

Emerging Challenges in International Law: Organ Transplant Abuse in China

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Introduction

Transplantation is a new technology developed for human good, but, like other forms of technological development, has run up against the hard realities of human nature and its capacity for wrongdoing. In China, David Kilgour and I have concluded that innocents, practitioners of the spiritually based exercised regime Falun Gong, are being killed for their organs. Whatever you may think of our conclusions, it is incontestable that the precautions that should be in place to prevent this abuse are not in place.

Transplant abuse is not unique to China, but the Chinese form of abuse is unique - institutionalised and inflicted on prisoners of conscience. The form of transplant abuse we see in China presents an emerging challenge to international law. International norms have been developing as a means of combating that abuse. The development of these norms has not ended the abuse, but have nonetheless had an impact.

Background

The Epoch Times published a story in its March 9, 2006 issue with the headline "Over 6,000 Falun Gong practitioners detained in secret concentration camp in China". The report quotes a person with the pseudonym Peter as saying that the camp was located in Sujiatun and that:

"The concentration camp has a crematorium to dispose of bodies. There are also many doctors on site. ... Before cremation, the internal organs are all removed from the body and sold".

A woman using the pseudonym Annie then in Washington DC told the Epoch Times in a story published in its March 17, 2006 edition that her ex-husband harvested corneas of

Falun Gong practitioners in a Sujiatun hospital between 2003 and 2005. Other doctors at the same hospital harvested other organs of these victims. The Falun Gong were killed during the harvesting. Their bodies were cremated.

Falun Gong is a set of exercises with a spiritual foundation started in 1992, a modernized blend of ancient Chinese spiritual traditions of Buddhism, Taoism and the exercise traditions Qi Gong. The Communist Party of China banned Falun Gong in 1999 because of jealousy at its increasing popularity. At the time of banning there were more substantially more Falun Gong practitioners than there were members of the Communist Party. The Party saw a widespread practice with a spiritual foundation as a threat to its ideological supremacy.

Annie's interview led to a controversy about whether or not she was telling the truth. The Government of China, as one might expect, denied what she said. The Coalition to Investigate the Persecution of the Falun Gong, a Washington DC based NGO, asked David Kilgour and me to investigate her claims. We held a press conference in May 2006 announcing that we had decided to conduct the investigation.

We wrote a report released in July 2006 under the title *Bloody Harvest* which concluded that practitioners of Falun Gong in China were indeed being killed for their organs, not just between 2003 and 2005 but from 2001 to the date of our report; not just in Sujiatun but throughout China. The organs were being sold by Chinese hospitals to patients worldwide in need of transplants. We produced a second version of the report in January 2007 and a third version in book form in November 2009.¹

Once our report came out, we embarked on a campaign to end the abuse we identified,

¹ *Bloody Harvest: The Killing of Falun Gong for their Organs* Seraphim Editions, 2009. The reports can be found at <www.organharvestinvestigation.net>.

travelling to more than forty countries and more than eighty cities to do so, some several times. One global response to organ transplant abuse in China was an attempt, by a variety of actors, to set out standards to counter that abuse. The text that follows sets out the principles which have been developed and asserted globally to attempt to counter Chinese transplant abuse, the Chinese responses to those efforts and an assessment of those responses.

Principles

1. Consent

The World Health Organization Guiding Principles on Human Cell, Tissue and Organ Transplantation of 2008² set out a number of principles. Guiding Principle 7 states:

"Physicians and other health professionals should not engage in transplantation procedures, and health insurers and other payers should not cover such procedures, if the cells, tissues or organs concerned have been obtained through ... coercion of the donor...."

The first Chinese law on transplants, enacted in 1984, contemplated involuntary donations from "uncollected dead bodies or the ones that the family members refuse to collect."³ The Government of China introduced a number of changes first through a Ministry of Health notice issued on March 16, 2006 titled "Clinical Application of Human Organ Transplant Technology Management Interim Provisions" which came into effect on July 1st, 2006 and second through a State Council regulation issued March 31, 2007 titled "Regulations on Human Organ Transplant" which came into effect May 1, 2007. The interim provisions and the regulation are, in many respects, identical. Amongst the changes introduced by both the interim provisions and the regulation was a provision

² WHO Document EB123/5 noted by the Executive Board at its 123d session on 26 May 2008, with a requested modification.

³ Article III(1).

banning organ harvesting without consent.

The regulation states:

"Legal penalties shall be imposed for:

1. Harvesting organs from a living donor without the person's consent;
2. Harvesting organs from a deceased donor who, when alive, did not consent to donate the organs".

Even this law does not require consent while living from deceased donors. All it does is prohibit harvesting deceased donors where the donor while living explicitly refused.

2. Ensuring consent

Part of the commentary to World Health Organization Guiding Principle 7 states:

"Health care professionals should only proceed with ... intermediate management ... of .. organs when donations are .. truly voluntary. ... Failing to ensure that the person consenting to the donation has not been ... coerced ... breaches professional obligations and should be sanctioned by the relevant professional organizations and government licensing or regulatory authorities.

In Hong Kong, the onus is on the foreign professionals to ascertain the status of the Chinese donor. The foreign professional is not acting ethically as long as he or she makes no inquiries or only cursory ones. The foreign professional, after investigation, has to be satisfied beyond any doubt before referring a patient to China that consent was given freely or voluntarily by the donor.

The Professional Code of Conduct of the Medical Council of Hong Kong states that "If there is doubt" as to whether the consent is given freely or voluntarily by the donor, the profession should have nothing to do with the donation. The very least one can say about

China, in light of the fact that almost all transplants come from prisoners, is that there is doubt in almost every case whether the consent is given freely or voluntarily by the donor.

Specifically the Professional Code of Conduct of the Medical Council of Hong Kong, as revised in January 2009, states:

"35.3 Consent must be given freely and voluntarily by any donor. If there is doubt as to whether the consent is given freely or voluntarily by the donor, the doctor should reject the proposed donation .

35.4 In the case of a referral of the recipient to a place outside Hong Kong for an organ transplant from any donor, it is unethical for a doctor to make the referral without ascertaining the status of the donor or following these principles."

3. No sourcing from prisoners

The Transplantation Society, an international non-governmental organization, in July 2006 opposed the transplantation of organs from prisoners. Their statement said:

"Because of the restrictions in liberty in a prison environment it is impossible to ascertain whether prisoners are truly free to make independent decisions, and thus an autonomous informed consent for donation cannot be obtained. Therefore, The Transplantation Society is opposed to any use of organs from executed prisoners."

Wang Guoqi a doctor from the Tianjin People's Armed Police General Brigade Hospital testified before the U.S. Congress on June 27, 2001 that he helped remove corneas and skin from more than 100 executed prisoners. A few days after the testimony, Foreign Ministry spokeswoman Zhang Qiyue called it "sensational lies" and "vicious slander" against China. "With regard to the trade in human organs, China strictly prohibits that," Zhang said. "The major source of human organs comes from voluntary donations from Chinese citizens."⁴

⁴ John Pomfret "Rare Chinese Newspaper Exposé Details Prisoner Organ Harvests" The

Instead of labelling their critics as liars, officials now acknowledge the correctness of the position of the critics. In July of 2005 Huang Jiefu, Chinese Deputy Minister of Health, indicated as high as 95% of organs derive from execution⁵. Speaking at a conference of surgeons in the southern city of Guangzhou in mid-November 2006, he said: "Apart from a small portion of traffic victims, most of the organs from cadavers are from executed prisoners"⁶. In October 2008, he said "In China, more than 90% of transplanted organs are obtained from executed prisoners"⁷. In March 2010, he stated that: "... over 90% of grafts from deceased donors are from executed prisoners"⁸.

What is more, the Government of China now accepts that this sourcing of organs from prisoners is improper. Deputy Health Minister Huang Jiefu, at the time of the announcement of an organ donor pilot project in August 2009, stated that prisoners "are definitely not a proper source for organ transplants".⁹

4. A justifiable fee

World Health Organization Guiding Principle 8 provides:

"All health care facilities and professionals involved in cell, tissue or organ

Washington Post, July 31, 2001

⁵ The Congressional Executive Commission on China Annual Report 2006, p. 59, note 224, p.201: "Organ Transplants: A Zone of Accelerated Regulation" Caijing Magazine (Online), 28 November 05.

⁶ http://news3.xinhuanet.com/english/2006-11/16/content_5335427.htm

⁷ <<http://press.thelancet.com/chinaorgan.pdf>>

⁸ "Tomorrow's Organ Transplantation Program in China", Presentation delivered at the Madrid Conference on Organ Donation and Transplantation, Madrid 2010, by Prof. Huang Jiefu, Vice Minister of Health, P.R.C.

⁹ "China's Organ Reforms", China Daily, August 26, 2009

procurement and transplantation procedures should be prohibited from receiving any payment that exceeds the justifiable fee for the services rendered."

The Government of China introduced a number of changes first through a Ministry of Health notice issued on March 16, 2006 titled "Clinical Application of Human Organ Transplant Technology Management Interim Provisions" which came into effect on July 1st, 2006 and second through a State Council regulation issued March 31, 2007 titled "Regulations on Human Organ Transplant" which came into effect May 1, 2007. The interim provisions and the regulation are, in many respects, identical.

Amongst the changes introduced by both the interim provisions and the regulation was a ban on the trade or sale of organs. The regulation states

"No organizations or individuals are not allowed to trade human organs in any form and are not allowed to be engaged in any activities related to trading human organs."¹⁰

In itself, this regulatory provision, even if enforced, does not counter the problem David Kilgour and I addressed because neither practitioners of Falun Gong nor their relatives were selling the organs which were harvested. The organs were stolen, not sold.

The exorbitant charges levied in China for transplants are paid to doctors and hospitals. In form, they are not that different from charges of hospitals for transplants in other countries. The money that goes to prison guards involved in handing over prisoners for their organs is closer in form to the trading of organs. Yet, even here, technically, the guards are not being paid for the organs of prisoners, since the guards hand over the prisoners alive to the organ harvesters.

¹⁰ Regulation article 3. See also Interim provisions article 27.

In substance though this regulatory provision is violated when Falun Gong are killed for their organs. Those who participate in the killing of Falun Gong for their organs are both murderers and thieves. Thieves sell stolen organs. The law prohibits the trading of organs "in any form". Killing Falun Gong for their organs and then charging patients high prices for transplants of these organs is a form of trading in Falun Gong organs.

The regulation also has a fee limitation. It states:

"Medical institutions engaged in organ transplant shall collect only these fees and expenses:

1. The expense of surgery for harvesting and transplanting organs;
2. The expense of storing and transporting organs;
3. The cost of medicine, the examination fee, the cost of medical materials and fees for use of equipment.

The fee collection structure must take this form; the amounts will be set out separately."¹¹

Fees beyond the stipulated charges are forbidden. There is no amount hospitals can allocate to pay prison guards to hand over prisoners for transplant.

Before its removal from the web on 25 in April, 2006, the size of the profits for transplants was suggested in the following price list for the China International Transplantation Network Assistance Centre in Shenyang City¹²:

Kidney US\$62,000

Liver US\$98,000-130,000

Liver-kidney US\$160,000-180,000

Kidney-pancreas US\$150,000

¹¹ Regulation article 21. See also interim provisions article 33.

¹² <http://en.zoukiishoku.com>

Lung US\$150,000-170,000

Heart US\$130,000-160,000

Cornea US\$30,000

These fees are unjustifiably large. Absent other information, one has to presume they continue.

Because there is no rule of law in China, it is impossible to challenge the hospital charges for transplants and the prison cooperation in transplants for money as a form of trade of organs or a violation of the fee regulation scheme. Individuals can not go to court to challenge actions of the state. Even if they could, the courts in China are not independent from government. So the result of such a challenge would be pre-ordained.

5. Prohibiting referrals and brokerage

Part of the commentary to World Health Organization Guiding Principle 7 states:

"Physicians and health care facilities should also not refer patients to transplant facilities in ... countries that make use of ... organs obtained through payments to ... vendors or brokers; nor may they seek or accept payment for doing so.

Taiwan on October 30, 2006 issued a bulletin stating that doctors and other medical personnel, in order to respect the Physicians Act, which requires conformity to medical ethics, must not

- a) introduce patients to organ transplant brokers;
- b) direct patients to a place where
 - i) local law does not prohibit the sale of organs,
 - ii) information on organ sourcing is not transparent, or
 - iii) international public opinion clearly and openly criticizes violations of human rights or medical ethics in organ transplantation;

- c) contact foreign organ transplant institutions to transplant organs for their patients; or
- d) go abroad with their patients for organ transplants and receive compensation¹³.

6. Informing patients

The October 2010 policy statement on organ trafficking and transplant tourism of the Canadian Society of Transplantation and Canadian Society of Nephrology¹⁴, under the heading "Recommendations for Pretransplant Counseling, sets out this principles:

"6. ... Patients should be educated about the harms that may come to those who provide organs through transplant tourism. ... organs have allegedly been taken by force, and individuals may even been killed to obtain their organs ... The entire transplant tourism industry relies on secrecy, making it is impossible to determine whether donor information provided by organ brokers, who are motivated by financial gain, is accurate."

This standard bears directly on the Chinese situation, though China is not specifically named. The policy makes every effort to discourage doctors from having anything to do with Chinese transplant abuses.

7. Refusing records and post transplant care

Part of the commentary to World Health Organization Guiding Principle 7 states:

"Post-transplant care may be provided to patients who have undergone transplantation at such facilities, but physicians who decline to provide such care should not face professional sanctions for such refusals, provided that they refer such patients elsewhere."

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http://www.doh.gov.tw/CHT2006/DM/DM2_p01.aspx?class_no=45&now_fod_list_no=673&level_no=3&doc_no=46559

¹⁴ Transplantation - Volume 90, Number 8, October 27, 2010

The October 2010 policy statement on organ trafficking and transplant tourism of the Canadian Society of Transplantation and Canadian Society of Nephrology¹⁵, under the heading "Post Transplant Obligations" has this principle:

"2. In non-emergent situations, individual physicians may elect to defer care to another physician....In such situations, the physician should ensure that the patient has reasonable access to the proposed alternative care provider and that the deferral is not discriminatory to any individual patient."

8. Transparency

World Health Organization Guiding Principle 11 provides:

"The organization and execution of donation and transplantation activities, as well as their clinical results, must be transparent and open to scrutiny, while ensuring that the personal anonymity and privacy of donors and recipients are always protected."

The commentary on Guiding Principle 11 provides:

"Transparency can be summarized as maintaining public access to regularly updated comprehensive data on processes, in particular allocation, transplant activities and outcomes for both recipients and living donors, as well as data on organization, budgets and funding. ... "

a) Discrepancy between sources of organs and volumes of transplants

The United Nations on several occasions has asked China to explain the discrepancy between the volume of transplants and the identified sources, without success. United Nations Rapporteur on Torture Manfred Nowak and UN Rapporteur on Religious Intolerance Asma Jahangir wrote in their 2007 reports:

¹⁵ Transplantation - Volume 90, Number 8, October 27, 2010

"Allegation transmitted [to the Government of China]: Organ harvesting has been inflicted on a large number of unwilling Falun Gong practitioners at a wide variety of locations, for the purpose making available organs for transplant operations.... It is reported that there are many more organ transplants than identifiable sources of organs, even taking into account figures for identifiable sources, namely: estimates of executed prisoners annually, of which a high percentage of organs are donated, according to the statement in 2005 of the Vice Minister of Health Mr Huang Jiefu; willing donor family members, who for cultural reasons, are often reluctant to donate their organs after death; and brain-dead donors. Moreover, the reportedly short waiting times that have been advertised for perfectly-matched organs would suggest the existence of a computerized matching system for transplants and a large bank of live prospective donors. It is alleged that the discrepancy between available organs and numbers from identifiable sources is explained by organs harvested from Falun Gong practitioners, and that the rise in transplants from 2000 coincides and correlates with the beginning of the persecution of these persons...."¹⁶

The Government of China responded but without addressing the concerns raised. As a result, the Rapporteurs reiterated their concerns in 2008 with these words:

"A critical issue was not addressed in the Government's previous responses, in particular: It is reported that there are many more organ transplants than identifiable sources of organs, even taking into account figures for identifiable sources, namely: annual estimates of executed prisoners by whom a high percentage of organs are donated, according to the statement in 2005 of the Vice

¹⁶ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Addendum, Manfred Nowak UN Document A/HRC/4/33/Add.1, 20 March 2007, paragraph 40; Report of the Special Rapporteur on freedom of religion or belief Addendum, Asma Jahangir, UN Document A/HRC/4/21/Add.1, 8 March 2007 paragraphs 107 to 111.

Minister of HLTH, Mr. Huang Jiefu; willing donor family members, who for cultural reasons, are often reluctant to donate their organs after death; and brain-dead donors. Moreover, the short waiting times that have been advertised for perfectly-matched organs would suggest the existence of a computerized matching system for transplants and a large bank of live prospective donors. It is alleged that the discrepancy between available organs and numbers from identifiable sources is explained by organs harvested from Falun Gong practitioners, and that the rise in transplants from 2000 coincides and correlates with the beginning of the persecution of these persons. The Special Rapporteurs note reports that on 15 November 2006, Vice-Minister Huang reiterated at a conference of surgeons in Guangzhou that most organs harvested come from executed prisoners. And notwithstanding the reported stringent criteria in place for donors, including for those sentenced to death, the Government informed in its response of 28 November, that voluntary donations, and donations between relatives are the two other legitimate sources of transplant organs. According to the allegations, based on data from the China Medical Organ Transplant Association, between the years 2000 and 2005 there were 60,000 transplantations performed, or approximately 10,000 per year for six years. This period coincides with the alleged rise in the persecution of Falun Gong practitioners. In 2005, it is reported that only 0.5% of total transplants were accounted for by donations by relatives; non-relative brain dead donors were around nine in 2006; and estimates-given that the Government does not make public statistics on executions-for 2005 indicate 1770 executions were carried out, and 3900 persons sentenced to death. It is alleged that the discrepancy between the number of transplants carried out and the number of available sources is made up from the harvesting of organs from Falun Gong practitioners. However, it is also reported that the true number of executions is estimated to be around 8,000 to 10,000 per year, rather than the figure of 1770 executions referred above. As the Special Rapporteur on torture recommended in

his report on his visit to China, he reiterates that the Government (E/CN.4/2006/6/para. 82, recommendation q) should use the opportunity of the restoration of the power of review of all death sentences by the Supreme People's Court to publish national statistics on the death penalty. A full explanation of the source of organ transplants would disprove the allegation of organ harvesting of Falun Gong practitioners, particularly if they could be traced to willing donors or executed prisoners. The request for an explanation for the discrepancy in the number of transplants between the years 2000 to 2005 and the numbers from identifiable sources of organs is reiterated.¹⁷"

This time the Government of China responded, by a letter sent to the Rapporteurs dated March 19, 2007 and published in the report of Professor Nowak to the UN Human Rights Council dated February 19, 2008, stating that

"Professor Shi Bingyi expressly clarified that on no occasion had he made such a statement or given figures of this kind, and these allegations and the related figures are pure fabrication."

Moreover, the Government of China, lest there be any doubt, asserted that

"China's annual health statistics are compiled on the basis of categories of health disorder and not in accordance with the various types of treatment provided."¹⁸

Shi Bingyi was interviewed in a video documentary produced by Phoenix TV, a Hong Kong media outlet. That video shows Shi Bingyi on screen saying what the Government of

¹⁷ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Addendum, Manfred Nowak, UN Document, A/HRC/7/3/Add.1, 19 February 2008, paragraph 36; Report of the Special Rapporteur on freedom of religion or belief, Addendum, Asma Jahangir, UN Document A/HRC/7/10/Add.1, 28 February 2008, paragraph 40 and 41.

¹⁸ UN Document A/HRC/7/3/Add.1

China, in its response to Nowak, indicates he said, that the figures we quote from him he simply never gave. He says on the video:

"I did not make such a statement because I have no knowledge of these figures I have not made detailed investigation on this subject how many were carried out and in which year. Therefore I have no figures to show. So I could not have said that."

Yet, the actual source of the quotation is footnoted in our report. It is a Chinese source, the Health News Network. The article from the Network was posted on the website for transplantation professionals in China¹⁹. The text, dated 2006-03-02, stated, in part, in translation:

"Professor Shi said that in the past 10 years, organ transplantation in China had grown rapidly; the types of transplant operations that can be performed were very wide, ranging from kidney, liver, heart, pancreas, lung, bone marrow, cornea; so far, there had been over 90,000 transplants completed country-wide; last year alone, there was close to 10,000 kidney transplants and nearly 4,000 liver transplants completed."

This article, in June 2008, remained on its original Chinese website, though it has been taken down since. The original source of the information remained available within China through the internet at the time Shi Bingyi denied the information.

Moreover, the information in this article continues to be recycled in Chinese publications. The official web site of the Minister of Science and Technology of the People's Republic of China posts a newsletter of June 20, 2008 which states:

"Up to date, China has performed some 85,000 organ transplants, only next to the United States in number. In recent years, China performed organ transplants on

¹⁹ <www.transplantation.org.cn>

more than 10,000 patients a year...Liver transplants have exceeded 10,000 in number... Heart transplants went over 100 in number..."²⁰

The number of 90,000 total transplants in 2006 and only 85,000 total transplants in 2008 are not consistent and call for an explanation only those who provide the statistics can give. What is striking about the later article, aside from the statistical mismatch, is that it flies in the face of the official Chinese statement to the Rapporteurs that China's health statistics are compiled on the basis of categories of health disorder and not in accordance with the various types of treatment provided.

So what we have is a statement from Shi Bingyi on a Chinese based web site which was extant at the time of the denial, a statement which Shi Bingyi publicly denied ever having said. Moreover, despite the continued presence on this website of a statement showing that Shi Bingyi said what we wrote he said, the Chinese government accused us of fabricating the words we attributed to Shi Bingyi.

Neither the Government of China nor Shi Bingyi claim that the Health News Network had misquoted or misunderstood what Shi Bingyi said. At the time of the denial, there was no effort to hide or mask or take down from the internet the publicly posted article of the Health New Network where Shi Bingyi was quoted. The continuation of this article on a Chinese web site at the same time as China was removing from the internet so much other information about organ transplants which we used to come to our conclusions amounted to a continuation to assert what is to be found in that article.

b) Death penalty statistics

China does not provide death penalty statistics. This issue was raised by the United Nations Universal Periodic Review Working Group in February 2009. The Universal

²⁰ <<http://www.most.gov.cn>>

Periodic Review is a new element of the United Nations Human Rights Council which was created in 2006 to replace the failed UN Human Rights Commission. Under the Universal Periodic Review, every state gets reviewed once during a four year cycle. China's turn came up February 2009 in Geneva.

Only states can intervene in the Universal Periodic Review Working Group debate. But it can be any state; it does not have to be a state which is a member of the Human Rights Council. The debate is an interactive dialogue, meaning China has a right to respond.

At the Universal Periodic Review Working Group, Canada, Switzerland, United Kingdom, France, Austria, Italy recommended that China publish death penalty statistics. The Government of China said no to this recommendation.

c) Registries

The China Liver Transplant Registry in Hong Kong²¹ used to provide public access to statistical aggregate data but has now closed off the site. Access is available only to those who have a Registry issued login name and password. The other three registries, kidney²² and heart²³ in Beijing and lung²⁴ in Wuxi, are also accessible only to those who have registry issued login names and passwords.

d) Donations

²¹ Liver Transplant Registry, www.cltr.org, Queen Mary Hospital, The University of Hong Kong, Hong Kong

²² Kidney Transplant Registry, www.csrkt.org

²³ PLA No. 309 Hospital, Beijing, Heart Transplant Registry, www.cotr.cn, effective from April 2010, Fuwai Cardiovascular Hospital, Chinese Academy of Medical Sciences, Beijing

²⁴ Lung Transplant Registry, www.cotr.cn, effective from April 2010, Wuxi People's Hospital, Wuxi

We do know that organs are not coming from donations. The Government of China announced in August 2009 an organ donation system as a pilot project in ten locations. The Chinese Ministry of Health, under the supervision of the Chinese Red Cross, in March 2010 set up an organ donation system in 11 provinces and municipalities.

The newspaper Beijing Today reported in March 2011, one year later, "In Nanjing, the capital of Jiangsu Province, [one of the eleven sites], the not one person has elected to be a donor." Liu Wenhua, a member of the Red Cross of Nanjin and one of 12 donation counsellors sent by the city government to five hospitals said "only three people in Nanjing have donated organs in the past 20 years". The story goes on to note: "Success was equally absent in other regions. As of last Thursday, only 37 people nationwide had registered to donate their organs."²⁵ These were donations not of actual organs but just promises of donations of organs on death.

e) Brain dead

We also know that organs are not coming from accident victims, the brain dead, cardiac alive. The Government of China has committed to enacting a law to legalize organ harvesting from the brain dead. The official Chinese government report on the original proposal for the law change about organ transplants which took effect on July 1, 2006 quoted unnamed sources as saying that the regulation would "introduce, for the first time in China a set of medical standards on brain death"²⁶.

This promise has been repeated many times since. The promise is now over five years old. Yet, still the law prohibiting the sourcing of organs from the brain dead cardiac alive

²⁵ Han Manman "Organ donor pilot a failure after one year"
 March 18, 2011
<http://www.beijingtoday.com.cn/feature/organ-donor-pilot-a-failure-after-one-year>

²⁶ "Organ Transplant Regulation Drafted" China Daily March 13, 2006 <china.org.cn>

remains.

9. No advertising

The May 2008 Declaration of Istanbul on Organ Trafficking and Transplant Tourism sets out principles and proposals. It was a produce of an international summit on transplant tourism and organ trafficking convened by The Transplantation Society and International Society of Nephrology in Istanbul, Turkey, April 30 through May 2, 2008²⁷. One of the principles in the Declaration is this:

"6. Organ trafficking and transplant tourism violate the principles of equity, justice, and respect for human dignity and should be prohibited. ... In Resolution 44. 25, the World Health Assembly called on countries to prevent the purchase and sale of human organs for transplantation.

a. Prohibitions on these practices should include a ban on all types of advertising (including electronic and print media), soliciting, or brokering for the purpose of transplant commercialism, organ trafficking, or transplant tourism."

Web sites in China which used to advertise prices of organ transplants and short waiting times for transplants have mostly disappeared. We have archived the sites, but the sites are no longer visible from their sources.

There still remains though at least one visible sight. The Omar Health Care Service website offers to foreigners transplants at The Tianjin Oriental Organ Transplant Center²⁸. The website languages are English and Arabic.

10. No membership

²⁷ Clin J Am Soc Nephrol 3: 1227 - 1231, 2008

²⁸ <http://cntransplant.com/> and <http://cntransplant.com/index1.htm>

The Transplantation Society on November 6, 2006 recommended a set of principles for its member when interacting with individuals or transplant programs in China. Among these were that only those doctors who agree to conduct clinical practice according to The Transplantation Society policy should be permitted to become members. That policy opposes the recovery of organs from prisoners.

The World Medical Association at its General Assembly, in Pilanesberg, South Africa, in October 2006 adopted a resolution stressing the importance of free and informed choice in organ donation, stating that prisoners and other individuals in custody were not in a position to give consent freely, and demanding that the Chinese Medical Association condemn any practice in violation of these ethical principles and basic human rights and ensure that Chinese doctors were not involved in the removal or transplantation of organs from executed prisoners. The resolution demanded that China immediately cease the practice of using prisoners as organ donors.

The World Medical Association issued a press release on October 5, 2007 announcing that it had reached an agreement with the Chinese Medical Association against transplantation of prisoners' organs, except for members of their immediate family. The agreement was reported at that day's meeting of the World Medical Association annual General Assembly in Copenhagen. The Chinese Medical Association undertook to promote the strengthening of management of human organ transplantation and prevent possible violations of the regulations against the sale of organs made by the Chinese Government.

The Chinese government has shrugged off the agreement between the World Medical Association and the Chinese Medical Association at the Copenhagen General Assembly. Liu Zhi, from the CMA international department, told the Sydney Morning Herald in October 2007 said that the agreement had no legal effect²⁹.

²⁹ Mary-Anne Toy, "Olympic jitters behind China's organ pledge" Sydney Morning

Liu Zhi expressed the hope that the agreement would influence the government. Yet, he also said that the current transplant system in China is "clean". It is hard to know what influence Mr. Liu could expect the agreement to have on the government when he was not prepared to acknowledge that the system had any problems.

11. No presentation of studies or research

The Transplantation Society recommended as principles for its member when interacting individuals or transplant programs in China that

- a) presentations of studies involving patient data or samples from recipients of organs from prisoners should not be accepted at The Transplantation Society meetings.
- b) members of The Transplantation Society should not carry out pre-clinical or clinical research projects in collaboration with groups from China if any material is derived from prisoners or recipients of organs from prisoners.

Some professional transplantation journals have developed an editorial policy about contributions which rely on data from abusive transplant practices. The Editors and Associate Editors of the journal *Liver Transplantation* wrote that they "have decided that original publications dealing with clinical liver transplantation outcomes submitted to this journal should explicitly exclude the use of executed prisoners or paid donors as a source of donor organs."³⁰

The American Journal of Transplantation issued as instructions to authors a new policy effective May 2011 which states:

"AJT will not accept manuscripts whose data derives from transplants involving

Herald, October 10, 2007

³⁰ Issue 13:182, 2007.

organs obtained from executed prisoners. Manuscripts writing about this practice (e.g. an editorial or a report recounting the secondary consequences of this practice) may be considered at the discretion of the Editorial Board, but require a written appeal to the Board prior to submission of the manuscript.

12. No training

On the issue of training, the transplant profession has been divided. Some professionals say yes to training persons from programs which use organs from prisoners. Others refuse to offer training to such persons.

The Transplantation Society stands in favour of training. Its November 2006 policy on contact with China says this:

"6. Should members of The Transplantation Society accept clinical or pre-clinical trainees from transplant programs that use organs or tissues from executed prisoners?

Yes. To promote dialogue and to educate such trainees in appropriate and effective alternatives to the use of organs or tissues from executed prisoners, trainees may be accepted. Care should be taken to ensure, as far as possible, that it is their intention that their clinical career will comply with the standards of practice outlined in The Transplantation Society Policy & Ethics Statement."

Hospitals in Australia have taken an opposite tack. Neil Laurie, Clerk of the Queensland Parliament, by letter dated November 1, 2006, sent a petition to Stephen Robertson, the Minister of Health for the Queensland Government in Australia, asking for an investigation of the forced organ harvesting from Falun Gong. The Minister of the Queensland, on December 1, 2006 in response, wrote that the Prince Charles Hospital has "a policy of not training any Chinese surgeon in any transplant surgical technique" and that the Princess Alexandra Hospital "does not undertake any sponsored organ transplant research or

training with China."

The Prince Charles and Princess Alexandra Hospitals are the two major transplant hospitals in Queensland. I have been told informally that, though no other Australian State Health Minister has issued a similar statement, other transplant hospitals in Australia now follow a similar policy.

In my view the Australian hospital policy is preferable to The Transplantation Society policy. There is a cachet for Chinese professionals in all walks a life to being published in a professional journal, being invited to speak at a professional conference, or being trained at a professional institution with a global reputation. Denying to Chinese transplant professionals the hope of that cachet if they participate in organ transplant abuse creates a disincentive to that abuse. It is a mistake to cut off the use of that disincentive.

13. Pharmaceutical due diligence

Amnesty International in August 2010 issued an appeal which stated:

"Companies should exercise due diligence to ensure that they are not directly or indirectly implicated in the taking or use of organs from executed prisoners."

It called on pharmaceutical companies

"to collectively:

- declare their commitment to respecting human rights;
- condemn the practice of sourcing organs from executed prisoners; and
- undertake to carry out human rights due diligence, including throughout their value chains, so as to become aware of, prevent and address adverse human rights impacts, and to ensure that they do not directly or indirectly assist, encourage or support the sourcing of organs from executed prisoners."³¹

Drug company Novartis stated in August 2010 that it was observing a moratorium for its clinical immunosuppressive drug trials in China. Its spokesman, Satoshi Sugimoto, declared that Novartis supported the public statement of Amnesty International and would work on bringing together the stakeholders for the next steps³².

Other companies though - Astellas, Roche, Pfizer - do engage in clinical drug trials in China³³. Their failure to follow the example of Novartis is regrettable.

14. No insurance

The October 2010 policy statement on organ trafficking and transplant tourism of the Canadian Society of Transplantation and Canadian Society of Nephrology, under the heading "Recommendations for Pre-transplant Counselling, sets out this principle:

"5. Health care providers should inform patients that individual provinces or territories usually will not extend insurance coverage for medical or surgical expenses incurred by patients in jurisdictions outside Canada related to the transplantation of an organ obtained through transplant tourism ...

Israel passed a law banning the sale and brokerage of organs³⁴. The law as well ended funding through the health insurance system of transplants in China for Israeli nationals.

<http://www.amnesty.ch/de/themen/wirtschaft-menschenrechte/dok/2010/amnesty-international-calls-for-the-end-to-the-use-of-organs-from-executed-prisoners>

³² "Appel à clarifier les prélèvements d'organes sur des prisonniers en Chine" Frédéric Koller/Le Temps <<http://www.infosud.org/spip.php?article8664>>

³³ David Matas "Anti-rejection Drug Trials and Sales in China" talk delivered to the American Transplant Congress, Philadelphia, April 30, 2011, posted at <www.dafoh.org>.

³⁴ Shahar Ilan, *With top rabbis' blessing, Knesset approves organ donation*, Haaretz 24/03/2008

The Israeli Organ Transplant Law 2008 states

"This chapter does not forbid performance of organ transplantation outside Israel, including reimbursement of such transplant, as long as both of the following are maintained:

1. Organ procurement and transplantation have been performed according to local laws;
2. All the provisions of this law against the trade in organs have been respected."³⁵

It further states under the heading "Penalties", which are potentially three years in prison and a fine:

"The above penalties will apply whether organ procurement or transplantation has been performed in Israel or anywhere outside Israel"³⁶.

15. No complicity

a) Belgium

Two Belgian senators Patrik Vankrunkelsven and Jeannine Leduc introduced into the Belgian Parliament on November 30, 2006 a law which addresses organ transplant tourism³⁷. The law inserts a provision into an existing law on organ transplants³⁸.

The insertion prohibits the undergoing of transplants outside the European Union in three circumstances. The first is that there is evidence indicating that the source of the organ is a living person who has not consented. The second is that there is evidence indicating that the source of the organ is a prisoner sentenced to death. The third is that the amount paid for the transplant is so large that it creates a presumption that the organ was

³⁵ Clause 5

³⁶ Clause 36(B).

³⁷ SÉNAT DE BELGIQUE SESSION DE 2006-2007, December 13, 2006

³⁸ la loi du 13 juin 1986 sur le prélèvement et la transplantation d'organes

sold for profit.

A person who undergoes a transplant in violation of this prohibition is subject to a fine of between 500 and 5,000 Euros. The penalty can be avoided if the person who underwent the transplant can prove that the organ was not harvested from a living person who has not consented or a prisoner sentenced to death and that the organ was not sold for profit. The law gives the government the authority to establish a list of medical institutions outside the European Union to which a person can go for a transplant without the necessity of proving these matters.

The authors of proposed legislation appended a commentary which explains that the law provides that whoever undergoes an organ transplant outside of the European Union must personally assure him or herself that the organ was donated willingly and did not come from a prisoner sentenced to death, who is presumed not to be able to decide without constraint. Also, anyone who pays a large sum must assume that this payment is not a simple reimbursement for costs incurred. If the organ recipient can not prove the opposite, the recipient subject is subject to punishment.

The government can establish a list of medical institutions for which these negative presumptions do not apply. If the patient receives a transplant in one of the listed institutions, he or she does not have to discharge a burden of proof and is therefore not liable to punishment.

It follows that, if the patient must undergo an organ transplant outside of the European Union, it would be preferable that the patient goes to a medical institution on the list. Otherwise, the patient must be especially vigilant and verify the source of the organ received.

The background note stated that the proposed law was aimed at preventing Belgians from being tempted by the sale of organs in violation of ethical standards. The authors of the proposed legislation wrote that if the countries from which patients now go systematically to China instituted a ban, the encouragement for the sale of organs would end.

b) Canada

i) Proposed legislation

A Canadian Member of Parliament Borys Wrzesnewskyj introduced into the Parliament of Canada proposed extraterritorial legislation banning transplant tourism. The proposed legislation was introduced twice, into two successive Parliaments, the first time as Bill C-500 on February 5, 2008, the second time as Bill C-381 on May 7, 2000.

The Bill creates a number of distinct offences. All the offences have extraterritorial effect. They are punishable whether the acts are committed inside or outside Canada.

One set of offences deals with absence of consent. Every one commits an offence who receives the transplant of an organ removed without the donor's consent and knew or ought to have known, at the time of the transplant or earlier, that the organ was removed without the donor's consent. A person commits an offence if the person participates in the removal of an organ or other body part without the donor's consent. A person offends if the person knowingly acts on behalf of a person who removes an organ or other body part without the donor's consent or of a person who purchases the organ.

A second set of offences deals with the sale of organs. An offence is committed by a person who obtains an organ with the intention of having that organ transplanted and knew or ought to have known, at the time of the acquisition or earlier, that the organ part was acquired as a consequence of a financial transaction. There is an offence committed when a person participates in the acquisition of an organ, and knew or ought to have

known, at the time of acquisition or earlier, that the organ was acquired as a consequence of a financial transaction.

ii) Ethics

The October 2010 policy statement on organ trafficking and transplant tourism of the Canadian Society of Transplantation and Canadian Society of Nephrology, under the heading Guidance regarding the "Pre-transplant Evaluation of Transplant Candidates", has these principles:

- "1. ... Physicians should not prescribe medications or otherwise facilitate obtainment of medications that will be used during the transplantation of a purchased organ...
2.individual physicians may elect not to provide medical records to patients if they believe the information will be used in support of an illegal transplant performed in an unregulated system and that there is a significant risk of harm to the patient or organ vendor."

16. Oversight

The Assembly of the World Health Organization, on 22 May 2004, passed a resolution urging Member States

"to implement effective national oversight of procurement, processing and transplantation of human cells, tissues and organs, including ensuring accountability for human material for transplantation and its traceability".³⁹

The Chinese interim provisions and regulation require civilian hospitals engaged in transplants to be registered with the Ministry of Health⁴⁰. Unregistered civilian hospitals

³⁹ WHA57.18 Agenda item 12.14

⁴⁰ Regulation Article 11. Interim Provisions chapter two article 15.

could not be engaged in transplants. Civilian medical practitioners cannot carry out organ transplants unless registered to carry out transplants with their professional medical association⁴¹.

Though real, the change has limited significance. For one, it applies to civilian hospitals only. Military hospitals and military medical practitioners, which sell transplants as a business, are immune from the change, since the changes were edicted by the Ministry of Health and that Ministry has no control over the military.

Hospital registration provides a mechanism for control to prevent abuse. However, it does not mean that the mechanism is actually working. The murkiness of the workings of the Chinese health system prevents any assessment of the value of registration.

Institutions to be registered must have:

- i) the capacity to carry out organ transplants;
- ii) suitable technology, equipment, facilities;
- iii) a functioning ethics committee;
- iv) a quality inspection and control policy⁴².

Provincial health administrative departments are required to have experts evaluate transplant treatment⁴³. Evaluation must be objective, impartial and scientific. There must be a complete, archived record of the evaluation process and content.

Provincial health administrative departments are to provide specialized courses to increase organ transplant institution registration. These departments must provide to the Ministry

⁴¹ Article XVI.

⁴² Regulation article 11.

⁴³ Regulation article 14.

of Health and announce to the public the list of registered institutions and practicing physicians.

Organ transplants can be carried out in non-registered hospitals in emergency situations, for instance, where the organs can not be delivered in a timely fashion to a registered institution or where the patient is in a critical condition. If in a registered medical institution conditions change such that the criteria for registration are no longer met, the institutions shall stop doing transplants.

Before the registration requirement, there were an estimated 1,000 hospitals engaged in transplants. About 600 civilian hospitals applied for registration. The Ministry of Health announced in August 2007 that 164 applications were granted⁴⁴. By August 2009, the Ministry of Health had revoked the licenses of 16 for failing to comply with the registration criteria⁴⁵.

Despite the registration system, transplant abuse in China appears to be increasing because the death penalty is decreasing and transplant volumes, after a dip in 2007, have returned to traditional levels. Since there is no significant alternative increasing sourcing, this combination must mean that the sourcing from prisoners other than prisoners sentenced to death, that is to say prisoners of conscience and principally Falun Gong practitioners must be increasing.

17. Reporting

a) Canada

⁴⁴ Jim Warren "China moving rapidly to change transplant system to comply with international ethics, standards practice" Transplant News, September 2007

⁴⁵ Peter Foster, "China admits organs removed from prisoners for transplants" Daily Telegraph, August 26, 2009

The Canadian proposed law sets up a certification procedure. Anyone who has a transplant must within 30 days after the transplant obtain a certificate establishing that the organ was donated and that no money was paid for it and provide that certificate to a designated Canadian authority. A Canadian citizen or a permanent resident who has a transplant outside Canada must provide the certificate to the designated Canadian authority at the latest upon return to Canada.

The proposed law sets up reporting requirements. Doctors and nurses must report to the designated Canadian authority the identity of any person examined who has had an organ transplant.

b) France

French Parliamentarian Valérie Boyer on 19 October 2010 along with several other members of the National Assembly proposed a law which sets out certificate and reporting requirements similar to the Canadian proposed law. The proposed law requires every French citizen and habitual resident who undergoes an organ transplant abroad to acquire at the latest 30 days after the transplant a certificate stating that organ was donated without payment. The organ recipient must provide the certificate to the French Biomedical Agency before returning to France.

The proposed legislation requires every doctor to report to the Biomedical Agency the identity of every person the doctor examined who underwent a transplant. The proposed law in turn requires the Biomedical Agency to report to the Public Department any person who there are reasonable grounds to believe was involved in a financial transaction to obtain an organ.

18. Protecting the vulnerable from transplant tourism

The Assembly of the World Health Organization May 2004 resolution urges Member States

"(5) to take measures to protect the poorest and vulnerable groups from 'transplant tourism' and the sale of tissues and organs, including attention to the wider problem of international trafficking in human tissues and organs;"

Chinese patients are now given priority access to organ transplants, taking precedence over foreigners. The Ministry of Health of the Government of China announced that change on June 26, 2007⁴⁶. The priority includes permanent residents of China from Hong Kong, Macau and Taiwan.

Transplants to foreigners under this policy are still possible. The priority to locals is not a ban on transplants to foreigners. Rather for foreigners, the procedure is different. Foreign transplants must be approved by the Ministry of Health.

A priority given to Chinese patients is real, though not total. Transplant tourism into China has decreased, but not ended. This change in the demand does nothing to change the supply. Sourcing is as disreputable as ever.

The form of the WHO resolution is respected, but not the substance. The vulnerable are still victimized. The shift to local patients has done nothing to end abusive sourcing.

This change has a cosmetic effect, since finding out from Chinese patients in China about what goes on during the transplant process is almost impossible. Foreign transplant tourists or their families or their local doctors involved in after care have been in many cases forthcoming, providing valuable information about the workings of the Chinese transplant system.

Conclusion

⁴⁶ "Foreign Applications for Organ Transplant Restricted" <china.org.cn>

Transplant tourism into China and Chinese Government transplant abuse have spurred the development of standards in what was largely a norm free zone. The development of these standards in turn has influenced Chinese Government behaviour. Abuses nonetheless still persist.

In recent years, there has been a substantial improvement in China in the demand side of the equation. Foreign transplant tourism into China has dropped significantly.

However, the supply side of the equation, the sourcing of organs, still remains almost entirely abusive. In light of the drop in the death penalty without any commensurate increase from voluntary donor sources, sourcing in China from Falun Gong killed for their organs must have increased substantially.

For change to be effective there have to be first standards and then implementation. The developers of transplant technology were blind sided by Chinese abuse. They could hardly have anticipated what the Chinese Communists ended up doing, killing innocents for their organs as a way of shoring up the finances of a hospital system losing state funding in the shift from socialism to capitalism.

The Chinese health system abuse has led to an after the fact international scramble for standards and implementation. We are still in the standards setting phase, without much in the way of implementation. Many of the changes we have seen so far in China are cosmetic, attempts to counter the charges of abuse through camouflage and obfuscation rather than through correction, mutations without progress.

The Chinese health system is now so hooked on the funding which comes from abusive transplants, it will be difficult to see how, as long as the Communists remain in power, this abuse will ever end. Nonetheless, the standard setting exercise is a necessary prelude to

implementation.

The killing of prisoners of conscience for their organs was a violation of basic rights even before the transplantation standard setting exercise began. Nonetheless the standard setting exercise is worthwhile as a means of drawing attention to the phenomenon of abuse, mobilizing concern and particularizing the specific application of general standards to the situation at hand. The more specific the standards, the more clear the violation.

It is tragic that the Chinese abuse has necessitated this standard setting exercise. Here, as elsewhere, the development of standards comes from a need to end flagrant wrongs. Through a focus on Chinese health system abuse, the international community is now developing a set of standards which says that what is happening in China should not be happening.

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