

Transplant ethics as a source of international law

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by David Matas

I. The facts

The development of transplant technology has led to transplant abuse. A particularly acute problem is that in China the almost exclusive source of organs used in transplants is prisoners, a sourcing that the Government of China acknowledges and defends. I and others have concluded that these prisoners were mostly prisoners of conscience, practitioners of the spiritually based set of exercises Falun Gong, killed for their organs.

While it would take me too far afield to go through all the evidence which led us to that conclusion, I will mention a few bits.

- Investigators made calls to hospitals throughout China, claiming to be relatives of patients needing transplants, asking if the hospitals had organs of Falun Gong for sale on the basis that, since Falun Gong through their exercises are healthy, the organs would be healthy. We obtained on tape, transcribed and translated admissions throughout China.
- Falun Gong practitioners who were detained and who then got out of detention and out of China told us that they were systematically blood tested and organ examined while in detention. Other detainees were not. The blood testing and organ examination could not have been for the health of the Falun Gong since they had been tortured; but it would have been necessary for organ transplants.
- Falun Gong practitioners who came from all over the country to Tiananmen Square in Beijing to appeal or protest were systematically arrested. Those who revealed their identities to their captors would be shipped back to their home localities. Their immediate environment would be implicated in their Falun Gong activities and penalized.

To avoid harm to people in their locality, many detained Falun Gong declined to identify themselves. The result was a large Falun Gong prison population whose identities the authorities did not know. As well, no one who knew them knew where they were. This population is a remarkably undefended group of people, even by Chinese standards. This population provided a ready source for harvested organs.

- China maintains what the Government of China euphemistically calls re-education through labour camps. These camps are both arbitrary detention slave labour camps and vast live organ donor banks. The United States Department of State's Country Reports for China report that foreign observers estimate that Falun Gong adherents constitute at least half of the inmates in the country's re-education through labour camps.

- China has two parallel power structures, a Communist Party structure and a state structure. The Party structure governs the state structure. Every state position up and down the system, in the centre and the regions, has a parallel Party position. It is the Party organ which instructs the parallel state organ.

The Party established an office for the repression of Falun Gong called the 610 office, named after the date of its establishment, the 10th day of the sixth month, June, of 1999. The 610 office is a Party office only, not a state office. The 610 office is the instrument of the Party instructing the police, the prisons, the labour camps, the prosecution and the courts on the repression of Falun Gong. Because persecution of the Falun Gong is Party directed, deflecting it, avoiding it, or combating it, is a political impossibility.

- The Party has engaged a prolonged, persistent, vitriolic national and international campaign of incitement to hatred against Falun Gong. The campaign has prompted their marginalization, depersonalization and dehumanization in the eyes of many Chinese

nationals. To their jailors, Falun Gong are not human beings entitled to respect for their human rights and dignity.

- Waiting times for transplants of organs in China are days and weeks. Everywhere else in the world waiting times are months and years. A short waiting time for a deceased donor transplant means that someone is being killed for that transplant.
- There is no other explanation for the transplant numbers than sourcing from Falun Gong. China is the second largest transplant country in the world by volume after the US. Yet, until 2010 China did not have a deceased donation system and even today that system produces donations which are statistically insignificant. The living donor sources are limited in law to relatives of donors and officially discouraged because live donors suffer health complications from giving up an organ.

The Government of China does acknowledge that the overwhelming proportion of organs for transplants in China comes from prisoners but asserts that the prisoners who are the sources of organs are all sentenced to death. Yet, the number of prisoners sentenced to death and then executed that would be necessary to supply the volume of transplants in China is far greater than even the most exaggerated death penalty statistics and estimates. Moreover, in recent years, death penalty volumes have gone down, but transplant volumes, except for a short blip in 2007, remained constant.

Practitioners of Falun Gong, the prisoners who are, in my view and the view of several others, sources of most of the organs for transplants, have been given short sentences for disrupting social order. Alternatively they are sentenced to nothing and just arbitrarily detained.

- The Government of China accepts that sourcing of organs for transplants from prisoners is

ethically wrong. The Government in March 2012 committed to ending the reliance on prisoners for organs in five years. The Government further indicated that this phasing out would start in this year, 2013.

A Government official, then Deputy Health Minister Huang Jiefu, went further, conceding in a mid November 2006 speech that "too often organs come from non consenting parties". The World Health Organization Guiding Principle 11 requires transparency of sources, open to scrutiny, while ensuring that personal anonymity of donors and recipients are protected. China does not respect this principle, so that claims of consent which sometimes are made, despite what Huang Jiefu said, are unverifiable. As well, because prison is a coercive environment, consent in such a context is not meaningful.

- The standards and mechanisms which should be in place to prevent the abuse are not in place, neither in China nor abroad. International organ transplant abuse should be treated like international child sex tourism, an offence everywhere with extraterritorial effect. However, so far that is not the case.

On the one hand, we have organ transplant abuse which is possible without legal consequences. On the other hand, we have huge money to be made from this abuse, as well as desperate patients in need of transplants. This combination is a recipe for victimization of the vulnerable. Standards and mechanisms to prevent the abuse need to be introduced.

The Transplantation Society, The World Medical Association, a group of transplant professionals through the Istanbul Declaration, the Canadian Society of Transplantation and Canadian Society of Nephrology and the World Health Organization have all developed detailed statements of transplant ethics in response to transplant abuse in China and elsewhere. They are appropriately considered as a source of developing international

transplant law.

There are international law developments to combat organ transplant abuse. There is right now in negotiation at the level of the Council of Europe a draft Convention against Trafficking in Human Organs. Several states have taken legal and policy stances to combat organ transplant abuse. In several other states, these laws and policies have been proposed and are under active consideration. This paper focuses though not on the developing international law itself but rather the sources of that development, the ethical standards of professional organizations which address organ transplant abuse.

II. The Ethical Standards

a) The Transplantation Society

The Transplantation Society, an international non governmental organization, opposed the transplantation of organs from prisoners sentenced to death in July 2006. 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."

The Society recognized that in China, prisoners sentenced to death are a major source of organs. Indeed, their statement called executed prisoners "the major source". The Society, in November 2006, then issued a letter to all its members about interaction with China on transplants which failed to draw the logical conclusion from this reality.

The Society says about the presentation of transplant studies from China at Transplantation Society meetings:

"presentations of studies involving patient data or samples from recipients of organs

or tissues from executed prisoners should not be accepted".

The November letter treats collaboration on studies the same way. It states:

"Collaboration with experimental studies should only be considered if no material derived from executed prisoners or recipients of organs or tissues from executed prisoners is used in the studies."

This November letter is even more categorical on the source of organs in China. The letter is "almost all" organs are "likely" to have been obtained from executed prisoners.

The Society will permit doctors from China to become members of the Society only if they "sign the Statement of The Transplantation Society for Membership agreeing to conduct clinical practice according to The Transplantation Society policy".

When it comes to clinical or pre clinical trainees from transplant programs that use organs or tissues from executed prisoners, the policy states that "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".

On transplant tourism, the Transplantation Society Policy and Ethics statement provides:

"Transplant tourism is a recently described phenomenon that may entail exploitive practices of organ transplantation for recipients who travel outside their country of residence to purchase an organ from a vendor. A practice of transplant tourism that has no transparency or professional oversight violates ethical principles of care. The Transplantation Society is opposed to practices of transplant tourism that exploit donors and recipients."

b) World Medical Association

In a news release dated 5 October 2007 the World Medical Association announced at the annual General Assembly in Copenhagen an agreement with the Chinese Medical Association. The Chinese Medical Association agreed that organs of prisoners and other individuals in custody must not be used for transplantation, except for members of their immediate family.

In a letter to the World Medical Association, the Vice President and Secretary General of the Chinese Medical Association, Dr. Wu Mingjiang, said:

"We would like to inform you that after discussions in the Chinese Medical Association, a consensus has been reached, that is, the Chinese Medical Association agrees to the World Medical Association Statement on Human Organ Donation and Transplantation, in which it states that organs of prisoners and other individuals in custody must not be used for transplantation, except for members of their immediate family.

The Chinese Medical Association will, through its influence, further promote the strengthening of management of human organ transplantation and prevent possible violations of the regulations made by the Chinese Government. We also hope to work more closely with the WMA and exchange information and views on the management of human organ transplantation."

Dr Edward Hill, chair of the World Medical Association, said the announcement by the Chinese Medical Association was a very positive step forward and added:

"We shall now continue our dialogue with the Chinese Medical Association and include other national medical associations in a project to find best practice models for ethically acceptable organ procurement programmes. This would help not only China and its high demand for organs, but also other regions in the world that have the same problems of coping with a severe shortage of organs."

Liu Zhi, of the Chinese Medical Association's international department, said that the agreement with the World Medical Association has no legal effect. He expressed the hope that the agreement would influence Chinese 500,000 doctors and government decisions.

The Chinese Medical Association agreement does not bind military doctors who are not members of the Chinese Medical Association and military hospitals. Yet, organ recipients recount that military doctors and hospitals are heavily involved in organ transplant surgery. The mere fact that the recipient is an immediate family member of the prisoner does not automatically mean that the prisoner has freely consented to the donation.

The World Medical Association adopted a statement on organ and tissue donation at its General Assembly in Bangkok, Thailand, October 2012 which provides that detainees should be eligible to donate after death only where

- a) there is evidence that this represents their long standing and considered wish and safeguards are in place to confirm this;
 - b) their deaths are from natural causes; and
 - c) the organs are donated to a close relative either.
- The statement further provided that in jurisdictions where the death penalty is practised, executed prisoners must not be considered as organ and/or tissue donors because it is impossible to put in place adequate safeguards to protect against coercion in all cases.

The statement provided that transplant surgeons should seek to ensure that the organs and tissues they transplant have been obtained in accordance with the provisions of this policy; they should refrain from transplanting organs and tissues that they know, or suspect, have not been procured in a legal and ethical manner. "This policy" included these provisions: "Organs or tissue suspected to have been obtained through unlawful means must not be accepted for transplantation." and "Organs and tissues must not be sold for profit".

c) The Istanbul Declaration

A group of transplant professionals met in Istanbul Turkey in May 2008 and produced a declaration by consensus under the title "The Declaration of Istanbul on Organ Trafficking and Transplant Tourism" . The Declaration provided that "The legacy of transplantation is threatened by organ trafficking and transplant tourism."

Participants in the Istanbul Summit concluded that transplant commercialism, transplant tourism, and organ trafficking should be prohibited. Transplant tourism was defined to include travel for transplantation involving organ trafficking or transplant commercialism.

d) Canadian Society of Transplantation and Canadian Society of Nephrology

The Transplantation Society policy is primarily directed to non-Chinese transplant professionals interacting with Chinese transplant professionals. The World Medical Association has the Chinese Medical Association as a member. The World Medical Association is primarily directed to transplant professionals who are members of its national affiliates, including the Chinese Medical Association.

The Canadian Society of Transplantation and Canadian Society of Nephrology in October 2010 issued a policy statement on Organ Trafficking and Transplant Tourism which is primarily directed to Canadian professionals treating patients who may go or may have gone for transplantation abroad. That policy provides:

1. Patients who are candidates for transplantation should receive information about the dangers and ethical concerns regarding transplant tourism and organ trafficking. Patients should be told that individuals who purchase transplants overseas are at an increased risk for complications, including death, organ failure, and serious infections.

2. Patients should be told that those who obtain a transplant overseas may receive suboptimal care even when they return to Canada. One reason is poor documentation and communication about the transplant procedure. Canadian health care providers often receive little or documentation of commercial transplantations making the post transplant care of recipients of commercial transplantations more difficult. A second reason is that patients are transferred before they are clinically stable.

3. 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.

4. As members of the medical community, physicians have a duty to prevent harm to other individuals. Patients should be educated about the harms that may come to those who provide organs through transplant tourism. Patients should be told that

"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 impossible to determine whether donor information provided by organ brokers, who are motivated by financial gain, is accurate."

5. The obligation to do what is in the best interests of patients does not include the performance of investigations in preparation for transplantation of a purchased organ. Physicians should not prescribe medications that will be used during the transplantation of a purchased organ.

6. 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.

7. In nonemergency situations, individual physicians may elect to defer to another physician care of patients who may have obtained an organ through transplant tourism. The physician would discuss their preference to defer post transplant care to another physician before transplantation to avoid any expectation of post transplant care by the patient. Where a physician elects to transfer care to another physician, the patient must be provided with reasonable notice of the physician's decision to terminate the relationship and to transfer care to another physician.

e) World Health Organization

The World Health Organization, in an Assembly in May 2010 endorsed Guiding Principles on Human Cell, Tissue and Organ Transplantation. Two of these principles are traceability¹ and transparency².

Traceability requires coding to identify tissues and cells used in transplantation. Transparency requires public access to 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. The objectives are to maximize the availability of data for scholarly study and governmental oversight and to identify risks and facilitate their correction.

III. The Engine of Change

It seems that things must go badly wrong before we can get them right. There have been many positive changes in recent years to combat organ transplant abuse, though not enough. There is a direct connection between the improvements, however tentative, in

¹ Guiding principle 10

² Guiding principle 11

organ transplant standards and remedies and the dawning awareness that the Communist Party of China has been killing Falun Gong for their organs.

Transplant technology, though designed for human betterment is, like all technology, morally neutral. The innovators of transplant technology, I am convinced, never imagined that what they developed would be used to murder prisoners of conscience and sell their organs for huge sums. As the Communist Party of China though has shown in spades, transplant technology can be used to advance evil as much as good.

The global human rights, ethicist, legal, health, and transplant communities have come to realize, to all our horrors, that we can not let the intended good of transplant technology speak for itself. If we want to prevent organ transplant abuse, we have to lay in our defences against it.

While change has many parents, the driving force behind the changes I have set out has been the global Falun Gong community. I and others have approached the killing of Falun Gong as outsiders. We have produced independent, detached research, analysis, writing, advocacy and activism, all on a part time, voluntary basis. The impact of our work is attributable largely to the resonance it has had within the global Falun Gong community.

The global Falun Gong community approaches the matter differently from us - through lived experience. We can appreciate and understand. They know.

The Falun Gong are a survivor community. Many have been tortured to within an inch of their lives. Many others have lost immediate family members to Communist Party savagery. One after another surviving Falun Gong practitioner has narrowly escaped being killed for his or her organs. The Falun Gong community has seen their colleagues in the movement disappear into the Chinese organ pillaging maw.

Falun Gong are profoundly ethical. One of their founding principles is truthfulness. The Falun Gong community will persist in telling the truth about organ transplant abuse in China until that abuse ends and the perpetrators are brought to justice.

This planet will, I believe, at some point develop a proper set of global standards and mechanisms to prevent and remedy organ transplant abuse. Out of the Chinese Communist Party killing of Falun Gong for their organs will arise a global legacy, an ethical global organ transplantation system. That legacy will survive long after the Communist Party of China is a bitter, distant memory. And we will have the global Falun Gong community to thank for that legacy, because they will not rest until that legacy is built.

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