Justice through a request for an advisory opinion on the law of genocide from the United Nations General Assembly

There is a question whether forced organ harvesting of prisoners of conscience for their organs meets the definition of genocide set out in the statute of the International Criminal Court. For the China Tribunal, there was no doubt that forced organ harvesting of prisoners of conscience constitutes the act of genocide. The legal question was whether there is, for this sort of crime, the necessary criminal intent for genocide. The China Tribunal suggested that the question could be raised at the International Court of Justice through a request for an advisory opinion from the United Nations General Assembly.

The United Nations Charter provides that the UN General Assembly may request the International Court of Justice to give an advisory opinion on any legal question.<sup>5</sup> Any member state of the United Nations can ask the General Assembly to make such a request.

3) the Genocide Convention through calls on the competent organs of the United Nations to take action

China is a party to the Genocide Convention and that Convention provides that any state party may call on the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and

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<sup>4</sup> <https://www.ohchr.org/EN/HRBodies/UPR/Pages/CNIndex.aspx>

Questions submitted in advance

<sup>5</sup> Article 96a

suppression of acts of genocide.<sup>6</sup> There are 152 parties to the Genocide Convention. One of those possible actions is requesting a General Assembly resolution of the sort set out in the previous option.

4) the United Nations Committee against Torture established under the Convention against Torture through its concluding observations on the periodic reports from China.

China is a party to the Convention. As a party it is obligated to report periodically to the expert committee established under the Convention. The Convention empowers the expert committee to make concluding observations on those reports.

China has reported twice, in 2008 and 2015, since it began the mass killing of prisoners of conscience. In both years, the Committee, in its concluding observations, called on China to "immediately conduct or commission an independent investigation" into organ transplant abuse in China with prisoner of conscience victims.<sup>7</sup>

The Committee meets with and takes written submissions from NGOs. Next time China reports, if the recommendation is not followed in the meantime, the Committee should be urged to give the recommendation higher priority.

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<sup>6</sup> Article VIII

<sup>7</sup> 2008 Concluding observations paragraph 25

[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fCHN%2fCO%2f4&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fCHN%2fCO%2f4&Lang=en)

2015 Concluding Observations paragraph 50

[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fCHN%2fCO%2f5&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fCHN%2fCO%2f5&Lang=en)

5) the United Nations Protocol against Trafficking in Persons to the Convention against Transnational Organized Crime through a meeting of states parties

The UN Office of Drugs and Crimes, the UN bureaucracy responsible for the UN Protocol against Trafficking in Persons to the Convention against Transnational Organized Crime, has taken the position that organ trafficking and trafficking in persons for the removal of their organs are different, that the killing of prisoners of conscience for their organs is not trafficking in persons for the removal of their organs and that that organ trafficking does not accordingly fall within the Protocol. China is a party to the Protocol.

I take a different view. Trafficking a person includes recruitment by force. A person can be recruited by force for more than one purpose. When one of those purposes is organ removal, then trafficking in persons for the purpose of organ removal has occurred.

That is the case of prisoners of conscience in China. Practitioners of Falun Gong and Uyghurs are swept off the streets and taken into arbitrary detention for brainwashing, recantation, and expressions of support for the Communist Party of China. That is one purpose. But it is not the only purpose.

Those who refuse to succumb are put into forced labour and then killed for their organs. The slavery and organ extraction are also purposes.

The last word on the UN Protocol against Trafficking in Persons to the Convention against Transnational Organized Crime is not the UN Office on Drugs and Crimes. It is the states parties to the Protocol.

The states parties to the Convention and Protocol meet every five years. The next meeting is next year in April in Kyoto. The states parties could and should adopt a resolution indicating the extent to which organ trafficking falls within the ambit of the Protocol.

6) the Universal Declaration of Human Rights through United Nations Human Rights Council agenda item 4 - human rights situations that require the Council's attention.

The United Nations Human Rights Council has three regular sessions a year - typically in February and March for four weeks, June for three weeks and September for three weeks.<sup>8</sup> At each session, there is this agenda item 4. Not being a member of the Council prevents a state from voting at the Council, but not from speaking at the Council. Under agenda item 4, any country, whether a member of the Council or not, can deliver an oral statement. Organ transplant abuse with prisoner of conscience victims should be a matter of continuing concern at future Human Rights Council sessions, raised by all human rights respecting countries.

7) the Universal Declaration of Human Rights through the United Nations Human Rights Council Universal Periodic Review.

The United Nations Human Rights Council conducts a periodic review of the human rights record of every member state of the United Nations, without exception. China came up for review most recently in November 2018, one year ago and before that in October 2013.<sup>9</sup>

Before each review, countries can pose advance questions. For each country's Universal Periodic Review session, three hours is allocated. The time not allocated to the state under review is divided among the country delegations which have expressed an interest in speaking.

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<sup>8</sup> See <https://www.ohchr.org/en/hrbodies/hrc/pages/sessions.aspx>

<sup>9</sup> <https://endtransplantabuse.org/china-and-the-universal-periodic-review-2018>

In 2018, Germany asked a question about organ transplant abuse. Austria spoke up against this abuse. And that was it. Next time round, there needs to be many more countries asking questions and making statements about it.

8) the Universal Declaration of Human Rights and the Working group on arbitrary detention

The Working Group on Arbitrary Detention<sup>10</sup> of the UN Human Rights Council is a theme based mechanism. It applies to all states and is the only UN human rights theme based mechanism which investigates and decides complaints focused on individual cases. Complaints can be made by individuals directly concerned, their families, their representatives, non-governmental organizations for the protection of human rights, Governments or inter-governmental organizations.

There have been already a number of complaints to this Working Group about China which the Working Group has decided.<sup>11</sup> None of the decided complaints relates to forced organ harvesting with prisoner of conscience victims. This is a remedy which could easily be invoked, but to date has not yet been invoked.

9) the Universal Declaration of Human Rights through the UN rapporteur on torture

The United Nations Rapporteur on Torture Manfred Nowak in 2007 and 2008 asked China to explain the discrepancy between the volume of transplants and the identified sources. The Government of China did not respond to the 2007 request and responded to the 2008 request with nonsense.<sup>12</sup>

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<sup>10</sup> <https://www.ohchr.org/EN/Issues/Detention/Pages/Complaints.aspx>

<sup>11</sup> <https://www.hrichina.org/en/case-opinions-working-group-arbitrary-detention>

<sup>12</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading

The question still needs answering. The Rapporteur should not drop a legitimate concern because he or she receives a nonsense answer. The Rapporteur should continue with the subject matter as long as the substance of the concern remains.

There is a tendency for rapporteurs to raise new concerns rather than continuing concerns. However, there is nothing in their mandates which require rapporteurs to operate this way. For some violators and for some violations, repetition works. If evasion fails, the last resort may be compliance with human rights standards. Rapporteurs should not give violators an easy way out by dropping a subject if there is no immediate substantive response.

10) the Universal Declaration of Human Rights and the UN rapporteur on religious intolerance

The United Nations rapporteur on religious intolerance Asma Jahangir in 2007 and 2008 acted in tandem with United Nations Rapporteur on Torture raising the same concerns as the United Nations Rapporteur on Torture had raised. However, that does not always have to be so.

One rapporteur may be willing to pick up the subject again even if the other is not. Both

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treatment or punishment, Addendum, Manfred Nowak UN Document A/HRC/4/33/Add.1, 20 March 2007, paragraph 40;

Report of the Special Rapporteur on freedom of religion or belief Addendum, Asma Jahangir, UN Document A/HRC/4/21/Add.1, 8 March 2007 paragraphs 107 to 111.

Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Addendum, Manfred Nowak, UN Document, A/HRC/7/3/Add.1, 19 February 2008, paragraph 36;

Report of the Special Rapporteur on freedom of religion or belief, Addendum, Asma Jahangir, UN Document A/HRC/7/10/Add.1, 28 February 2008, paragraph 40 and 41.



mechanisms should be invoked.

11) the Organization for Economic Cooperation and Development Guidelines through presentation of cases to national contact points

The Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises implementation mechanism for the Guidelines is national contact points, established by governments. They handle cases as a non-judicial grievance mechanism. 48 governments have a national contact point.<sup>13</sup>

By coincidence, just yesterday, a Czech research institute released a report, titled “The Economics of Organ Harvesting in China”, which identifies a whole list of companies against whom there is compelling evidence of complicity in organ transplant abuse in China.<sup>14</sup> These companies are obvious candidates for engagement of the OECD guidelines and national contact points.

Examples of ways in which enterprises can become complicit in organ transplant abuse in China or cognate human rights violations are

- a) exhibiting plastinated body where the bodies are sourced from police or prisons in China,
- b) designing or constructing a transplant hospital or a transplant wing of a hospital in China,
- c) conducting anti-rejection trials in China, and
- d) supplying DNA sequencing equipment to China.

12) the Council of Europe Convention against Trafficking in Human Organs by invoking the implementation mechanisms, once developed

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<sup>13</sup> <http://mneguidelines.oecd.org/ncps/>

<sup>14</sup> <https://theircc.org/organharvesting/>

The Council of Europe Convention against Trafficking in Human Organs is addressed specifically to organ transplant abuse. The Convention can be signed by the member States of the Council of Europe, the European Union and the non-member States which enjoy observer status with the Council of Europe. It is also can be signed by any other non-member State of the Council of Europe upon invitation by the Committee of Ministers.<sup>15</sup> The Council of Europe approved the Convention in March 2015. To date, there are nine ratifying states and fifteen signatory states which have not yet ratified the Convention.<sup>16</sup>

The Convention provides that a committee of states parties will determine the procedure for evaluating the implementation of the Convention.<sup>17</sup> An explanatory note to the Convention states that

"the negotiators intended to ... defer ... the introduction of the follow-up mechanism until such time as the Convention was ratified by a sufficient number of States for it to operate under satisfactory conditions, with a sufficient number of representative Parties to ensure its credibility."

That has not happened yet. The Committee of Parties should be developing that follow up mechanism now.

## **Domestic**

13) extra-territorial laws punishing complicity in transplant abuse abroad

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<sup>15</sup> Article 28

<sup>17</sup> Article 25

State parties to the Council of Europe Convention against Trafficking in Human Organs must have these laws, but any state can. Several states not party to the Convention have these laws.

Some states, for criminal law, have territorial jurisdiction. Other states, for criminal law, have nationality jurisdiction. Those states with territorial criminal jurisdiction need to enact extra-territorial laws to capture complicity of nationals in organ transplant abuse abroad. All states need to enact these laws to capture complicity of permanent residents and visitors in this abuse.

14) mandatory reporting by health professionals to health administrators of transplant tourism

Mandatory reporting is useful for statistical purposes even if names of individuals are not reported. Mandatory reporting of names of individuals is an aid to enforcement of extra-territorial laws. It also can put a damper on transplant tourism if patients know that they will be reported on return.

15) Magnitsky laws through listing of names of serious human rights violators

Magnitsky laws are named after Sergei Magnitsky, a human rights victim of the Government of Russia. Under these laws, serious human rights violators publicly named are barred entry and their assets frozen.<sup>18</sup>

There are six countries with this law. In none of these countries have the laws been used

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<sup>18</sup> For the US law, see

[https://www.treasury.gov/resource-center/sanctions/Programs/Documents/glomag\\_pl\\_114-328.pdf](https://www.treasury.gov/resource-center/sanctions/Programs/Documents/glomag_pl_114-328.pdf)

to name Chinese human rights violators. More countries should enact these laws and, in all countries with these laws, those complicit in organ transplant abuse in China with prisoner of conscience victims should be publicly named.

#### 16) Universal jurisdiction laws on crimes against humanity through prosecution

Many countries have laws which allow for prosecution of those complicit in crimes against humanity abroad. The accused typically has to be found in the territory of the country to give the local courts jurisdiction. The laws also typically do not allow for private prosecution; the state prosecutors have to agree to take up the cases.

Prosecutors are reluctant to engage in these laws, even where there are accused in the territory against whom there is compelling evidence. The obstacle is the difficulty of mounting a case where most of the evidence is abroad. Invoking these laws to go after complicity in organ transplant abuse in China with prisoner of conscience victims does have the advantage of the finding of the China Tribunal that these abuses are crimes against humanity, without doubt.

Where private prosecutions are possible, they should be launched. Where they are not, the NGO sector can promote prosecution, with the a request for prosecution and provision of evidence and state publicly they are doing so.

#### 17) Universal jurisdiction laws on genocide through prosecution

There are also many genocide laws which allow for prosecution of those complicit in genocide abroad. However, mobilizing prosecution for genocide is even more difficult than mobilizing prosecution for crimes against humanity because genocide prosecutions are harder to prove. They raise issues which need not be addressed for prosecutions of crimes against humanity. Raising the spectre of genocide does, in contrast, highlight the gravity of the offence.

### 18) Universal jurisdiction laws on torture through prosecution

Those states which are parties to the Convention against Torture must enact laws to allow for prosecution of their nationals guilty of torture abroad.<sup>19</sup> There are 169 states parties to the Torture Convention.

The Convention also requires states parties to either extradite or prosecute any torture offender present on its territory. If there is no extradition, there must be prosecution.<sup>20</sup> Many states do not have extradition treaties with China.

Invoking laws implementing the Torture Convention to go after complicity in organ transplant abuse in China with prisoner of conscience victims has the advantage here too of the finding of the China Tribunal that these abuses are torture, without doubt. Torture is easier to prove than crimes against humanity because there are elements of crime in the crimes against humanity which need not be proved for torture. As well, these laws, because of the Torture Convention, are more likely to apply to visitors than crimes against humanity laws.

### 19) Immigration law through barring entry of those complicit in organ transplant abuse

Many states have laws barring entry of those who have committed an act which is a crime in the country of entry. Organ transplant abuse of the sort we see in China would be a crime most everywhere. So these laws in principle would bar entry of those complicit in this abuse.

US visa application forms ask visa applicants for entry this question:

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<sup>19</sup> Article 5(1)(b)

<sup>20</sup> Article 5(2) and article 8

"Have you ever been directly involved in the coercive transplantation of human organs or bodily tissue?"<sup>21</sup>

If a person answers yes, he or she will presumably be barred entry. If the person answers no, is allowed entry, but evidence later surfaces that the person was complicit in the abuse, the person can subsequently be removed for foreclosing inquiries about the complicity in the abuse without the need to prove that complicity.

## 20) civil liability laws through lawsuits against the complicit

Civil liability laws have the advantage that they can be invoked by individuals. State approval is not necessary. As well, the standard of proof which has to be met to establish civil liability is typically lower than that required to establish criminal liability. The Torture Convention obligates states parties to ensure that any victim of an act of torture can obtain redress and has an enforceable right to compensation.<sup>22</sup>

Sovereign immunity laws can render some perpetrators immune from civil liability, if they hold senior enough state functions. As well, there has to be some legal basis for extra-territorial civil jurisdiction, either legislative or jurisprudential. As well, plaintiffs have to be victims in some way of the abuse. They can not just sue out of sense of public interest.

There are cases where these obstacles can be overcome. The law should be put in place, if it is not already there, to allow these sorts of cases to go forward.

## 21) legislation on bodies exhibits through requirements to produce verifiable documentation on sourcing for exhibits

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<sup>21</sup> Immigration form DS 160

<sup>22</sup> Article 14

Bodies exhibits are a cognate abuse in the sense that the plastinated parts in many cases come from the same source as organ transplants, from prisons and police without explanation of sourcing. Because people can see these bodies exhibits, they provide, depending on the bodies exhibit, a visible demonstration of body parts sourced without explanation, something not available for abusive organ transplantation.

## **Conclusion**

The twenty one legal remedies just listed are not options in the sense that if we choose one, we can ignore the rest. On the contrary, all options on the list can be pursued simultaneously without any fear of duplication or inconsistency. The list sets out options only in the sense that all can be pursued separately. And they should be.

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