China’s government, the Falun Gong and International Law: Presenting a case for the trial of former Chinese President Jiang Zemin at the International Criminal Court *

** Editor’s note: this is a Canadian law student’s essay for which the professor gave him an A.*

Introduction

This paper will look at the human rights violations suffered by Falun Gong prisoners of conscience due to a campaign of persecution carried out by the Chinese government. This summer, the Coalition to Investigate the Persecution of the Falun Gong in China (CIPFG), wrote to two Canadian human rights activists, David Kilgour and David Matas and asked for their assistance in investigating allegations that state institutions and employees of the Chinese government have been harvesting organs from live Falun Gong practitioners. Kilgour and Matas were asked to investigate these allegations and to look at whether these activities were occurring on the basis of a systematic Chinese government policy of persecution:

> "Organ harvesting is a step in organ transplants. The purpose of organ harvesting is to provide organs for transplants. Transplants do not necessarily have to take place in the same place as the location of the organ harvesting. The two locations are often different; organs harvested in one place are shipped to another place for transplanting. The allegation is further that the organs are harvested from the practitioners while they are still alive. The practitioners are killed in the course of the organ harvesting operations or immediately thereafter. These operations are a form of murder. Finally, we are told that the practitioners killed in this way are then cremated. There is no corpse left to examine to identify as the source of an organ transplant."[1]

Initially, Kilgour and Matas had to deal with their surprise that this sort of activity could even conceivably occur in our lifetime:

> "The thought of such a practice occurring, particularly if it might be at the direction of a government, at the beginning of the 21st century when the value of individual human life is finally gaining more widespread respect, is most alarming. Accordingly, when one of the first in camera witnesses, a woman who is not a Falun Gong practitioner, we met in the course of this inquiry said that her surgeon husband told her that he personally removed the corneas from approximately 2,000 anaesthetized Falun Gong

> prisoners in northeast China during the two year period before October, 2003 (at which time he refused to continue), we were shaken. Much of what we have encountered since, as outlined in this report, has been almost equally disturbing."[2]

In their efforts to investigate the truth of the matter, they applied for visas to go to China and investigate by witnessing activities that were being carried out in the country but their requests for the visas were turned down. Due to this, they recognized the inherent limitations that would be imposed on their investigations by the fact that they would not be able to go to China. They recognized the circumstantial nature their work by stating that:

> "The allegations, by their very nature, are difficult either to prove or disprove. The best evidence for proving any allegation is eye-witness evidence. Yet for this alleged crime, there is unlikely to be any eye witness evidence. The people present at the scene of organ harvesting of Falun Gong practitioners, if it does occur, are either perpetrators or victims. There are no bystanders. Because the victims, according to, the allegation are murdered and cremated, there is no body to be found, no autopsy to be conducted. The scene of the crime, if the crime has occurred, leaves no traces. Once an organ harvesting is completed, the operating room in which it takes place looks like any other empty operating room. There are no surviving victims to tell what happened to them. Perpetrators are unlikely to confess to what would be, if they occurred, crimes against humanity. Nonetheless, though we did not get full scale confessions, we garnered a surprising number of admissions through investigator phone calls."[3]

After looking at all the evidence, David Kilgour and David Matas, concluded that the allegations are true. The report concludes that there was and still is forced organ harvesting from Falun Gong practitioners. The report also concludes that the Chinese government is very much involved in this campaign of persecution. The reaction to the report has resulted in the Government of China denying the allegations. In the last few months, Kilgour and Matas have been presenting their report to parliaments, governments, media and human rights organizations around the world. The press and

various human rights organizations have taken this issue very seriously and have followed the lead of these two activists by publicizing the report and calling for the international community to address this issue urgently.

This paper will examine in more detail the human rights violations suffered by Falun Gong prisoners of conscience due to a campaign of persecution that was carried out by the Chinese government. This campaign was initiated by Jiang Zemin, who served as General Secretary of the Communist Party of China from 1989 to 2002 and as president of the People's Republic of China from 1989 to 2003.[4] President Jiang's term in office ensured economic growth, stability and the gradual removal of pariah nation status resulting from the suppression of the pro-democracy demonstrations in Tiananmen Square.[5] In addition to this, human rights violations of Chinese citizens continued unabated under his rule.

For a long period of time, state leaders were protected by the fiercely-defended notion that state sovereigns could not be held responsible for crimes that they committed while they were in office. However, in recent years, we have seen an erosion of the principle of sovereign immunity as former presidents Noriega, Pinochet, and Milosevic have each reached the docket of some legal tribunal. While Jiang Zemin's actions against the Falun Gong rarely seemed tempered by world opinion or events, he may have been well served to pay specific attention to certain international legal developments in 2002. Had he done so, he would have seen that the International Criminal Court had come about with the entry into force of the Rome Treaty[6], meaning that subsequent events could thus be subjected to its scrutiny, were a case to be brought.[7] This matter is the topic to be discussed here. It is the thesis of this paper that Jiang Zemin's actions constitute crimes

against humanity, and that the various legal hurdles to prosecuting a former head of state can be overcome, and jurisdictional issues resolved, so that the ICC would be able to hear a case against Zemin on its substantial substantive merits.

Evidence of Human Rights Violations

The evidence of human rights violations is obviously a crucial part of the case against Jiang Zemin and so the evidence must be gathered as carefully and independently as possible. This paper will rely on reports from the United Nations and other third parties in order to analyze the merits of the case against Zemin. It should be borne in mind, however, that while the innumerable abuses over the past decade are certainly worthy of recognition in a different setting; the purpose of this paper is to address concrete, relevant legal questions to create a case for the ICC. Consequently, abuses that took place after July 01, 2002 will be given more weight. While that limits dramatically the information available, there is nonetheless ample evidence documented since that threshold. Furthermore, due to the nature of the information, and the nature of this paper, it does not seem appropriate to delve to deeply into an analysis of the human rights violations. The horror of the situation speaks for itself, and this paper primarily addresses the subsequent legal ramifications for one individual. Dwelling on the atrocities is not the aim of this paper, constructing legal arguments is. Therefore, for the most part the information will be left to speak for itself.

According to Amnesty International (AI) the Falun Gong spiritual movement was banned in July 1999 and the result of the ban was that police rounded up thousands of practitioners in a Beijing stadium.[8] On June 7, 1999, President Jiang Zemin issued a directive to signal the preparations for a systematic attack on Falun Gong practitioners:

> The central committee has already agreed to let comrade Li Lanqing be responsible for establishing a leadership group that will deal with problems of "FALUN GONG" specifically. Comrade Li Lanqing will be the director and comrades Ding Guangen and Luo Gan will be vice directors, comrades in charge of related departments will be the members of the group. [The group] will study the steps, methods and measures for solving the problem of "FALUN GONG" in a unified way. All CCP central departments, administrative organs, all ministries, commissions, all provinces, self-governing districts, all cities directly under central government must cooperate with the group very closely.
> […]
> After the leading group dealing with "FALUN GONG" problems has established at CCCCP, it should immediately organize forces, find out the organization system nationwide of "FALUN GONG" ASAP, constitute the battling strategies, get fully prepared for the work of disintegrating [FALUN GONG], [we] should never launch a warfare without preparations.
> […]
> The major responsible comrades in all areas, all departments must solidly take the responsibilities, carry out the tasks [of crushing Falun Gong] according to the CCCCP's requirements with the area's or department's actual situations taken into consideration.[9]

This directive by Jiang Zemin leaves no doubt as to its intentions. It is a clear statement that forecasts an impending and large scale attack on civilians. Jiang's words that refer to "solving the problem of Falun Gong" and "carry out the tasks of crushing Falun Gong" seem to indicate this attack. In order to systematically carry out this directive, an organizational framework was established:

> On June 10, 1999, bypassing procedures required by the Chinese constitution among other codes of law, and under direct orders from the then leader of the Chinese Communist Party (CCP), Jiang Zemin, the CCP Central Committee formed the "610 Office," an organization with the sole mission of cracking down on Falun Gong.
> […]
> Besides its central office in Beijing, the "610 Office" has branches in all the Chinese cities, villages, governmental agencies, institutions, and schools. In terms of its establishment, structure, reporting mechanism, and operation and founding mechanism, it is an organization that is allowed to exist outside the established framework of the CCP and the Chinese government. The power it has far exceeds that which is officially authorized under the Chinese constitution and other laws, furthermore, it is

> free from budgetary constraints. The “610 Office” has full control over any issue that has to do with Falun Gong, and has become an organization that Jiang Zemin uses, personally and privately, to persecute Falun Gong. This organization does not have any legal basis. It is an organization that is very similar to Nazi Germany’s Gestapo and the “Central Committee of the Cultural Revolution” during the Chinese Cultural Revolution.[10]

The campaign of persecution that was set into motion by Jiang Zemin gathered steam in the years following the ban. Various arms of the Chinese Communist Party as well as the government were utilized to carry out this campaign. In our effort to focus on abuses that occurred after July 1, 2002, we will highlight various statements and orders of Chinese government officials from the period in question that prove the involvement of the government in the campaign. For example, on July 3, 2003, an order issued to instruct provincial authorities gives us an idea of the latitude given to officials in their campaign against Falun Gong practitioners:

> Secret Order to Persecute Falun Gong States “Delete after Reading,” July 2003:
> “In China, the authorities in Zhoukou City, Henan province were told to start a new cycle of persecution against Falun Gong. Many related organizations passed on the request for supporting and carrying out the latest command to persecute Falun Dafa practitioners. It was reported that the higher levels received the secret order via e-mail from the top that stated, "delete after reading". Then they relayed the order verbally down the chain of command. When the secret order came to the working troops, it was said that, "Previously we were busy dealing with SARS, now we have time so we should take care to punish Falun Gong." Another implication of the order was, "No need to follow any laws in dealing with Falun Gong."”[11]

Public performances of plays were used by Chinese Communist Party and government officials to turn the Chinese public against Falun Gong. These plays were also useful in enlisting their support once the campaign against this religious group was underway:

> On the evening of December 23, 2003, a performance party with the theme ‘Promote Science and Be Against Cult’ that strengthen the construction of socialist spiritual civilization was held in Wuhan City

> police station assembly hall. Liu Jing, Chinese Communist Party Central Committee member and Deputy Minister of Public Security, He Zuoxiu, a famous scientist, and provincial and municipal leaders including Huang Yuanzhi, Chen Xunqiu, Li Xiansheng, Zhao Ling, Liu Shanbi, Cheng Kangyan, Yin Zengtao, Huang Guanchun, Wang Chengyu, Yang Xiangling, Hu Xukun and Liang Shoushu watched the performance. […] The primary intention for this performance evening party was to promote science, opposing evil cult, and push the whole city's battle against 'Falun Gong' forward to a deeper degree.[12]

At the national level, Mr. Luo Gan, one of the directors of the 610 office, the organization set up by President Jiang Zemin to organize the campaign against the Falun Gong, was unabashed in his call for tough measures against the Falun Gong. In a speech given on September 16, 2002, Mr. Gan publicly gave an order to "guard against and strike hard on enemy forces in and outside of China" and Falun Gong was on top of the list.[13] The implementation of the orders emanating from the top leaders of the Chinese Communist Party and government resulted in the violations of the human rights of many Falun Gong practitioners. The United Nations has repeatedly notified the Chinese government of the concerns that it has with respect to the treatment of Falun Gong practitioners. The 2005 UN Report of the Special Rapporteur on the independence of judges and lawyers states that:

> Over the past five years, hundreds of cases of alleged violations of the human rights of Falun Gong practitioners have been brought to the attention of the Special Rapporteurs.
> […]
> The Special Rapporteurs are concerned that reports of arrest, detention, ill-treatment, torture, denial of adequate medical treatment, sexual violence, deaths, and unfair trial of members of so-called 'heretical organizations,' in particular Falun Gong practitioners, are increasing. They expressed concern that these allegations may reflect a deliberate and institutionalized policy of the authorities to target specific groups such as the Falun Gong. An analysis of reports indicates that the alleged human rights violations against Falun Gong practitioners, including systematic arrest and detention, are part of a pattern of repression against members of this group. Most of those arrested are reportedly heavily fined and released, but many are detained and ill-treated in order to force them to formally

> renounce Falun Gong. Those who refuse are sent to re-education through labour camps, where torture is reportedly used routinely and in many cases has resulted in death.[14]

Of course, such blatant actions could not take place without the explicit or implicit backing of the people ultimately in power. In China, that was President Jiang Zemin and his cronies, and part of the aim of this paper is to allocate criminal responsibility for the persecution endured by Falun Gong practitioners.

International Criminal Law

An Examination of the Historical Legal Doctrines

1) Sovereign Immunity

As mentioned in the introduction, public international law, as it relates to international criminal law, has always maintained that heads of state possess a certain degree of immunity for their actions as heads of state. The concept is known as sovereign immunity. One of the major driving forces behind the notion of immunity was to ensure the ability of certain ranking members of state to perform their duties. Various diplomatic positions require travel by their very nature. It would be a major hindrance to international diplomacy, then, if diplomats could not travel freely, for fear of potential arrest and prosecution in foreign States. While the reasoning is obvious and clear, the problem that emerged, especially as the international community attempted to move towards a more accountable legal order after World War II, was that totalitarian regimes appeared in larger numbers. The leaders of those regimes increasingly ignored the rule of law in their own countries, while they abused the legal nuances of international relations to avoid accountability. Jiang Zemin is but one example among many, including Pinochet, Milosevic, and many more. Interestingly, over the same period, human rights

norms have become dramatically more prominent. As Aceve has argued, the balance between rights has reached unprecedented levels in international law:

> While the sovereignty norm remains at the core of international law, it sits on a precarious perch. Since 1945, two developments in human rights law have challenged its dominion. First, the international community has recognized the existence of other norms that now compete with the sovereignty norm for primacy. These norms include, inter alia, the right to be free from torture and other cruel, inhuman or degrading treatment, the right to life and the prohibition against arbitrary deprivation of life, and the prohibition against genocide. Each of these norms has attained jus cogens status as non-derogable obligations that bind all states. Second, diverse institutions - including national courts and international tribunals - have applied these human rights norms to challenge the sovereignty norm. They have done so by imposing civil and criminal liability on government officials who commit serious human rights abuses.
> …
> A graduated normative hierarchy has now developed in international law. While Prosper Weil expressed concern about the development of relative normativity, recent history recognizes the wisdom of a graduated normative hierarchy. Sovereignty matters - it maintains the stability of the international system and promotes peaceful relations between states. But human rights also matter. When the sovereignty norm is used to mask human rights abuses, its rationale is undermined and it no longer merits a hallowed place in the hierarchy of international norms.[15]

It is important to note that traditional notions of immunity have dealt primarily with immunity from jurisdiction, of certain ranking members of government, in *other States*. The ICC, though, is not another *State* – it is a supra-national body with over-arching jurisdiction. As such, the various arguments drawn from previous ICJ decisions, based on public international law generally[16], are not strictly relevant. The construction of a case involving a head of state must nevertheless refer to them, as they do have some legal authority. Given is temporal proximity, the most pertinent case regarding immunity is the ICJ's *Yerodia*[17] decision, concerning the Democratic Republic of the Congo's (DRC's) ex-Minister for Foreign Affairs. The court was examining the question of an

international arrest warrant that had been issued by a Belgian judge. The DRC contested that the warrant violated certain norms of international law, including the following:

> [T]he "principle that a State may not exercise its authority on the territory of another State", the "principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations", as well as "the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations".[18]

Particularly relevant to this discussion is the background to the case. Per the arrest warrant, Yerodia was accused of breaches of the Geneva Conventions and of crimes against humanity. While the ICC would look to the ICJ for guidance on such issues, the ICC will operate under different principles and different procedural requirements, as per the *Rome Statute*. The *Rome Statute* contains certain sections specifically designed to combat norms of international law that had previously made it unfeasible to prosecute state leaders. It is thus important to look at the *Yerodia* decision, as the ICC surely would, but at the same time crucial to bear in mind the technicalities that would differentiate its approach from the ICJ's. The DRC's main arguments stem from what it sees as "a violation 'in regard to the... Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers'."[19] Belgium countered by submitting that customary international law, as deduced from the Nuremberg Trials, the Tokyo Trials, and the International Criminal Tribunal for the Former Yugoslavia, prohibited immunity in cases of crimes against humanity. The court found that there was no customary international law specifically relating to ministers of foreign affairs having committed crimes against humanity.[20] That ruling has only limited relevance for a case against Zemin though, because the specific

treaty terms of the *Rome Statute* can supersede customary international law. The court goes on to discuss the differences between complete immunity, and jurisdictional immunity, noting that a diplomat could still face charges in their own state, which would have no bar to jurisdiction.[21] The court then found that the arrest warrant did constitute a breach of Yerodia's immunity.[22] It is worth mentioning Judge Van den Wyngaert's caution that the court may well have opened up the concept of immunity to abuse and unlimited application to all members of government. It remains to be seen whether future international courts would be willing to open the concept up further, especially with the ICC taking primary jurisdiction on matters such as this from this point forward. The primary guidelines from the case have thus been extracted. Furthermore, it has been noted that the case has only limited value as precedent for the ICC adjudicating a case as per the guidelines of the *Rome Statute*, where immunity would have radically different legal status, as will be demonstrated below.

2) Jurisdiction

The second major international criminal law doctrine of relevance to the case against Zemin is jurisdiction. Nation-States have always been loath to have their sovereignty violated by relinquishing criminal jurisdiction over issues that pertain to them. As a result, a few major principles have evolved. They are the Territorial Principle, the Nationality Principle, the Passive Personality Principle, the Protective Principle, the Universal Principle, and By Agreement. Due to the nature of international law's reliance on political cooperation, physical possession of an accused offender often plays more of a factor than the criminal jurisdiction principle that should apply. Consequently, the principles have evolved more as justifications for particular situations than fundamental

starting points for jurisdiction. In brief, the six principles can be described as follows: the territorial principle involves the notion that "the State in whose territory a crime was committed has jurisdiction over the offence."[23] The Nationality Principle is best described as a possessory right, in which a State claims jurisdiction over its own nationals. Under the passive personality principle, a State claims jurisdiction for injury against its own nationals, even when the crime was committed elsewhere. The basic premise of the protective principle is that a State can exert jurisdiction over any person anywhere whose acts threaten the security of the State. The universal principle has two main interpretations. The more infrequently used interpretation is that all States can exert jurisdiction over all crimes, regardless of where they occurred. The other interpretation invokes similar notions to the protective principle, except that *any* State can claim jurisdiction, not just the injured State. Universality is usually reserved for only the most serious offences, such as hijacking, hostage taking, and terrorism. It is, of course, the grounds used by the ICC. The last principle is by agreement, though it is not so much a principle as it is more of an acknowledgement of the reality between friendly States, whereby, for instance, an agreement exists for a foreign military to maintain its own law on-base.[24]

3) Physically Obtaining the Accused

This area of international law may turn out to have the most applicability of all, because there is obviously very little chance that Zemin will willingly turn himself over to an international body intending to prosecute him for crimes against humanity. There is also slim likelihood of an Iraq-style invasion because quite plainly, China has formidable military resources that it can deploy to thwart any foreign invasion that may be

contemplated by the international community that is seeking to obtain Zemin. It may thus be moot to look at international legal history on the matter, but it is still relevant from a theoretical point of view, in order to understand fully the legal issues in question. Much of the cases have to do with the US, because few other States have the means to pursue actions or incursions against individuals in foreign states. As a result, many of the cases have been decided in US courts. Even so, those decisions have been divided. The decisions in *Ker v. Illinois*[25] and *Frisbee v. Collins*,[26] combined to form what was known as the Ker-Frisbee rule, which essentially stated that due process guarantees in the US only required that a fair trial be held, and that the manner in which the accused came before the court was irrelevant. *United States v. Toscanino*[27] was a complete turnaround in US law, and stated that due process guarantees required that a US court divest itself of jurisdiction if the accused was illegally obtained. Unfortunately for international comity, the Supreme Court reversed that decision in *US v. Alvarez-Machain*.[28] While the District Court and Court of Appeals had upheld the rule from *Toscanino*, the majority of the US Supreme Court reversed the decision. The dissent was horrified, and speculated on the effect such a decision might have on international law, going so far as to call the majority's decision "monstrous."[29] To be fair, however, the US is not alone in ignoring international precedent, as illustrated by the *Eichmann case*.[30] The Israeli Supreme Court upheld Eichmann's convictions for war crimes and crimes against humanity, even though the Israeli Secret Service had illegally abducted him from Argentina in order to present him to the Israeli Court. As controversial as it was at the time though, the *Eichmann* decision may ultimately prove valuable as precedent in a Zemin prosecution. In the case of Noriega, the court decided the question of "illegal arrest" under US law,

paying scant attention to potential international assertions on the subject. Noriega's rights were primarily weighed under US due process law, though the court did examine some international law on the legality of the invasion in connection to Noriega's rights,[31] a subject that will be revisited below.

Recent Trends in International Law

The cases of Noriega, Pinochet, and Milosevic form the emerging, important precedent of head of state prosecution. Each case is worthy of discussion, and so all will be examined briefly.

1) Noriega

Noriega is an interesting case because the US was technically violating international law – at least, as it then stood – by invading Panama to retrieve Noriega. He was subsequently tried in US courts,[32] perhaps a strange place for a Panamanian head of state to be prosecuted; nevertheless, the case did take place, and so bears discussing. One of the first issues that arose at trial was whether Noriega could even qualify for sovereign immunity, as he had not been democratically elected as leader of Panama at the time of his removal. The defence argued that he had been the *de facto* leader, and as such, his status should be recognized, and immunity thus granted. The prosecution answered this argument by stating that Panama had not requested such immunity, and that he had undertaken acts privately and illegally.[33] The court held that he had no immunity, but did so at the cost of increased judicial discretion on the matter:

> In refusing to acknowledge head of state immunity for Noriega, the court created a new category of executive suggestion in cases where the Executive Branch remains silent--non-verbal manifestation of executive intent. The legal problem, however, was that the court failed to articulate any clear standard for determining executive intent in head of state cases, leaving great discretion for both federal courts and international tribunals.

> Thus, difficult problems may result in the future when courts continue to determine executive intent when that branch remains silent, imputing to the Executive Branch intent that it had not explicitly expressed.[34]

The Noriega case thus presents a judicial decision on an ex-"*de facto* head of state", but it does not provide us with the legal framework necessary to pursue a leader like Zemin. The only similarities that could be drawn were if the Chinese people had revolted during the period in which Jiang Zemin ruled the country, or if they elected another leader, who Zemin had refused to recognize. The international community could then conceivably follow the precedent set by the US in Panama. The likelihood of that is slim though, since the Chinese Communist Party does not allow national level elections in China. In addition, the reality of a UN invasion force into China is not likely to materialize given the influence of China on the international community and its formidable military strength.

2) Pinochet

The *Pinochet*[35] case in the House of Lords was a benchmark case in International Criminal Law, and so bears direct relevance on potential future trials at the ICC for heads of state. The practical result of the situation is that Pinochet has been sent back to Chile, where various health concerns and legal obstacles have prevented him from being tried completely – a most frustrating state of affairs for the families of his numerous victims. While the political realities of the situation illustrate how difficult it is to bring former rulers to justice for atrocities ordered, encouraged, or tolerated by them, the Pinochet case nonetheless sets a powerful precedent:

> …[O]n March 24, 1999, the House of Lords issued the final ruling of the trilogy, holding that Pinochet was not entitled to enjoy immunity for his alleged crimes, *since such allegations could not be considered official acts under international principles of immunity*.[36] [My italics]

If Pinochet was not entitled to immunity on the grounds that his acts could not be considered official acts under international principles of immunity, the same could easily be held in a case against Zemin. Hasson discusses the significance of the decision further:

> In comparison, unlike the *Noriega* case, where the federal courts exercised jurisdiction pursuant to the territorial and protective principles, initial jurisdiction by the Spanish Courts was justified through an exercise of the universal and passive personality principles. However, similar to *Noriega*, the House of Lords, accepting the position asserted by the Spanish prosecutors, quickly disposed of the defense arguments that Pinochet was immune from jurisdiction of foreign courts for acts committed while he was the head of state. Although the ultimate outcome is unlikely to please many in the international community, the case against Pinochet has set a powerful precedent likely to be used by other international tribunals seeking to prosecute foreign leaders for human rights violations and other violations of international and domestic law.[37]

As already indicated, that powerful precedent would be invaluable in a potential prosecution of Zemin. The status of international law on the matter is thus a combination of *Yerodia*, as decided by the ICJ, and *Pinochet*, as decided by the House of Lords. To reiterate though, the ICC would not be bound by either of those decisions.

3) Milosevic

As the first former head of state to be charged with genocide, crimes against humanity and war crimes, Milosevic's case obviously has direct bearing on any potential future case against Zemin at the ICC. The case has some aspects that are worthy of examination. The background to his appearance in the docket of the ICTY is relevant in its potential lessons for the Zemin situation, so it is worth a brief synopsis. Milosevic was indicted for war crimes by the ICTY at The Hague in 1999. He then lost domestic elections in November of 2000, but refused to acknowledge the results. Military

commanders then switched allegiances, ousting him from power. A few months later, and after a tense standoff, Serbian authorities had him arrested on April 1, 2001. They eventually handed him over to the ICTY in June of that year, under heavy Western pressure and American economic threats.[38] The nature of Milosevic's choice of action in the proceedings against him has meant that he has questioned the jurisdiction of almost every court that has heard anything remotely connected to the case. One case worth mentioning is *Milosevic v. The Netherlands*,[39] in which Milosevic requested a release from custody based on the ICTY's alleged lack of jurisdiction. The regional court denied his request, he then appealed, but subsequently withdrew his appeal, and so when his case was heard at the ECHR, they denied his request on the grounds that he had not exhausted local remedies. It is also worth noting that they ruled that the ICTY has exclusive competence to hear any matters relating to his trial. Although Milosevic died in custody before the ICTY could issue a verdict in his case, it is important to note that he was tried, even as a former head of state, in an international tribunal for genocide, war crimes, and crimes against humanity. That in itself bodes well for the potential prosecution of Zemin.

A Case Presented

The case against Zemin would have to be constructed according to the guidelines set out in the *Rome Treaty*. It would necessitate establishing jurisdiction, and then using the evidence in such a way as to bring Zemin to justice. The Preamble of the *Rome Statute* states:

> Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,
> Recognizing that such grave crimes threaten the peace, security and well-being of the world,

> Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,
> Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,
> …
> Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole, Resolved to guarantee lasting respect for and the enforcement of international justice…[40]

The ICC was created with the explicit intention of prosecuting international criminals such as Zemin, so he would present an ideal test case for the court. At the same time, the proceedings would send a message to the world that a new day in international justice has arrived.

1) Jurisdiction of the ICC

In order to bring Jiang Zemin before the ICC, it is of course imperative to first examine whether the court could even be seized of the matter. The *Rome Statute* enumerates a few specific crimes to be within the ICC's jurisdiction. Notably among them are "crimes against humanity,"[41] which would be the charge in the prosecution proposed here. As has been mentioned previously, one of the major concerns regarding potential cases against Zemin would be the temporal limit on the court's jurisdiction: "The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute."[42] As has been indicated on numerous occasions throughout this paper, there is ample evidence of crimes committed after the entry into force of the *Rome Statute* to satisfy that jurisdictional requirement. Regarding whether the *Rome Statute*'s binding effect, China has not signed nor ratified the convention. Article 12 deals

specifically with States that are not party to the statute, and notes that acceptance can be obtained by the State lodging a declaration with the Registrar.[43] The Security Council can also directly refer a case to the Prosecutor.[44] Alternatively, a case can be referred by a State Party.[45] The means by which the ICC can obtain jurisdiction of a case are thus multitudinous. The simplest way for Zemin to be brought to trial without China having ratified the convention appears to be the Security Council's referral, although a referral by a State Party is also a straightforward procedure. The case can thus be referred to the ICC without China's specific ratification of the Statute. The likelihood of the United Nations Security Council referring a case regarding Jiang Zemin to the ICC is remote. This is due to the fact that China is a permanent member of the United Nations Security Council and will probably veto any attempt to refer this case to the ICC. The other option of a state referring this case to the ICC is more likely to occur even though there are few states in the world today that can withstand the inevitable Chinese pressure that is sure to follow any attempt at referral. In the unlikely event that Chinese courts bring a case against Zemin, the ICC would not be able to intervene, as its jurisdiction is only secondary if domestic courts are seized of the case. However, there are also specific provisions against domestic courts delaying justice by holding quasi-legal proceedings and not actively pursuing justice.[46] In practical terms then, there appears to be very little standing in the way of the ICC's jurisdiction over a case concerning Zemin's alleged crimes against humanity.

2) Procedural Requirements

The Rome Treaty has ensured that prospective defendants have ample protection, and so one would need to meet relatively high standards to ensure a successful case. As has

been illustrated above, there were serious historical procedural difficulties in prosecuting heads of state due to the immunity doctrine. However, the *Rome Statute* was specifically drafted to avoid the procedural difficulties that had plagued cases against dictators. Article 27 attempts to undo the effect of all such immunities:

> 1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
> 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.[47]

There would thus be no bar to the ICC's *jurisdiction* over Zemin – at least, not based on any immunity arguments. However, the *Yerodia* decision discussed earlier, with its seeming extension of the immunity doctrine, would potentially become problematic in a discussion of the merits, as per Article 27(2). The ICJ follows rather different procedural and substantive law though, so the ICC would not be *bound* by *Yerodia*. The most compelling argument, however, is the *Pinochet* decision, which held that crimes against humanity are of such grave nature that they nullify the immunity doctrine.[48] The most difficult procedural hurdle in the trial of Zemin would thus likely be the issue of cooperation. On the surface, there do not appear to be any legal difficulties. Article 86 of the Rome Statute states the general obligation to cooperate: "States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court."[49] Were all State parties to cooperate with the court and Zemin voluntarily surrendered, or if he was handed over by the Chinese authorities, the problem would be resolved relatively easily

because the legal obligations are clear. However, it is both unlikely that Zemin would surrender to the ICC or that China would hand him over to the Court. China, Russia and the United States have all refused to sign and ratify the *Rome Statute* because they fear that the ICC will be used by other countries to launch politically motivated proceedings against them.[50]

After all the legal hurdles have been overcome, the final stumbling block to prosecuting Zemin for crimes against humanity would be the political, practical reality of an inability to physically obtain him. On one hand, that presents a shortcoming that the ICC and international community may want to address – it seems rather pointless to have these institutions in place if they serve no practical purpose. On the other hand, there remains an option: the case against him could begin *in absentia*, and he could be arrested upon any travel outside of China.[51]

3) Potential for Conviction based on Crimes under the Rome Statute

The charges laid against Zemin would no doubt start with the most egregious: crimes against humanity, as articulated in Article 7 of the *Rome Statute*. Crimes against humanity are certain acts "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[52] As per Article 7(1), they include but are not limited to (a) murder, (b) extermination, (e) imprisonment, (f) torture, (h) persecution against identifiable groups, (i) enforced disappearances, (k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.[53] Each of those crimes is then defined and detailed in Article 7(2). An examination of the relevant subsidiary crimes reveals, when combined with accumulated evidence, that there is more than enough with which to

charge Zemin at the ICC. Article 7, paragraph 2(a) defines an 'Attack directed against any civilian population' as "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."[54] This paper has previously provided examples of such attacks under Zemin's rule by quoting the 2005 UN Report of the Special Rapporteur on the independence of judges and lawyers. The report mentioned that Falun Gong practitioners were subjected to murder, torture, imprisonment, and the denial of adequate medial treatment.[55] Zemin may not have been personally responsible given that he may not have carried out these actions directly, but he has been complicit by forcefully speaking out against Falun practitioners and doing absolutely nothing to discourage or temper the actions of those that persecute them. As per Article 25, paragraph 3(b), Zemin could be charged:

> 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
> …
> (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;[56]

Furthermore, the *Rome Statute* specifically accounts for superior-subordinate relationships:

> (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
> (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
> (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
> (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[57]

His actual involvement in the perpetration of the crime, then, is not necessary, and it is argued here that there is sufficient evidence to find him guilty of this charge.

As documented in previous sections on the human rights violations in China, there is extensive torture of Falun Gong practitioners. The *Rome Statute* defines torture as follows:

> "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;[58]

Clearly then, torture is another subsidiary crime with which Zemin could potentially be charged.

Conclusion

This paper has illustrated the potential for launching a case against Jiang Zemin on the charge of committing crimes against humanity, as well as the propriety for the ICC to have jurisdiction. As was the case with Pinochet, there are legal temporal limits to the alleged crimes Zemin has committed. As such, the case against him may not be as strong as it could be were all the evidence to be admissible. That, though, is of course the nature of criminal law – domestic, or international. As it stands, there is plenty of evidence against him after the relevant dates, with countless legal violations that have been recorded by reputable authorities. The case against him is strong, and he should be prosecuted. The procedural and jurisdictional obstacles are what make a potential Zemin prosecution such an interesting, and important, test case. Successful conclusion of a case against him would send a message throughout the world that even former heads of state from powerful countries will no longer go unpunished, and that leaders cannot hide

behind archaic notions of immunity. This paper has illustrated that the procedural hurdles can be cleared. The question then remains whether the international community is serious about the enforcement of international law as it relates to former heads state that are implicated in crimes against humanity. Ultimately, political realities will dictate the vital question of cooperation. It is obviously highly doubtful that Jiang Zemin would surrender himself to the mercy of an international court, especially not the international criminal court. It is likely, then, that some sort of concerted effort by the international community, preferably with Security Council authorization or a referral by a state that has ratified the Rome Statute, would be required to actually get Zemin to trial. Zemin's prosecution at the ICC for crimes against humanity is a logical and necessary step for the world to take – if the international community is indeed serious about this issue. The case has been presented, now the world must act.

Endnotes

[1] David Matas & David Kilgour, *Report Into Allegations of Organ Harvesting of Falun Gong Practitioners in China*, (2006) at page 2. <http://organharvestinvestigation.net>
[2] *Ibid*. at page 2.
[3] *Ibid*. at page 2-3.
[4] "Profile: Jiang Zemin," BBC News, September 19, 2004 <http://news.bbc.co.uk/2/hi/asia-pacific/1832448.stm>
[5] *Ibid*.
[6] *Rome Statute of the International Criminal Court*, UN Doc. A/CONF.183/9 (1998) [hereinafter *Rome Statute*], found online at <http://www.un.org/law/icc/statute/romefra.htm>.
[7] *Ibid*. The Statute entered into force 1 July 2002, in accordance with article 126.
[8] Amnesty International Falun Gong Persecution Fact sheet <http://www.amnesty.org.nz/web/pages/home.nsf/dd5cab6801f172358525647400532 7c8/83fba691f912206bcc2571d3001824ed%21opendocument>
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[12] Chinese Police Website December 23, 2003 http://www.china110.com/police/plnews/gdjs/hub/item/2003_12/746271.shtml, cited in page 40 Appendix 6, Appendices to the *Report Into Allegations of Organ Harvesting of Falun Gong Practitioners in China*, found online at <http://investigation.go.saveinter.net/appendices%2020060706%20short.pdf>
[13] Luo, Gan. "Speech given at the national TV-teleconference of the CCP Political and Judiciary Committee," September 16, 2002. http://news.21cn.com/domestic/guoshi/2002-09-16/769785.html, cited in page 14 Appendix 6, Appendices to the *Report Into Allegations of Organ Harvesting of Falun Gong Practitioners in China*, found online at <http://investigation.go.saveinter.net/appendices%2020060706%20short.pdf>
[14] Leandro Despouy, *Report of the Special Rapporteur on the independence of judges and lawyers*, U.N. Commission on Human Rights, March 18, 2005 http://www.falunhr.org/reports/UN2005/lawyer_chn.pdf, cited in page 17 Appendix 6, Appendices to the *Report Into Allegations of Organ Harvesting of Falun Gong Practitioners in China*, found online at <http://investigation.go.saveinter.net/appendices%2020060706%20short.pdf>
[15] W.J. Aceves, "Relative Normativity: Challenging the Sovereignty Norm Through Human Rights Litigation" (2002) 25 Hastings Int'l & Comp. L. Rev. at 261 [footnotes omitted].
[16] Public international law generally, as opposed to the more specialized international *criminal* law.
[17] *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, (2002), I.C.J., 14 February General List, No. 121, online: *Press Release* at <http://www.icj-cij.org/icjwww/ipresscom/ipress2002/ipresscom2002-04bis_cobe_20020214.htm> and whole decision [hereinafter *Yerodia*] at <http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe_ijudgment_20020214.PDF>.
[18] *Press Release*, *ibid*, at paragraphs 1-12.
[19] *Ibid*, at paragraphs 1-12.

[20] It is the author's position that the ICJ routinely evades complicated legal issues that have very serious diplomatic consequences, resorting instead to finding obscure legal nuances that divest the court of its responsibility to decide those issues. See, for example, the ICJ's decision in the *Namibia Case*, where the court denied itself jurisdiction by finding that Liberia and Ethiopia did not have standing, and so could not bring the case to the court's attention; *Namibia Advisory Opinion*, 1971 ICJ REP. 16 (June 21). Fortunately, there are other examples of international courts acting with more resolve – most notably the European Court of Justice (ECJ), which has issued numerous unpopular rulings advancing European Community Law at the expense of domestic law, including the following notable cases: *Stork* v. *High Authority* [1959] ECR 17; *Geitling* v. *High Authority* [1960] ECR 423; *Sgarlata and others* v. *Commission* [1965] ECR 215, [1966] CMLR 314. One would hope that the ICC will not be hindered by political considerations, and that it can resolve divisive legal questions on their merits, instead of avoiding the issues as the ICJ does.
[21] *Yerodia*, *supra* note 55, at paragraphs 47-55.
[22] *Ibid*, at paragraphs 62-71.
[23] H. Kindred, gen. Ed., *International Law Chiefly as Interpreted and Applied in Canada*, 6th ed. (Toronto: Emond Montgomery Pub. Ltd., 2000) at 516.
[24] For an elaboration of each of the principles, see Kindred, *supra* note 61, at 516 and following.
[25] 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421 (1886).
[26] 342 U.S. 519, 72 S.Ct. 509, 96 L.Ed. 541 (1952).
[27] (1974), 500 F.2d 267 (2d Cir.) [hereinafter *Toscanino*].
[28] (1992), 112 S.Ct. 2188.
[29] As reproduced in Kindred, *supra* note 61 at 545.
[30] (1961), 36 I.L.R. 5 (Dist Ct. Jerusalem); aff'd 36 I.L.R. 277 (Israel S.C.) [hereinafter *Eichmann*].
[31] *United States* v. *Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990), [*aff'd*, 117 F.3d 1206 (11th Cir. 1997).] [hereinafter *Noriega*] at 1529-1535.
[32] A.I. Hasson, "Extraterritorial Jurisdiction and Sovereign Immunity on Trial: Noriega, Pinochet, and Milosevic--Trends in Political Accountability and Transnational Criminal Law", Winter 2002, 25 *B.C. Int'l & Comp. L. Rev.* 125, at 125-126.
[33] S. Albert, *The Case Against The General*, 137 (1993), as it appears in Hasson, *supra* note 71, at 133.
[34] Hasson, *supra* note 71, 145-146 [footnotes omitted].
[35] *Regina* v. *Bartle and the Commission of Police for the Metropolis and Others Ex Parte Pinochet* (*In Re Pinochet*), [1999], (H.L.), online: United Kingdom Parliament <http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990115/pino01.htm> (last modified: 1999) [hereinafter *Pinochet*].
[36] Hasson, *supra* note 71, 147-148.
[37] *Ibid*, 149.
[38] Most information gleaned from various BBC reports, most notably P. Biles, "Analysis: Milosevic's road to The Hague", BBC online: <http://news.bbc.co.uk/1/hi/world/europe/1814861.stm>
[39] *Milosevic* v. *The Netherlands*, European Court of Human Rights (ECHR): Application no. 77631/01 (March 19, 2002), online: <http://hudoc.echr.coe.int/Hudoc1doc2/HEDEC/200203/77631_01_di_chb2_19032002e.doc>.
[40] *Rome Statute*, *supra* note 2, Preamble.
[41] *Ibid*, at Article 5(1)(b).
[42] *Ibid*, at Article 11(1).
[43] *Ibid*, at Article 12(3).
[44] *Ibid*, at Article 13(b).
[45] *Ibid*, at Article 14(1).
[46] *Ibid*, at Article 17(2)(c) specifically does not recognise cases in which "The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice."
[47] *Ibid*, at Article 27.
[48] See earlier "Pinochet" subsection of this paper.
[49] *Rome Statute*, *supra* note 2, at Article 86.
[50] "The International Court on Trial," Guardian Unlimited, November 10, 2006 <http://www.guardian.co.uk/elsewhere/journalist/story/0,,1944544,00.html>

[51] While Article 63 specifically states that the accused shall be present during the trial, article 61(2) states that if all reasonable measures have been taken, pre-trial motions can take place without his/her presence, though with the presence of counsel. The initial proceedings could thus begin, and a warrant for Zemin's arrest could be issued, thus bringing about his effective "house-arrest", meaning that he could not leave China without being arrested. *Rome Statute*, *supra* note 2, at articles 61(2) and 63.
[52] *Ibid*, at Article 7.
[53] Ibid.
[54] *Rome Statute*, *supra* note 2, at Article 7(2)(a).
[55] Leandro Despouy, *Report of the Special Rapporteur on the independence of judges and lawyers*, U.N. Commission on Human Rights, March 18, 2005 http://www.falunhr.org/reports/UN2005/lawyer_chn.pdf, cited in page 17 Appendix 6, Appendices to the *Report Into Allegations of Organ Harvesting of Falun Gong Practitioners in China*, found online at <http://investigation.go.saveinter.net/appendices%2020060706%20short.pdf>
[56] *Ibid*, at Article 25(3)(b).
[57] *Ibid*, at Article 28(b).
[58] *Ibid*, Article 7(2)(e).

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