

Bringing to Justice those who Kill Falun Gong for their Organs

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This conference raises the questions, "what is justice and why do we seek it?" The answers to these questions depend on context. In determining what constitutes justice, one size does not fit all.

I approach these questions from the perspective of crimes against humanity and genocide. Justice in the face of those crimes means, first, deterrence. The most effective deterrence for any crime is the prospect of detection, apprehension, prosecution, conviction and punishment. Establishing an effective justice system can deter grave human rights violations from occurring.

Justice also means providing a historical record which has authority through impartial investigation. Justice requires as well helping the victims address their victimization by providing them a remedy. Justice must further hold perpetrators to account.

When justice is not available against grave human rights violations, these violations spread. Not stopped in time, they eventually engulf us all. Justice is not merely one ideal amongst others. Its functioning is necessary for human survival. An unjust world is a world where humanity self destructs.

Mechanisms for bringing to justice perpetrators of grave human rights violations have historically not existed. It has historically been easier to prosecute a person for one murder than for a thousand murders. Justice systems have been geared to dealing with individual crimes, not mass crimes.

One reason for that is individual crimes are seen as and often are aberrations. Mass crimes involve mass criminality. Bringing to justice perpetrators of mass crimes means mass remedies, an effort beyond the capacity of most justice systems.

Mass crimes can involve the complicity of thousands and the silent approval of tens of thousands. Mass crimes are not the work of a few. They are the responsibility of a society within which the crimes are perpetrated.

Yet, the functioning of justice requires society acting against the perpetrators. It is true that justice imposed by outsiders is still justice. But outsider justice does not come squarely to grips with the environment in which the criminal behaviour has festered.

When the society in which the criminals are embedded has tolerated and even encouraged the crimes, transition to justice requires a break with the past. The environment which at one time endorsed the crimes must reject them. Revulsion at the crimes can and must lead to internal demands for justice. Before we get to justice, we must get acceptance of the ideal of justice and rejection of injustice.

The best mechanism for getting from injustice to justice is justice itself. The phrase "Justice, justice you shall pursue" is not a stutter or mindless repetition. It appears in Deuteronomy¹ not just because in Greek "deuteronomy" means "repetition of the law". It is rather a reminder that justice goes from small to large. Justice is both an

¹ Chapter 16 Verse 20

overarching roof and the rungs of the step ladder which get us there. We arrive at justice overall by doing justice in individual cases. Society comes to appreciate the horror of mass crimes in stages, first by glimpses, by peeling back the cover which hides their enormity.

In the post-Nuremberg history of bringing Nazi war criminals to justice, the trial of Adolf Eichmann put only one man on the dock. But it had an unleashing effect. It invigorated the pursuit of justice for the crimes of the Holocaust everywhere, including Germany.

Mass crimes have multiplied in the twentieth century not because twentieth century humanity has been worse than its predecessors. It is rather that technology has made mass crimes easier to perpetrate. Human nature in the twentieth century remained what it was before. But technology changed dramatically.

The Holocaust happened not because antisemitism was new, but rather because radio, which spread hatred, and trains, which brought victims to their death, and poison gas, were new. The combination of the same old hatreds combined with modern technology was lethal on a scale never before seen.

The same old humanity, with its same old capacity for good and evil, combined with technological development and the absence of an effective justice system for mass crimes, made the twentieth century deadly, a century of genocide. The twentieth century was a warning which the twenty first century has yet to heed.

The twenty first century, with its enhanced technological developments and rudimentary international justice system for mass crimes, places us all in peril. What are we going to do about it?

Attempts to deal with mass criminality often focus on the leadership. Yet, leadership means nothing in a vacuum. Leaders have no impact without followers. Mass crimes happen with the complicity of masses of ordinary people, who attack their neighbours, associates, former friends and sometimes even relatives.

In a modern technological world, the ranks of perpetrators include masters of the technology which generate the weapons of murder. Perverted experts hide behind their technology, wilfully blind to the larger context. They are cogs pretending to be unaware of the machine.

Comprehensive justice means bringing all perpetrators to justice, the followers and not just the leaders, the mechanics of the machinery of death. The focus on leadership not only is arbitrary and selective. It also distorts the nature of the crimes. Absolution of the mass of hands-on perpetrators denies history, undermines deterrence and provides an inadequate remedy to the victims.

The question then becomes: how do we provide justice for a mass crime which is commensurate with the scope of the crime? I suggest six steps. First of all we need victims to engage the justice system. When the justice system is engaged, justice itself is put on trial. We can find out how well or badly the justice system can address

victimization only if this trial takes place.

Second we need to get at the facts. We need an investigation to determine individual culpability. But, even before that, we need to get at the scope of the crime, the way the violations happened and how they happened.

Third we need to provide a remedy to victims. A justice system which ignores the victims is a justice system in name only.

Fourth we need to hold the perpetrators accountable. A mass crime is not only victims. It is also perpetrators. We must certainly not forget the victims. But we must also not forget the perpetrators.

Fifth we need to be comprehensive. A system must be put in place so that every perpetrator can be brought to account and every surviving victim, and their family and their community receives a remedy.

Sixth, we have to end where we began, with continuing to establish the facts even after all the perpetrators and victims are gone. Perpetrators and victims are mortal. Justice should be never ending.

In order to give a fuller explanation of these statements, I want to attempt to work them out in a specific setting, the attempt to seek justice for the killing in China of Falun Gong for their organs. I choose this example partly because of its modernity. This is a violation which is twenty first century. The violation is tied to modern technology, organ transplantation. The justice system which should be in place to address the crime does not exist. So, to be specific, how do we get to justice for the mass killing of Falun Gong in China for their organs?

Falun Gong is a spiritually based set of exercises started in 1992 with the teachings of Li Hongzhi. It is a blending and updating of the Chinese spiritual and exercise traditions, Buddhism, Taoism and Qi Gong. The best know Qi Gong is Tai Chi. Falun Gong is a Chinese equivalent of yoga.

The practice of Falun Gong was initially encouraged by the Communist Party of China because the exercises are beneficial to health and cut down on the health system expenses. The practice was ultimately repressed out of Communist Party fear for the Party's ideological supremacy, after those doing the exercises became more numerous than members of the Party.

Starting in July 1999, those protesting the repression of Falun Gong or continuing the exercises were detained and asked to recant. If they did not recant they were tortured. If they did not recant after torture, they disappeared.

The disappeared became a vast forced organ donor bank. Practitioners of Falun Gong have been killed in China for their organs, in the tens of thousands, starting from 2001. Other prisoners of conscience too have been victims of this abuse - Tibetans, Uyghurs and Eastern Lightning House Christians. But Falun Gong have been the overwhelming majority of these prisoners of conscience victims.

The first step in getting to justice for this victimization, the need to engage the system, has been only tentative. Finding a person killed for their organs who would seek justice is, by definition, an impossibility. Finding a family member of a victim killed for their organs willing to engage justice is not much easier.

Justice within China, given Communist Party rule, is an impossibility. The Communist Party rules the police, the investigators, the prosecution, the judges and even the defence bar. The Party will not bring a case to Court against itself.

Any attempt by Party outsiders to try to do so, within China, is fraught with peril. As Chinese human rights lawyer Gao Zhisheng has said and shown by his own experience, attempting to promote while you are in China respect for human rights through law means that you will become a victim of human rights violations yourself.

Family members, as one might expect, are not advised by the authorities that their loved ones have been killed for their organs. All the family knows is that a member of the family has disappeared. They do not even know that the disappeared have been arbitrarily detained by the authorities.

The anonymity of the detention of Falun Gong practitioners has been, in part, the consequence of the dynamic of repression in China. Falun Gong practitioners who disclose their identity to the authorities once detained are returned to their home location and their friends, relatives, work associates and neighbours victimized for not having turned them in earlier and for not having prevented or stopped them from practicing Falun Gong. Practitioners, from this experience, have learned not to disclose their identity on arrest. The result is that the family does not know where they are and the jailers do not know who they are.

The community of Falun Gong practitioners outside China wants and attempts to seek justice for the human rights violations inflicted upon their co-practitioners in China. Indeed, that is one of the strengths of this community.

As a lawyer, I can see gaps in the international justice system. Actually filling the gaps requires the willingness of victims to engage the system, show its faults and mobilize efforts to remedy them.

Many victims are reluctant to seek justice for mass crimes. They have learned to distrust society. They have abandoned hope for justice. Seeking justice is a work of patience. The effort itself is a retraumatization. Victims do not wish to be defined by their victimization. Simply to move on with their lives many victims attempt to leave their victimization behind.

The Falun Gong community, including escapees from China, distinguishes itself by its unflagging commitment to justice and its willingness to pursue every available remedy for the victimization of its co-practitioners in China. This commitment, if it produces results, can alleviate the plight of the victims in China. Even if the efforts fail, they allow us to point out flaws in the international justice system and generate support for fixing them.

The second step, the need to investigate the facts has been pursued ambivalently. David Kilgour and I have done our own investigations, in a report titled *Bloody Harvest*, which came out in three versions, in July 2006, in January 2007 and, in book form, in August 2009. Ethan Gutmann authored independently a book on the subject *The Slaughter*, which came out in December 2014. We three then published an update to our combined work, released in June 2016 in Washington DC.

There are a number of other private sector investigations besides, all coming to the same conclusion, the mass killing of prisoners of conscience in China for their organs, primarily Falun Gong. What is missing is any governmental or inter-governmental investigation.

It is not for want of trying. The Office of the United Nations High Commissioner for Human Rights has been presented with a petition with 1.5 million signatures asking the Office to investigate, to no effect. There is something wrong with a UN human rights system which can ignore a petition of 1.5 million people.

The United Nations Office of Drugs and Crimes, the UN implementation mechanism for UN Treaty on Human Trafficking, which includes organ trafficking, has also refused to do anything on this file. The Office has made the startling claim that organ trafficking does not include transplant tourism.

What legally is untenable, even inexplicable, becomes clear if one thinks about not what the law means but rather who the members of the United Nations are. The United Nations Office of Drugs and Crimes, like the Office of the United Nations High Commissioner for Human Rights, hears Chinese Communist Party/Government footsteps.

The European Parliament has asked the European Union to investigate, but so far also to no avail.² Here too, there is something wrong with a European system which can ignore a resolution of its own Parliament. The flaw is also self evident, the unwillingness of the European Union civil service, the European Commission, to accept direction from its own Parliament.

The United States House of Representatives in June 2016 passed a resolution making a similar request to the Department of State, to investigate organ transplant abuse in China.³ In the United Kingdom, the Conservative Party Human Rights Commission also in June 2016 asked the British government to investigate.⁴

² Resolution of December 11, 2013

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT>

³ June 13, 2015 Resolution 343

<https://www.govtrack.us/congress/bills/114/hres343/text/eh>

⁴ March 2016

http://conservativehumanrights.com/reports/submissions/Falun_Gong_Submission_Human_Rights.pdf

The fact that these requests were made is promising. The history of ignored requests means that we cannot be sure that these requests will actually lead to investigations. We need to continue to press until we get at least one governmental or inter-governmental investigation launched.

Bringing perpetrators to account is a remedy for the victims, but it is not the only remedy. Simply providing a historical record, telling the truth, bearing witness is, in itself, a remedy. Part of victimization is burying the crime, forgetting the victim. By remembering the victimization and the victim, we, even without more, help to provide a remedy.

Prosecution, conviction and sentencing are the work of the state or inter-state organs. Noticing, taking account of what happened, remembering, are the work of us all. If we want to give the victims a remedy, we can do our part.

Outside the Falun Gong community, there has been far too little of that. The Falun Gong community, understandably, is sensitive to the persecution of their co-practitioners. Outside that the community, the sensitization is far too thinly spread. We need more people in more places to pay attention to what has happened to this victim community.

As for court cases against perpetrators outside China, they run afoul of a number of legal obstacles. Civil remedies run up against the doctrine of sovereign immunity. States legislate that other states can not be sued in local courts.

Since perpetrators are individuals, the doctrine of sovereign immunity, on its face, should not present an obstacle to holding perpetrators to account. Nonetheless, the doctrine of sovereign immunity is expanded to cover individuals acting in state functions, since states act through individuals. The logic is that penalizing individuals for acting in state functions prevents the state from functioning.

Again, superficially, this exemption of individuals acting in state functions from being brought to account foreign courts should not impede justice for gross human rights violations, since gross human rights violations are not properly state functions. On the contrary, at least formally, all states reject gross human rights violations and claim that they are not engaged in them.

Yet, typically sovereign immunity statutes do not provide exemptions for grave human rights violations. This absence stands in contrast to the exception for commercial activity, which is often present. States typically allow foreign states to be sued in local courts for violation of commercial promises, but not for promises to respect human rights.⁵

There are some exceptions. The US allows for officials of states designated as sponsors

⁵ For Canada, see the State Immunity Act
<http://laws-lois.justice.gc.ca/eng/acts/S-18/index.html>

of terrorism to be sued for grave human rights violations.⁶ Canada allows for officials of states designated as sponsors of terrorism to be sued for terrorism.⁷ But these exceptions are too narrow. For one, they do not catch officials of non-designated states and China has not been designated in any country by any of these statutes.

A designation system is inevitably going to be politicised and slow. A better gatekeeper, to prevent private prosecution by those who would use phoney accusations of human rights abuse as a political weapon, would be the requirement of consent by the state prosecutor.

Even with this problem, the absence of an exemption for grave human rights violation in sovereign immunity statutes, there would seem, at first glance, for China, a way out, since Chinese human rights violations are directed not by state officials acting in state functions but rather by Communist Party officials, acting in Party functions. In China, the state is a puppet; the Party pulls the strings.

Sovereign immunity applies to the state and state functionaries; not to the political parties and party operatives, even in the governing party. This seemingly simple rule has not, regrettably, been applied by foreign governments and courts to China. Foreign governments and parties view the Communist Party and Chinese state to be so closely linked that they have extended sovereign immunity from the state to the Communist Party.⁸

There have been many civil suits around the world against the lead persecutors of Falun Gong - against Jiang Zemin, Bo Xilai, and Luo Gan. These lawsuits have in most cases run aground on the shoals of sovereign immunity. They have mostly not led to judgements against the perpetrators. But they have led to calls for reform in the law of sovereign immunity, a call for an exception for grave violations of peremptory norms of international human rights law, not a victory, but a small bit of progress nonetheless.⁹

Criminal prosecutions have not got even that far. Prosecution at the International Criminal Court in the Hague is a non-starter because the Court has jurisdiction only over nationals of states parties to the Court treaty, crimes committed on the territory of states parties, or situations referred to the Court by the Security Council. China is not a state party to the Court treaty and has a veto in the Security Council.

Many states have universal jurisdiction criminal laws allowing for prosecution of international criminals found on their territories. Those laws typically require the

⁶ Foreign Sovereign Immunities Act
<https://www.law.cornell.edu/uscode/text/28/1605A>

⁷ Justice for Victims of Terrorism Act
<http://laws-lois.justice.gc.ca/eng/acts/J-2.5/index.html>

⁸ See for instance *Rong Jin v Bo Xilai*, 2016 ONSC 917

⁹ See for instance Bill C-632, 41st Parliament of Canada, second session
<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6729743&File=4>

consent of the state prosecutor for initiation and state prosecutors, in the case of China, have been reluctant to consent.

What is needed is specific laws which make complicity in organ transplant abuse an extraterritorial offence, an offence for which prosecution is possible even if not committed on the territory of the prosecuting state as long as the perpetrator is found in the jurisdiction. Further, laws should impose compulsory reporting of transplant tourism so that the authorities know about the offence when committed.

Israel,¹⁰ Spain¹¹ and Taiwan¹² have enacted such laws. Legislators in Canada,¹³ Belgium,¹⁴ France¹⁵ and Australia¹⁶ have proposed such laws. The victimization of Falun Gong has here too led to steps for law reform, without the reform being complete.

That is pretty much the result so far. Efforts globally to seek remedies around the globe for the mass killing of Falun Gong for their organs have not so much resulted in justice as exposed defects in the global justice system. The remedies for victims have, for members of the Falun Gong community, been elusive.

Even when the machinery of justice is operating, its wheels grind slowly. But they grind inexorably to an inevitable result.

When the machinery of justice needs to be constructed, arriving at the result of justice is even slower, much slower. But the results are just an inexorable. The cry for justice will never be stilled, until we get to justice itself.

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¹⁰ Organ Transplant Act 2008
<http://www.declarationofistanbul.org/resources/legislation/267-israel-transplant-law-organ-transplant-act-2008>

¹¹
http://www.ont.es/infesp/Legislacin/ExtractoLeyOrganica_5_2010.pdf

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<http://www.dafoh.org/taiwan-legislation-sets-a-new-standard-in-the-combat-against-rogue-organ-harvesting-practices/>

¹³ Bill C-500 on February 5, 2008, the second time as Bill C-381 on May 7, 2009, Bill C-561- December 6, 2013

<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6375892&File=4>

¹⁴ Sénat de Belgique Session de 2006 2007, December 13, 2006

¹⁵ <http://www.assemblee-nationale.fr/13/propositions/pion2797.asp>

¹⁶ Human Tissue Amendment (Trafficking in Human Organs) Bill 2013