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1 **13<sup>th</sup> September 2021 (0:09:43 – 1:13:17)**

2 **Andrew Khoo**

3

4 *COUNSEL – I have a handful of questions for you, arising from [your?/the?]*  
5 *preliminary advise, in reference also to the legal opinions on the situation in Xinjiang,*  
6 *which are publicly available. Might I begin by asking you if you've had sight or an*  
7 *opportunity to read the three legal opinions on alleged crimes being committed in*  
8 *Xinjiang from Essex Court Chambers and the Bar of Human Rights Committee and*  
9 *the Newlines Institute.*

10 **ANDREW KHOO –** Good morning/good afternoon from Kuala Lumpur. The answer to  
11 your question is yes though not in as much detail as I would have liked but I have read  
12 through as much as possible the three reports and opinions you have referred.

13 *COUNSEL – Thank you. I don't have questions specific about those reports, we would*  
14 *be grateful if you might be able to indicate in your answers whether there are any*  
15 *points of convergence or divergence in those legal views/opinions that may help us*  
16 *better identify the underlying sources behind particular interpretations of law.*

17 **AK -** I think it's fair to say, in a broad sense, I am in agreement with the opinions and  
18 views that have been expressed.

19 *COUNSEL – My first question is that there is a large body of international law that is*  
20 *potentially applicable to the evidence before the tribunal. In terms of international law,*  
21 *how far would you consider it permissible to depart from applying the law from the*  
22 *body of law that is known as peremptory norms. And just for the benefit of everyone*  
23 *here, by peremptory norms, we mean international law from which non-derogation is*

24 *permissible and usually entails duties on the part of the state to the world at large. So,*  
25 *we're talking about genocide, crimes against humanity, torture, crime of aggression,*  
26 *slavery and a relatively restrictive group of crimes*

27 AK – I would be very slow in departing from these peremptory norms. Unless there is  
28 a very good reason to do and purely case-by-case basis.

29 *COUNSEL – In relation to genocide, and identifying preparators, and a specific intent*  
30 *to destroy might you tell us what you understand to be by “destroyed”?*

31 AK – To destroy has connotations of elimination, erasure of some form, it could be  
32 total, it could be partial. Basically to use some common parlance, its akin to trying to  
33 wipe them off the face of the earth

34 *COUNSEL – Related set of short questions. You'll be familiar that all surrounding facts*  
35 *and circumstances maybe be considered when trying to ascertain the specific intent*  
36 *of a person or preparator. To what extent, if at all, are the alleged crimes being*  
37 *committed in Xinjiang that are not the five exclusive prohibited acts of genocide*  
38 *relevant to the issue of intent?*

39 AK – I would say it adds to the body of evidence that the tribunal may issue to consider  
40 so that it is indicated a consistent policy or program, systematic... that would add to  
41 the preponderance of evidence pointing to the major crimes that the tribunal is  
42 considering.

43 *COUNSEL –Can you clarify as a matter of jurisprudence, how far motive and policies*  
44 *are relevant to the issue of specific intent.*

45 AK – Well, I think, you've been talking about the– or you've used the word perpetrator.  
46 I would agree with some of the opinions that would draw a difference between the

47 state as a body that is seen to be committing these crimes as opposed to an individual.  
48 And so I think in terms of the state, it may not be necessary to discover specific motive  
49 but more broad policy to achieve certain goals. Then the question becomes, how are  
50 those goals achieved and in what way? Then of course you look at the— you would of  
51 course consider the individual, which I don't believe is the case here. Then you have  
52 to actually talk about actual knowledge or desire to bring about the outcomes that  
53 constitute the elements of the crime.

54 *COUNSEL – So might it be possible for an alleged perpetrator to have a particular*  
55 *goal – say for instance assimilation and a particular motive, say for instance*  
56 *eradication of terrorism or economic development but at the same time not intend to*  
57 *destroy a group or even intent to commit any crime.*

58 AK – Yes, I think that is possible.

59 *COUNSEL – You'll be aware of the Packer and Diamond report to the Tribunal; and*  
60 *the associated Newlines report. There is a view that “destroy” must mean more than*  
61 *intent to physically or biologically destroy, notwithstanding the jurisprudence in the*  
62 *area. Are you of the same view?*

63 AK – I think to me, it's a matter of emphasis rather than any substantive agreement. I  
64 think when we talk about destruction, destruction can come in many forms and it can  
65 be expressed in different ways. I'm saying again that it's that preponderance of a wide  
66 range of activities that are undertaken in order to achieve what we consider to be  
67 destruction.

68 *COUNSEL – I'll put a question to you that I put to Professor Packer. Would you rule*  
69 *out an intention to socially destroy a group? If you wouldn't, what would be the*  
70 *jurisprudential basis for such a view?*

71 AK – Well, I go back to what I said earlier about an attempt to raise a people group,  
72 certainly social and cultural identities are of/part and parcel of the group. I would say  
73 that attempting to eradicate those, can be viewed, in conjunction with other activities  
74 or actions as an attempt to destroy.

75 *COUNSEL – Various legal opinions relating to alleged genocide in Xinjiang suggest*  
76 *at least a substantial part of the Uyghurs are being targeted in Xinjiang. The*  
77 *jurisprudence indicates the starting point is the numbers, but qualitative factors may*  
78 *also be relevant when developing a substantial part. My question is of the allegations*  
79 *being made in respect of Xinjiang, there in terms of the numbers, if not, then what*  
80 *other factors may be relevant?*

81 AK – I think it's not a question of pure numbers. Although, from what I've read and  
82 heard the numbers themselves, in terms of the number themselves are quite large.  
83 Being subjected to restrictions and other limitations of their liberty. To me, substantial,  
84 could also be qualitative in nature. For example, if you were able to single out and  
85 identify leaders or religious leaders, or cultural leaders or thought shapers. These  
86 would also constitute a substantial group of people. Carry the heritage and traditions  
87 of that particular group. Or to be, in a sense, holders of the heritage of that group.

88 *COUNSEL – Can you clarify for us that destruction in substantial part, is part of the*  
89 *intent of the crime. So, it is actually not necessary to destroy a substantial part, but*  
90 *simply that the perpetrator has an intent to destroy a substantial part.*

91 AK – One has to look at the policy in place, how that policy is being implemented or  
92 given effect. And whether or not it involves targeting. As I said key leaders, people  
93 who are holders of cultural and social traditions and practices, people who in a sense  
94 or embody or represent the identity of that people group.

95 *COUNSEL – As you are aware the tribunal is considering both individual responsibility*  
96 *and state responsibility. Can you please explain whether a state can commit a crime*  
97 *and how exactly according to the jurisprudence?*

98 AK – Well I would be hesitant to say that a state can commit a crime but in terms of  
99 state responsibility I would say there are, in international law, obligations placed on  
100 states as a result of treaties that they've entered into and treaty obligations that they  
101 have therefore taken upon themselves either by way of omission or by way of  
102 obligation of that treaty or commission of those things that are in violation of those  
103 things. I think you could say that a state could be made responsible, and I think in  
104 shorthand, people may say that 'that state has committed a crime' although strictly  
105 speaking that would not be accurate.

106 *COUNSEL – So in attributing responsibility to a state for a crime would you say that*  
107 *you require an individual?*

108 AK - I think the short answer is yes. I think there has to be organs/officials of the state  
109 that are implementing the policy or the laws that have been passed by the state. And  
110 it is implementing and the way in which those policies have been implemented if they  
111 were to as a result of that end up in the commission of crimes then the individual may  
112 be himself, or themselves held responsible but it is also the attribution of responsibility  
113 over the person by way of command or perhaps control that would allow the state to  
114 attributed to the commission of those acts.

115 *COUNSEL – And just by way of clarification, are you able to explain to us how specific*  
116 *intent might be identified in relation to individuals and then how you might attribute that*  
117 *to the state.*

118 AK – Well if you are looking at the individual, I believe that individual has to satisfy the  
119 specific intent perhaps understand what he is doing or her. The nature of and the  
120 effects of the act that he/she are carrying out in furtherance of state policy

121 *COUNSEL – Just two more questions, if I may. Can you provide some clarification*  
122 *what we mean by state responsibility in terms of genocide, crimes against humanity?*  
123 *Just to be more specific, what is the difference between attributing a crime to a state*  
124 *and then the duties arising under treaties or customary international law relating to, for*  
125 *instance, prevention, duty to prohibit, duty to punish or the duty to enact legislation.*

126 AK – Well can I take the second part, first? So as I mentioned a little earlier, that the  
127 obligations taken on by a state as a result entered into international treaties, taking on  
128 obligations set up on specific treaties so that in most cases will entail prohibiting such  
129 acts, criminalizing such acts, implementing laws, promulgating laws to prevent such  
130 acts from happening and then to punish people who commit those acts and also talk  
131 about elements of remedy and perhaps compensation so that would be on the state,  
132 but the state also has policies and have to be carried out and these have to be carried  
133 out by individuals acting in compliance directives from the state or other bodies that  
134 are associated with the state. And if those individuals also commit atrocities, then I  
135 would say that their acts can be attributed to the state.

136 *COUNSEL – Thank you. You might not have had a chance to see the discussion with*  
137 *Professor Packer there was a discussion with standards of proof, my question is: what*  
138 *standard of proof would you say is ordinarily applied to state attribution of crimes?*

139 AK – From my reading of the law there doesn't appear to be a single standard of proof  
140 in terms of how you attribute state responsibility or what standard to measure a state's  
141 complicity in the matter, I read somewhere that there could be different interpretations

142 so I suppose that is not terribly helpful but to me what the tribunal has to do, or might  
143 consider doing is looking at the overall picture and to look a different policies and  
144 different practices, which in themselves may not necessarily point to a sufficient  
145 degree of culpability but in building an overall picture where one can see very clearly  
146 how state policy is being implemented in a way that results in acts of genocide.

147 *COUNSEL – At the ICJ, about the two seminal cases related to genocide, the view*  
148 *was that very high standards must be applied in attributing the crime of genocide to*  
149 *the state. That was then elaborated to suggest that beyond a reasonable doubt would*  
150 *be an appropriate standard, would you then encourage them, as Mr. Diamond and*  
151 *Professor Packer did the Tribunal, in applying a different standard for the reasons they*  
152 *gave and for the reasons of the particular circumstances in which, allegedly Uyghurs*  
153 *find themselves in, in Xinjiang?*

154 AK – I believe that since Packer & Diamond used the phrase “clear and convincing  
155 evidence”– as you say the understanding is beyond reasonable doubt. I think again it  
156 may be a question of degree as what you mean by beyond a reasonable doubt. I would  
157 look at the preponderance of evidence that is available to the tribunal and use that as  
158 a guide to come to a decision.

159 *PANEL – Mr Khoo, first of all, by way of full disclosure, you and I first met when you*  
160 *were appointed to the China Tribunal that I chaired investigating forced organ*  
161 *harvesting, that issued its judgement in June 17, 2019 and signed off its written, early*  
162 *in 2020 since then we’ve maintained light social contact but (not) having discussed*  
163 *this matter at all since until you were asked either possibly by me or properly by Mr.*  
164 *Hamid Sabi to be a legal expert. Is that correct?*

165 AK – Yes, Sir Geoffrey, that is correct.

166 *PANEL – And the reason you were asked, as you know, the sanctions implied by the*  
167 *People’s Republic of China on various people including the tribunal, had the effect,*  
168 *making the United Kingdom lawyers unavailable to us and you were good enough to,*  
169 *at my and Mr. Sabi’s request, to agree to help us, as things might have affected the*  
170 *United Kingdom ...*

171 AK – Yes, that is true. I run a small practice, which doesn’t extend to very broad and  
172 commercial work and so I don’t think consequence anything that the PRC would do  
173 that to me, at least from a commercial point of view, would put me out too much.

174 *PANEL – Well we’re very grateful to your assistance and we will leave as much time*  
175 *allocated to my colleagues for reasons that will become clear. First of all and given the*  
176 *audience for this proceedings. What is jurisprudence?*

177 AK – Is that the question? What is jurisprudence?

178 *PANEL – Yes, what is jurisprudence?*

179 AK – At one level, it is the principles underlying the law. It is legal philosophies that  
180 inform how laws ought to be made, or how laws ought to be implemented. It also  
181 extends to discussions about the law, how the law is or war, or ought to be– and the  
182 decisions that have been made and the reasonings and the rationale underpinning or  
183 underlying those judgements. So, it is quite a lot, it is collected quite a lot of discussion  
184 and debate about what the law is and ought to be.

185 *PANEL – There is absolutely no criticism and gratitude to you for answering questions*  
186 *that embody such a huge amount of learning, but it is pretty unlikely isn’t it. The*  
187 *concept of or content of legal jurisprudence is going to be known to the average non-*  
188 *expert educated citizen around the world.*

189 AK – Quite possibly– it is not something that the average person would necessarily  
190 think about in his/her 9 to 5 job.

191 *PANEL – Would you be tolerant to the following remark, not of course directed at you*  
192 *in any way but the following light-hearted remark: that the law and jurisprudence has*  
193 *provided a nice playing ground for lawyers and judges since the start of the ad hoc*  
194 *tribunals for Yugoslavia and Rwanda in 1993.*

195 AK – You use the word playground; I suppose that is the light-hearted comment you  
196 are making. I think there is a lot of discussion about this area, because the whole area  
197 of international criminal law has traversed different issues over the years. I think  
198 lawyers and judges, and other interested parties are keen to try and work out whether  
199 or not there can be a broad and systematic way in dealing with these different  
200 emanations of criminal law by the use of a use of a set of standards that could be  
201 universally applied and that is where the discussion and debate has centred around.

202 *PANEL – But we find from– well first of all on another note and remark, it was John*  
203 *Packer and his colleague who were good enough to stand behind their point in front*  
204 *of this Tribunal and the other three, and Amnesty, Human Rights watch and the*  
205 *American government analysis of their finding of genocide was also not publicly*  
206 *authored or indeed publicly articulated. Packer is on his own and the others haven't*  
207 *appeared. Is that right?*

208 AK – I don't have a very detailed knowledge of that. I assume that is the case, yes

209 *PANEL – But just reading their reports, it is clear that there's differences in opinion.*

210 AK – I suppose there are. I don't think you can put a whole group of lawyers and get  
211 everybody to agree on everything. But I think we are all trying to work out, I mean  
212 some of the key issues which I suppose the tribunal will exercise. Things like the scope

213 of the crime, the applicability of the law, what will constitute a commission of that crime,  
214 what will constitute sufficient evidence what is the level of proof that needs to ascertain  
215 to a conclusion, and I suppose in any one of those areas that could well have some  
216 disagreement in terms of the approach that needs to be taken.

217 *PANEL – Mr. Khoo, now I'm going to explain why and [give] the remaining time to my*  
218 *colleagues. Join such an analogy as is appropriate between this tribunal between a*  
219 *jury and a criminal trial, a jury and criminal trial making a decision about a trial has to*  
220 *be directed in straightforward terms as understood by them, like those watching in the*  
221 *public gallery and trial.*

222 AK – Yes, I suppose the question then is who is giving that direction.

223 *PANEL – Well in the jury trial it's the judge. And so far as this group of 9 individuals*  
224 *composing the Tribunal, we're looking for an individual or bodies of individuals, it might*  
225 *be you, it might be counsel, it might be you in combination with the opinions that*  
226 *someway synthesize, we are looking for a straightforward direction of law that could*  
227 *be as understood by you, by us and as understood by public and as understood by*  
228 *the PRC. And so, what I'm going to do Mr. Khoo is almost immediately ask my*  
229 *colleagues to ask their questions and concerns and then perhaps to invite you, maybe*  
230 *counsel to see if you can prepare for us in writing, straightforward direction that could*  
231 *be published. Would you prepared to cooperate with that as an exercise?*

232 AK – Yes, it would be my pleasure to do so.

233 *PANEL – Because the word genocide, was advanced between 1948-1993 has been*  
234 *this suggestion that the convention was activated in decisions made about the Kurds*  
235 *a little earlier than the 90s or earlier 80s even that is not clear. When it started to be*  
236 *used, it started to be used by members of the public in describing particular atrocities,*

237 *of which they were concerned. The public are using this term now, and*  
238 *parliamentarians are not using this term about the Uyghurs treatment, but they are not*  
239 *able to use it in a simple way if they follow the jurisprudence because the jurisprudence*  
240 *is muddled. Would you accept that?*

241 AK – Well, I think if we were to reflect, one of the reasons perhaps why, an absence  
242 of focus, in genocide as you say between 1948, 1980s, was the fact that we were not  
243 necessarily looking at large scale that were happening and perhaps that incidents after  
244 the fall of the Soviet Union, the break-up of eastern Europe that led to warfare between  
245 states, once again see atrocities that were committed but again these were primarily  
246 atrocities that were committed in the context of the war. I think it might be a little bit  
247 easier for the average person to understand the atrocities in the context of war and to  
248 understand genocide, from that perspective. I think when it comes to a more slow form  
249 of genocide that takes many, many years, it takes, incremental actions in the part of a  
250 state and its organs to bring about a destruction of a people that might be a little bit  
251 more challenging. From many different angles, how one could still say that genocide  
252 was happening, and I suppose the development of the jurisprudence have been in that  
253 regard to sort of say even though this may not look like your average wartime atrocity.  
254 These are nonetheless very serious and grave crimes that qualify as war crimes or  
255 crimes against humanity or even genocide.

256 *PANEL – Thank you, it's a big step for private individuals to deal with an allegation of*  
257 *genocide and crimes against humanity against the most populous nation on the earth.*  
258 *Which must be accorded respect and not be exposed to risk of unfairness of any kind.*  
259 *And the one way of being certain, we can do that, is to look at genocide being proved,*  
260 *if and only if, the requisite intent is proved in an individual level at the level of beyond*  
261 *a reasonable doubt. That's the way we can show respect, that's how we save the PRC*

262 *from unfairness. Would you agree that it would most likely fit the general public view*  
263 *of what genocide is?*

264 AK – I think the phrase beyond a reasonable doubt is in the collective mind of Fox-  
265 American con-dramas and so that formulation is something that people on balance  
266 would have heard of I suppose, given that it is a criminal trial I think people would  
267 understand that. The challenge is when you move from an individual to a state how do  
268 you prove beyond a reasonable doubt vis-à-vis a state. State has a mind that directs  
269 its actions. And so, we have to draw parallels for what would be the mind of the state  
270 when it comes to attributing or at least saying there was criminal intent. I think that is  
271 where the challenge is for the average person.

272 *PANEL – If the Tribunal elected to say it would not find genocide against the state*  
273 *unless it found in an individual was powering the state's genocidal intent, then it could*  
274 *be sure it wasn't being unfair to the People's Republic of China?*

275 AK – Yes, I would agree with you.

276 *PANEL – Thank you for your presence today. I would like to talk about joint criminal*  
277 *enterprise, with individual responsibility. As against state responsibility. If we join*  
278 *criminal enterprise, there is a substantial number perhaps in positions of state power,*  
279 *provincial or otherwise. And they have positions, decision making power, if that's quite*  
280 *substantial. Does that then become like the state, what I'm trying to get at: can you*  
281 *have both frameworks, operating together?*

282 AK – I think the short answer is that you can. But I think in terms of if you're talking  
283 about a criminal act amongst individuals. Then joint enterprise, when people come  
284 together, and conspire with each other to achieve a certain criminal outcome and  
285 therefore there has to be a degree of communication, collaboration. You may not be

286 a partner in the whole thing. You may be a partner in some of that but it's a long, a  
287 chain that results in the commission of a criminal activity. And so, I suppose the  
288 challenge with that in terms of the state and the individual, there may be no such kind  
289 of evidence active collaboration partnership. I'm thinking in particular of an individual  
290 that receives a directive from a state organ but a particular state to implement a  
291 particular policy the question is by implement and following orders and by  
292 implementing those polices do you actually get into a joint criminal enterprise. I think  
293 that would be those would say that may not be correct so then if I look at certain  
294 individuals you have to ask and I've been thinking about this for a while. You have to  
295 ask if these people can be said to be in a sense, the alter ego to the state. That they  
296 are in some ways they are "the state." The state being there is no one individual, that  
297 necessarily represents the state but in certain cases, but especially true of  
298 authoritarian... whose thoughts, speeches, directives take on, in a sense the authority  
299 or the Imprimatur of the state if therefore, if more than one person, they sing the same  
300 tune, in a sense, as what policies are, how they should be implemented. Then you can  
301 say that there is, that would be the criminality, evidence of criminality of the state  
302 invoking the idea of criminal enterprise.

303 *PANEL – Would it be fair to say that the allegations as made against the PRC, in*  
304 *contemplation of genocide are very different from any that have been considered by*  
305 *formal court convention/jurisprudence since the establishment of the convention, in*  
306 *other words, it is very different from Rwanda or Bosnia and therefore the latitude or*  
307 *scope for disagreement may well be wider and therefore, in a sense the channels for*  
308 *this tribunal are wider. Is that fair to say?*

309 AK – Very briefly, short answer, yes. As I was saying to Sir Geoffrey in our exchange  
310 earlier, it maybe very different or we may be able to see things in a slightly different

311 way or perspective when we are talking about situations where there are allegations  
312 outside the context of an outright war or conflict, not so much the latitude but the  
313 perhaps the way in would look at what constitute culpability. Would need to be different

314 *PANEL –. Mr Khoo thank you, in relation to intent, which is clearly one of the issues*  
315 *here, to what degree can you deduce intent from the acts themselves? The facts there*  
316 *are particular offences contemplated by the Genocide Convention in a state. A number*  
317 *of witnesses have said to us that the state is opaque in its structure and its decision*  
318 *making. To what extent do you have to identify individuals, and that these events have*  
319 *taken place and coming to a conclusion that they have not taken place in this structure*  
320 *unless relevant people could have promulgated them or at least supported them.*

321 AK - I would tend to agree with the second part of your question, it may not be  
322 necessary identify particular individuals to take note of the fact that these things have  
323 occurred and these things would not have occurred before certain policies and  
324 practices that were incumbent upon the individual to carry out and it is the existence  
325 of those polices or programs would need to be tested against the idea whether there  
326 was the idea of intent.

327 *PANEL – Thank you Mr Khoo, lots of points to consider here, in terms of genocide, we*  
328 *have a lot of evidence that people are disappearing but we – I suppose crudely to say–*  
329 *we haven't got the bodies to show for it. How much corroboration do we need to say*  
330 *that there is genocide, in particular. I agree with you it's quite challenging and may not*  
331 *well be sufficient evidence to prove that genocide has happened because of the*  
332 *disappearance of people. The fact that people have disappeared, having gone through*  
333 *the system of incarceration. In a sense, their final presence was within the control of*  
334 *particular authorities could be indicative of enforced disappearance or some form of*

335 *murder. Yes so, we will never be able to prove that a 100%. The whole idea of*  
336 *genocide is not necessarily to look at every particular criminal is there proof of*  
337 *genocide, but sometimes we cannot look at the totality of evidence but in comparison*  
338 *to the other acts and ask ourselves whether some form of program that overall*  
339 *encompasses all of these separate elements. And it's that preponderance of all of this*  
340 *evidence when seen together that would/could the tribunal to come to the conclusion*  
341 *in relation to whether genocide has occurred.*

342 *PANEL – I'm interested in this question of fairness to the state of China. And the*  
343 *question that we wouldn't find against the state unless we were to find an individual*  
344 *we could be sure, that we weren't being unfair to the state of China. Is that even*  
345 *possible?*

346 *AK – Well I think the proposition that Sir Geoffrey put to me was that if the tribunal*  
347 *decided that in trying to be fair to China they would not, they would want to have proof*  
348 *of individual guilt, was that something that could be done? And I suppose the answer*  
349 *is yes, it is for the tribunal to decide how it wishes to arrive at a decision, I say that*  
350 *would be particularly challenge because some of the sessions I've heard there has*  
351 *been no particular reference to any one individual who has alleged to have done this*  
352 *or that, I think some of the opinions given, in the context of high level political leaders—*  
353 *to me that is something you would have to look at, whether or not the evidence that*  
354 *has been given to the tribunal that those individuals are responsible. I would prefer, I*  
355 *would suggest, returning to the concept of state responsibility might be a more*  
356 *productive approach to this whole issue, then in which case one, would be*  
357 *preponderance but to see the PRC, one would have to see that preponderance of*  
358 *evidence and not just look at very isolated incidents or statements but to see and to*  
359 *ensure there was sufficiently wide and robust evidence proving those state policies*

360 and interpretations of this is to be done, statements about political aims and outcomes  
361 that the state designed from those policies.

362 *PANEL – Mr. Khoo, we're into round 2 I think, there is 10 minutes left. I'm going to*  
363 *make my question extremely short. The Packer report seems to allow for that once*  
364 *you've identified your standard of proof, you can nevertheless reduce it because the*  
365 *evidential issue is difficult, if you don't have evidence– its difficult to get evidence thus*  
366 *you lower your standard of proof. You may have noted, if you heard that session, that*  
367 *I expressed disagreement with that. Do you accept that once you accept a standard*  
368 *of proof, you shouldn't have to reduce it, simply because the evidential makes it difficult*  
369 *to reach it.*

370 AK – Yes, once you have set the standard you should stick with it.

371 *PANEL – I'd like to talk about the standing of a People's Tribunal. As you know the*  
372 *main reason why this was set up is because legal avenues were not possible. So*  
373 *whatever decision we come to at the end of the Tribunal... First, are there– what are*  
374 *further legal possibilities? And secondly can this somehow be made into a legal*  
375 *avenue, are there precedents or can there be another way forward.*

376 AK – I think at best, the decision of the tribunal will have moral weight, not necessarily  
377 legal weight, because if one were to say the tribunal has come to this particular  
378 conclusion and we take it to a court. The court will say no, at our processes, we'll have  
379 to re-hear all the evidence and come to a finding of our own, they would not merely  
380 accept, the decision of the tribunal and say “well its proven and then we could move  
381 on”, so then I think the authority of the Tribunal's decision lies more in the moral sphere  
382 where given the way– I'm sorry, just because I say the tribunal has moral weight does  
383 not mean it does not have authority. Because of the way its gone about it hearing

384 evidence, inviting people to offer evidence, I think the scope of the evidence and the  
385 richness before the tribunal, gives weight to any upcoming finding that the Tribunal  
386 may have and then itself can be used for further activity for advocacy, on the part of  
387 individuals interested in taking this further.

388 *PANEL – Can I just explore Article II with you please. So, the Preamble to Article II*  
389 *includes the words “with the intent to destroy”. It does not say “with the intent to*  
390 *physically destroy”. My understanding is that there is jurisprudence that suggests what*  
391 *it should do. The question is, and a statement, is it true that the various five acts can*  
392 *be dealt with separately, i.e. each individual one can be sufficient, as a matter of fact,*  
393 *to achieve genocide, assuming that the intent was there. If that is the case, why would,*  
394 *for instance, the words in Article C be included, where the words physical destruction*  
395 *are included. I accept that there is a difference between the word intent and the act,*  
396 *but nevertheless, you might think if it was intended that physical destruction was the*  
397 *only way then it would be included in the preamble.*

398 AK – Mr. Vetch, I think you, [if] read the jurisprudence there is also a body of thinking  
399 that– the reference to physical is only in the context of where the word ‘physical’  
400 actually appears. So for example, in (C) where there’s mention of physical destruction,  
401 then yes, then you have to read that definition. But in terms of all the others, there may  
402 not necessarily be a need to have physical destruction. I don’t think you’d necessarily  
403 need to have to read the word physical into the–what they call– the Chapeau of Article  
404 2 because it’s not there and there’s no reason to read the physical into those words.  
405 Your other question, the way Article 2 is framed is Genocide that any of the following  
406 acts is not every act– so if you can say for– if there is sufficient evidence any one of  
407 those acts has been committed. Then you can come to a finding of genocide if it fits  
408 within the intention to destroy.

409 *PANEL – So just to reinforce the point then. If you look then, to clause B of the Article*  
410 *2. Where it says causing serious bodily harm or mental harm– then by definition unless*  
411 *there’s mass suicide, it’s unlikely then the mental harm is going to result in physical*  
412 *destruction.*

413 *AK – Yes, and the point is that mental harm, doesn’t have to have physical destruction,*  
414 *mental harm by its physical nature perhaps not physical.*

415 *PANEL – Sorry this point is more of a point of clarification than where we got to in the*  
416 *discussion. In relation to the standard of proof, as I understand it. The tribunal, on*  
417 *advice has no prescribed standard of proof you can look to with preponderance of*  
418 *proof, look at reason doubt and coming back to the point that Sir Geoffrey made about*  
419 *the need–which all of us agree– to treat China with respect and fairness, if we decided*  
420 *on a level of proof, haven taken your advice and listened to expert its different from*  
421 *reasonable doubt, that would still be acceptable.*

422 *AK – Yes, that would be acceptable. Correct*

423 *PANEL – This is a people’s tribunal, and obviously there are laypeople like myself on*  
424 *it. But from a lay point of view, and indeed the scientific point of view, one always likes*  
425 *to hear two sides to an argument, and now in this case one has been fair, and one has*  
426 *invited the PRC on several occasions to take part. In a court, is the fact that one side*  
427 *is not producing any evidence, considered that it being deleterious to the argument in*  
428 *that they either might be hiding something or just not wanting to take part. How does*  
429 *a court of law look at that? I mean we talked about intent and standard of evidence,*  
430 *proof. Can we come to a conclusion on the absence of one party?*

431 *AK - The short answer is yes you can but it would have to be done with extreme*  
432 *caution. And in a criminal trial it would be a the case that the judge would in some*

433 ways, try to ensure that the evidence and the presentation of the evidence and the  
434 arguments of the prosecution would be fair to the accused and so, the judge may  
435 perhaps– be seen to be perhaps, stepping in sometimes on behalf of the accused on  
436 behalf of an accused to ensure there is a level playing field given the fact that the  
437 accused is not there and that you're Still proceeding, in absentia as it were– so courts  
438 can do that and they are doing that for example a court in the Netherlands is hearing  
439 evidence about the shooting down of the Malaysian airlines 17 and the accused  
440 person are not there but then it becomes incumbent upon the bench there that there  
441 is a level playing field as possible and this may involve them intervening on behalf of  
442 the absence of the accused in order to make sure there is procedural fairness.

443 *PANEL – Thank you very much, Mr. Khoo you've been extremely helpful, I happen to*  
444 *know you've made yourself available being involved in extremely significant difficulties*  
445 *that your country is going through, and you've engaged the skills and position you hold*  
446 *so we are doubly grateful to you. I think you've noticed by the questions that the*  
447 *tribunal would be most assisted by a straightforward and direction of the law not only*  
448 *us but everyone else can understand who is dealing with the conceptual question, I*  
449 *suppose, the visitor to the PRC: standing there saying to herself/himself, am I now in*  
450 *a country where the country is committing genocide? Sort of simple as that,*  
451 *complicated. I hope that the questions haven't deterred you from working with our*  
452 *team of lawyers for direction.*

453 AK – Not at all.