

Organ Transplant Abuse in China: International and US Law

(Remarks prepared for delivery to the Annual Meeting of the American Society for Bioethics and Humanities, Pittsburgh, Pennsylvania, October 27, 2019)

by David Matas

China since the early 2000s has been killing prisoners of conscience, initially mostly practitioners of the spiritually based set of exercises Falun Gong, and more recently also Uyghurs, in massive numbers for their organs for transplantation. The question is what can be done about it, according to international law and US Law.

The China Tribunal

A people's tribunal, The Independent Tribunal into Forced Organ Harvesting of Prisoners of Conscience in China (the China Tribunal), established by the NGO The International Coalition to End Transplant Abuse in China, concluded, in a summary judgment delivered in London in June of this year (2019) that the forced organ harvesting of Falun Gong and Uyghur in China was happening, beyond reasonable doubt.¹ Those acts, to the Tribunal, constituted both crimes against humanity and torture. The Tribunal also considered the crime of genocide.

For each offence, the Tribunal went through the applicable constituent elements of the offence. For crimes against humanity, the Tribunal found these constituent acts had occurred:

- attacks were directed against the Falun Gong and Uyghurs;
- state actors of the government of China had knowledge of the attacks;
- the attacks have been state sponsored or state-sanctioned, driven by a state policy to commit the attacks;

¹ Paragraphs 187, 188, 189

- forced organ harvesting of Falun Gong and Uyghurs are attacks on Falun Gong and Uyghurs;
- the attacks are widespread or systematic; and
- the Falun Gong and the Uyghurs have been victims of murder, extermination, severe deprivation of physical liberty in violation of fundamental rules of international law, torture, grave sexual violence, persecution on racial, national, ethnic, cultural or religious grounds, and enforced disappearance.

For torture, the Tribunal found these constituent acts to have occurred:

- forced organ harvesting was intentionally inflicted severe pain or suffering;
- forced organ harvesting was an act of discrimination or punishment for an act the victim had committed or was suspected of having committed, and
- the pain or suffering was inflicted by persons acting in official capacities or at the instigation of officials or with his or her consent or acquiescence.

For the crime of genocide, the Tribunal found these constituent acts to have occurred:

- members of a group have been killed;
- serious harm to members of a group has been caused;
- conditions of life calculated to bring about the groups' physical destruction in whole or in part have been deliberately inflicted on the groups;
- the Falun Gong and the Uyghurs are both groups, as that term is understood in genocide law;
- these groups are the sort of groups who are identified in genocide law as deserving of protection, that is to say national, ethnical, racial or religious groups.

When it came to the necessary mental element for genocide, the Tribunal was uncertain. There is a debate among international lawyers about the necessary mental element is, whether there is a specific intent required for genocide different from the normal criminal

intent to commit the act.² The Tribunal did not come firmly down on one side or the other in that debate.

International law

What is the international law relevant to organ transplant abuse with prisoner of conscience victims? International law has several sources, but here I will focus on treaty law only. Relevant treaties are:

- The Genocide Convention,
- The Convention against Torture,
- The Rome Statute of the International Criminal Court,
- The UN Protocol on Human Trafficking to the Convention against Transnational Crime and
- The Council of Europe Convention against Trafficking in Human Organs.

Both the US and China are states parties to the Genocide Convention. The Genocide Convention has a disputes resolution mechanism. Where two states disagree on whether there has been a violation of the Convention, the Convention provides that the dispute can be resolved by the International Court of Justice. China, on becoming party to the Convention, declared that it did not consider itself bound by this provision in the Convention.³

Both China and the US are states parties to the Torture Convention. The US has

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See

<https://endtransplantabuse.org/the-development-of-human-rights-norms-as-a-reaction-to-genocide-david-matas/>

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https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=en#top

accepted the inter-state disputes resolution mechanism of the Convention⁴, but China has not⁵. China has also entered a reservation stating that it does not consider itself bound by the provision of the Convention which gives the expert committee established under the Convention the power to make findings where there is reliable information on the systematic practice of torture.⁶

The Convention against Torture requires periodic reporting on compliance with the Convention and empowers the expert committee to make concluding observations on those reports. China has reported twice since it began the mass killing of prisoners of conscience, in 2008 and 2015. In both years, I went to Geneva to make submissions that the Committee should address organ transplant abuse in China, and they did so.

In 2008, the Committee wrote:

"... the Committee takes cognizance of the allegations presented to the Special Rapporteur on the question of torture who has noted that an increase in organ transplant operations coincides with the beginning of the persecution of [Falun Gong practitioners] and who asked for a full explanation of the source of organ transplants which could clarify the discrepancy and disprove the allegation of organ harvesting. The Committee is further concerned with information received that Falun Gong practitioners have been extensively subjected to torture and ill-treatment in prisons and that some of them have been used for organ transplants.

The State party should immediately conduct or commission an independent investigation of the claims that some Falun Gong practitioners have been subjected

⁴ Article 30

⁶ Article 20

to torture and used for organ transplants and take measures, as appropriate, to ensure that those responsible for such abuses are prosecuted and punished."⁷

In 2015, the Committee wrote:

" ... the State party should adopt the necessary measures to:

(b) Ensure in practice that the removal of organs only takes place on the basis of informed consent and that compensation is provided to the relatives of convicted persons whose organs were removed without their consent. The State party should also commission an independent investigation to look into claims that some Falung Gong practitioners may have been subjected to this practice (see CAT/C/CHN/CO/4, para. 25)."⁸

Neither China nor the US is a state party to Rome Treaty of the International Criminal Court. US President Bill Clinton signed the treaty in 2000 but did not present the treaty to the Senate for ratification. US President George Bush withdrew the signature in 2002. The Court has jurisdiction over crimes within the jurisdiction of the Court committed in the territory of a state party, by a national of a state party, and situations in which crimes appear to have been committed which have been referred to the Court by the Security Council.⁹ Because China has a veto in the Security Council, it is unlikely that the Security Council would refer organ harvesting in China to the Court.

Both the US and China are states parties to The UN Protocol on Human Trafficking to the Convention against Transnational Crime. China made a reservation stating that it was

⁷ Paragraph 25

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

⁸ Paragraph 50

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

⁹ Article 13

not bound by the clause of the Protocol which allows for referral of a dispute about the Protocol to the International Court of Justice.¹⁰

The UN Office on Drugs and Crime, the UN bureaucracy responsible for the administration of the Protocol, takes the position that human trafficking does not include organ trafficking. In an Assessment Toolkit produced in 2015, they wrote categorically:

"The terms organ trafficking or trafficking in organs and trafficking in persons for organ removal are often used interchangeably. Trafficking in persons for organ removal, however, is specifically defined in the Trafficking in Persons Protocol, and does not encompass the term trafficking in organs or organ trafficking." ¹¹

This statement by the UN Office of Drugs and Crime is not the final word. The states parties to the Protocol could endorse at a general meeting a different interpretation. However, for the time being, the Protocol does not provide a remedy.

Neither China nor the United States is a state party to The Council of Europe Convention against Trafficking in Human Organs. However, both could become parties. The Convention is open for signature by states not members of the Council of Europe. Costa Rica has signed, but not yet ratified the Convention.¹²

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https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-12-a&chapter=18&lang=en#EndDec

¹¹ Section 2.4

https://www.unodc.org/documents/human-trafficking/2015/UNODC_Assessment_Toolkit_TIP_for_the_Purpose_of_Organ_Removal.pdf

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https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/216/signatures?p_auth=sGIgLzSe

One other international remedy needs mentioning. 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.¹³

I mentioned earlier that the China Tribunal came to no firm conclusion on whether the forced organ harvesting of prisoners of conscience had met the intent requirement of the crime of genocide, because there was no consensus among international lawyers about what that intent requirement is. The China Tribunal observed that it was open to the UN General Assembly to ask the International Court of Justice to resolve that issue.¹⁴

China can veto a Security Council resolution, but they can not veto a General Assembly resolution. Any state can propose a resolution to the General Assembly. Seeking such a resolution is an avenue, in my view, worth pursuing.

The United States

What are the laws in the US that allow for prosecution of transplant abuse in China? There is a United States Code provision on torture which allows for prosecution of those who commit torture outside the US. US courts have jurisdiction over an accused in a prosecution for torture as long as the accused is present in the US, regardless of the nationality of the accused or the victim.¹⁵ Any person present in the US who is complicit in forced organ harvesting of prisoners of conscience in China can be prosecuted in the US under this law.

There is a similar provision for the crime of genocide. The United States Code allows for

¹³ Article 96a

¹⁴ Paragraph 193

¹⁵ Article 2340A, <https://www.law.cornell.edu/uscode/text/18/2340A>

prosecution of any person complicit in genocide outside the US, provided only the person at the time of prosecution is present in the US.¹⁶ Using this law, however, would get us into the same debate about the requisite intent for genocide which concerned the China Tribunal.

For crimes against humanity, there has been a proposed law in the US, but no actual law. Senator Richard Durbin proposed a law in 2010 which would have made prosecutable in the US crimes against humanity committed abroad.¹⁷ The proposed law gave jurisdiction to US courts over a foreigner where the accused is residing in the US, but not where the accused is merely present in the US.

Worthy of note also are a couple of laws proposed in the US House of Representatives in 2018 and 2019 against the international trafficking in persons for the removal of their organs.¹⁸ The bills draw a direct link between this form of trafficking and human trafficking, a link which may well exist.

However, the bills leave open the question whether the laws would apply to organ trafficking where there is no accompanying human trafficking. In light of the fact that the bills refer to and rely on The UN Protocol on Human Trafficking to the Convention against Transnational Crime and, as noted, the UN Office on Drugs and Crime does not consider organ trafficking in its entirety to be encompassed in human trafficking, the bills are not a clear remedy for organ trafficking of the sort for which Falun Gong and Uyghurs are victims.

¹⁶ US Code section 191

¹⁷ <https://www.congress.gov/bill/111th-congress/senate-bill/1346/text>

¹⁸ H.R.6413 - STOP Organ Trafficking Act, 115th Congress
<https://www.congress.gov/bill/115th-congress/house-bill/6413/text>

H.R.2121 - STOP Organ Trafficking Act, 116th Congress
<https://www.congress.gov/bill/116th-congress/house-bill/2121/text>

The US Congress in 1984 passed a law which included a provision which states

"It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce."¹⁹

Interstate commerce is defined for this provision to encompass commerce between any state or territory of the United States and any place outside that state or territory.²⁰ In principle, the provision could encompass transplant tourism where the transplant tourist comes from the US. There have not, however, to my knowledge, been any prosecutions under this law for transplant tourism out of the US to any country, despite the fact that the law is now 35 years old.

The law would not in any case allow for prosecution of organ transplant abuse in China where the patient receiving the organ is a Chinese national in China and a person complicit in the abuse shows up in the US. It would also not encompass transplant tourism where the tourist comes from a country other than the US to China and then a person complicit in the abuse shows up in the US. For these sorts of abuses, an additional law would be necessary.

One other piece of US legislation worth mentioning the US Global Magnitsky Act. The US enacted a Magnitsky Act in 2012 specifically directed at Russia because of the killing in prison of Sergei Magnitsky, a human rights lawyer active in exposing Russian corruption.

¹⁹ PUBLIC LAW 98-507-OCT. 19, 1984 98 STAT. 2339, section 301(a)

<https://history.nih.gov/research/downloads/pl98-507.pdf>

²⁰ Section 301(c)(3) and the Federal Food and Drug Cosmetic Act section 201(b)(1)
<https://legcounsel.house.gov/Comps/Federal%20Food,%20Drug,%20And%20Cosmetic%20Act.pdf>

The Congress in 2016 passed a second Magnitsky Act broader in scope, to encompass serious human rights violators around the globe.²¹ Under the second law, serious human rights violators from whatever country can be publicly named, through the process the legislation and implementing regulations sets out. Once named, they are barred entry to the US and their assets in the US are frozen. No Chinese nationals are currently listed under this law, but they could be and several should be.

The US also has immigration and civil liability laws which can serve as remedies against those complicit in organ transplant abuse. The US non-immigrant visa application form, since June 2011,²² has asked all visa applicants:

"Have you ever been directly involved in the coercive transplantation of human organs or bodily tissue?"²³

While there are few who would answer "yes" to such a question, a "no" answer followed by a grant of a visa and entry could lead to later removal from the US for foreclosure of inquiries about the involvement, without the need to prove the involvement itself.

There is potential civil liability for complicity in organ transplant abuse in China under the Torture Victims Protection Act. A lawsuit against Cisco Company claimed that the company was complicit in torture of Falun Gong practitioners because it aided the Government of China in setting up electronic surveillance systems to spy on Falun Gong. A US District Court in 2014 dismissed the lawsuit, ruling that the Torture Victims Protection Act remedy is available against only those who subjected a person to torture and not against those

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https://www.treasury.gov/resource-center/sanctions/Programs/Documents/glomag_pl_114-328.pdf

²² <http://en.minghui.org/html/articles/2012/4/15/132727.html>

²³ Form ds-160, page 20
https://travel.state.gov/content/dam/visas/PDF-other/DS-160_Example.pdf

who aided and abetted torture.²⁴

Professional ethics, without law, are also a potential remedy. When it comes to professional ethics in the US and transplant tourism, there is not much.

This is an area where a lot of detail could be added. Without necessarily endorsing everything that is found there, I draw your attention to the Policy Statement of Canadian Society of Transplantation and Canadian Society of Nephrology on Organ Trafficking and Transplant Tourism, which addresses patient counselling,²⁵ and The Transplantation Society Ethics Committee Policy Statement on the Chinese Transplantation Program, which addresses collaboration with Chinese transplant professionals.²⁶

Conclusion

One of the reasons, though far from the only, that David Kilgour and I came to the conclusion we did that practitioners of Falun Gong were being killed for their organs was that legally there was nothing to stop it either in China or abroad. That situation has changed somewhat since then. There are relevant legal instruments, both international and US, which have come into existence since June 2006 when the first version of our report came out.

Yet, in substance, the situation remains much the same. There are such large gaps in the network of international and national legal instruments and remedies, including

²⁴ <https://www.eff.org/files/2014/09/19/10973373-0-28677.pdf>

²⁵ https://www.cst-transplant.ca/Library/documents/Policy_CST-CSN-2010-Organ-Trafficking-Transplant-Tourism.pdf

²⁶ <https://www.tts.org/images/stories/pdfs/StatementMembs-ChineseTXProg.pdf>

instruments and remedies in the US, to combat outside of China the forced organ harvesting of prisoners of conscience in China that the perpetrators have effective immunity. That still needs to change.

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