

Transplant Profession Standards as a Source of International Law

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Background

A woman with the pseudonym Annie in March 2006 made a public statement in Washington DC that her ex-husband had been harvesting the corneas of practitioners of Falun Gong for transplants sold to foreigners at high prices. She said that other doctors had been harvesting other organs, that the Falun Gong practitioners were killed through the organ extraction and their bodies cremated.

Falun Gong is a set of exercises with a spiritual foundation, roughly a Chinese equivalent to yoga, which started in 1992 with the teachings of Li Hongzhi. The Communist Party of China initially encouraged the practice of the exercises because the practice is beneficial to health, but its increasing popularity and spiritual foundation eventually led the Party to fear for the ideological supremacy of Communism. The Party decided in 1999 to repress the practice without officially banning it.

Practitioners of the exercises were arrested in the hundreds of thousands and asked to recant. If they did not, they were tortured. If they did not recant after torture, they were put into indefinite detention in re-education through labour camps.

A Washington DC based NGO, the Coalition to Investigate the Persecution of Falun Gong, in May 2006 asked David Kilgour and me to investigate whether what Annie had said was true. We concluded that practitioners of Falun Gong since 2001 had been killed for their organs throughout China in the tens of thousands. The first version of our report was July 2006; the second version was January 2007; the third version, in book form, was November 2009, under the title *Bloody Harvest: The Killing of Falun Gong for their Organs*.

As a result of our work, the American based doctor Torsten Trey founded the NGO, Doctors against Forced Organ Harvesting (DAFOH). I, with Torsten Trey co-edited a book of essays on the subject, published August 2012 under the title *State Organs: Transplant abuse in China*. The authors, from around the world, were mostly members of this new organization DAFOH.

Ethan Gutmann, an American journalist based in England in August 2014 published a third book on the subject, under the title *The Slaughter*. He concluded that the killing of prisoners of conscience for their organs in China extended beyond Falun Gong to Tibetans, Uighurs and Eastern Lightning House Christians, albeit in much smaller numbers.

One reason, amongst many, that I came to the conclusion I did that practitioners of Falun Gong were being killed for their organs was that there was nothing stopping it from happening - no laws, no standards, no ethics. There were and are, to be sure, laws in China against murder. But China is run by the Communist Party, not by the rule of law. Laws cannot be enforced against the Party; it is the Party which runs the legal system. The killing of Falun Gong for their organs in China is not a black market, but rather a component of the Party directed persecution of Falun Gong.

The Communist Party of China and its Chinese state officials contested, as one might expect, the conclusions to which I and others had come. But no one could contest the legal and ethical vacuum which was the context for the very specific evidence about organ transplant abuse. Since the first version of our report in July 2006, that context, at least outside China, has changed dramatically.

There is a direct linkage between victimization and standards. Laws both local and international are often developed in response to atrocities.

The authors of the later development of organ transplant standards did not necessarily ascribe to the conclusion to which I and others had come about the killing of prisoners of conscience for their organs. But, whether the authors of these new standards saw themselves as closing the barn door before or after horses had escaped, there developed an international consensus that this was a door which definitely needed closing.

There were many hands pushing to close this barn door. The evolution in this domain shows a direct relationship between the standards that professional associations adopted and the development of international law.

There are four particular standards in this area where this relationship was manifest. They are

- a) the prohibition against
 - i) sourcing of organs from prisoners sentenced to death,
 - ii) transplant tourism and
 - iii) collaboration with professionals engaged in organ transplant abuse, and
- b) the requirement of transparency in sourcing of organs.

It would make this paper far too long to mention all the developments relevant to these standards in national professional ethics, the bills proposed in national and provincial or state parliaments or congresses, and the laws enacted. The presentation focuses on international professional ethics and international legal developments.

Sourcing from prisoners sentenced to death

China, by volume, leads the world in transplants after the United States and has done so for many years. From where did these many organs come? The initial response of the Party/State was donations. Yet, until long after the report David Kilgour and I came out,

China did not have an organ donation system.

In July of 2005 Huang Jiefu, then Chinese Deputy Minister of Health, as a trial balloon, indicated as high as 95% of organs derive from prisoners.¹ He was able to sell this version of events to his colleagues. So eventually, it became the official version. Speaking at a conference of surgeons in the southern city of Guangzhou in mid-November 2006, Huang Jiefu said: "Apart from a small portion of traffic victims, most of the organs from cadavers are from executed prisoners"².

This explanation for sourcing, for a wide variety of reasons which it take me far too long to set out here, is not a plausible for the large majority of organs for transplant. For further elaboration, I invite you to read the essay I wrote on the subject in the book *State Organs*. This explanation for sourcing did provide the Party/State with more plausible deniability than donations because, although China did not then have a donation system for organs, it at least had the death penalty and executed prisoners in large numbers.

Practitioners of Falun Gong are not sentenced to death for practising the exercises. They are mostly not criminally charged for the practice. The few that are charged are brought to court for disrupting social order for which the maximum penalty is three years in prison.

This Party/State attempt to divert criticism by putting up a death penalty smokescreen for the killing of prisoners of conscience for their organs led in turn to an ethical reaction from the global transplant profession. The profession said that persons sentenced to death and then executed should not be organ harvested.

¹ 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.

² http://news3.xinhuanet.com/english/2006_11/16/content_5335427.htm

The Transplantation Society, a global association of transplant professionals, almost immediately after the first version of our report came out, in July 2006, published a statement that the Society was "opposed to any use of organs from executed prisoners".

The Transplantation Society statement said:

"Currently, in the People's Republic of China, the major source of organs is from executed prisoners. It has been estimated that, annually, there are now more than 5000 transplants from executed prisoners in China. Not only are these transplants being provided for national Chinese patients, such organs are also transplanted to foreign candidates going to China to pay for an organ transplant. The Transplantation Society is concerned that the financial incentive for recovering organs from executed prisoners may become an incentive to increase the number of such organs available for transplantation."

The World Medical Association followed suit, albeit many years later in 2012. At their Bangkok Assembly, the WMA adopted a Statement on Organ and Tissue Donation which provided:

"In jurisdictions where the death penalty is practised, executed prisoners must not be considered as organ and/or tissue donors. While there may be individual cases where prisoners are acting voluntarily and free from pressure, it is impossible to put in place adequate safeguards to protect against coercion in all cases."

The Transplantation Society and the Declaration of Istanbul Custodian Group in an open letter to the President of China in February 2014 wrote:

"Some Chinese officials contend that prisoners give 'consent' before their execution. It is obvious, however, that prison inmates condemned to death are not truly free to make an autonomous and informed consent for organ donation and that no legal due process exists to assure consent."

Both the United Nations and the Council of Europe have treaties on human trafficking which prohibit the removal of organs for sale without consent. The Council of Europe has in addition a specific Convention on organ trafficking. The UN treaty is a protocol to the Convention against Transnational Organized Crime which entered into force in December 2003. The Council of Europe Convention entered into force in December 2005.

The Council of Europe Convention against Trafficking Human Organs is much more recent. It opened for signature in March this year, 2015. It has not yet entered into force.

The first Council of Europe Convention states simply in Article 18:

"Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct contained in article 4 of this Convention, when committed intentionally."

Article 4 contains the definition of trafficking, which included organ trafficking.

This provision is similar to a provision in the UN Protocol. The Protocol states:

"Article 5

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally."

The second Council of Europe Convention is far more specific. One specific penalty provision is this:

"Article 4 - Illicit removal of human organs

1 Each Party shall take the necessary legislative and other measures to establish as a criminal offence under its domestic law, when committed intentionally, the removal of human organs from living or deceased donors:

a. where the removal is performed without the free, informed and specific consent of the living or deceased donor, or, in the case of the deceased donor, without the removal being authorised under its domestic law;"

That Convention can be signed by the member States of the Council of Europe, the European Union and the non-member States which enjoy observer status with the Council of Europe. It is also can be signed by any other non-member State of the Council of Europe upon invitation by the Committee of Ministers.³

The Chinese practice of killing prisoners of conscience for their organs can, and in my view should, be attacked frontally. Nonetheless, the instinct of the global transplant profession has been to attack the abuse obliquely, in this instance, by attacking the cover, the pretence that the source of organs was almost all prisoners sentenced to death and then executed.

At one time I myself thought that this sort of indirect attack might work. If China stopped killing prisoners for their organs, then, of necessity, it would have to stop killing prisoners of conscience for their organs. Having been brought up in the benign atmosphere of Winnipeg in Canada, I had not been habituated to the deviousness of the Communist Party. What the Party/State did, in response to the various calls to stop using organs from executed prisoners, was to set up a donor system and then claim that prisoners were donors.

In 2014, the authorities stated that they were going to shift from prisoners to donors as sources of organs by classifying executed prisoners as donors. Huang Jiefu in March 2014, stated:

"we will regulate the issue [inappropriate handling of organ donations from

³ Article 28

executed prisoners] by including voluntary organ donations by executed prisoners in the nation's public organ donation system⁴

He added:

"Judicial bodies and local health ministries should establish ties, and allow death row prisoners to voluntarily donate organs and be added to the computer organ allocation system"⁵.

Lest there be any doubt about what he meant, he elaborated on March 4, 2014 more specifically when asked about the commitment of the leaders of 36 transplant centres to stop sourcing organs from executed prisoners⁶. Huang Jiefu stated that the commitment from these 36 transplant centres

"is not about not using organs from executed prisoners, but not allowing hospitals or medical personnel to engage in private transactions with human organs."

Huang Jiefu in this interview added:

"Executed prisoners are also citizens having the right to donate organs. We are not against organ donation of prisoners which would deprive them of this right. ... Given the willingness of death row prisoners to donate organs, once entered into our unified allocation system then they are counted as voluntary donations of citizens. The so called death row organ donation doesn't exist any longer."

⁴ Shan Juan "Govt seeks fairness in organ donor system for inmates" China Daily USA, 2014 March 07

⁵ Matthew Robertson "Top Chinese Transplant Official Says There's No Plan to Stop Using Prisoner Organs" Epoch Times, April 11, 2014

⁶ http://news.china.com.cn/2014lianghui/2014-03/05/content_31674589.htm

A China Daily USA report further makes it clear that the change was not ending sourcing from prisoners but rather integrating prisoner sourcing into the donor system. The news outlet in March 7, 2014 reported:

"China is set to further strengthen the regulation of organ donations from executed prisoners and integrate it into the existing public voluntary organ donation and allocation system, according to a political adviser close to the situation.

Huang Jiefu, director of the China Organ Donation Committee and former vice-minister of health, made the remarks on Tuesday on the sidelines of the ongoing two sessions.

'By doing that, organs from death-row inmates used for life-saving operations are secured in a fair, transparent, and corruption-free manner, ... we will regulate the issue by including voluntary organ donations by executed prisoners in the nation's public organ donation system to help ensure an open and fair practice ... China is gradually moving away from a long-term reliance on executed prisoners as a major source for organ donations.' He [Huang] expects that procedures that include the procurement and allocation of organs from inmates who have been executed will be integrated into the national system soon. 'We've reached consensus with the legal and law enforcement departments on that,' he said.

To ensure that donations are voluntary, written consent from the inmate and the family is required, he said.

Another source who didn't want to be named but is close to the situation said written consent from the executed prisoner's lawyer will be added as well.

Also, only designated organ procurement organizations will be allowed to approach law enforcement departments regarding the issue, Huang said.

Most importantly, 'donated organs from executed prisoners will be put into a computerized system to ensure fair allocation', he said. 'Any organ donations, including those by executed prisoners, have to go through the system and the

computerized allocation process,' he added.⁷

The development of standards to oppose harvesting of organs without consent, in large measure in response to the Chinese Party/State smokescreen that organs for transplants were coming from prisoners sentenced to death and then executed, is welcome. These standards of course encompass the killing of prisoners of conscience for their organs. Yet, we did not need new standards to know that killing of prisoners of conscience for their organs is wrong. Responding to the smokescreen rather than the problem helps resolving the problem marginally if at all.

Transplant tourism

A second oblique way of getting at the problem China posed by its mass killing of prisoners of conscience for their organs was to attack transplant tourism. In 2004, the World Health Organization had already called on member states

"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".⁸

A group of transplant professionals met in Istanbul Turkey in late April and early May 2008 and adopted a declaration on organ trafficking and transplant tourism. Participants in the meeting stated that:

"in recent years, as a consequence of the increasing ease of Internet communication

⁷ Shan Juan "Govt seeks fairness in organ donor system for inmates" 2014 March 07, China Daily USA

⁸ World Health Assembly Resolution 57.18, Human organ and tissue transplantation, May 22, 2004, http://www.who.int/gb/ebwha/pdf_files/WHA57/A57_R18-en.pdf

and the willingness of patients= in rich countries to travel and purchase organs, organ trafficking and transplant tourism have grown into global problems.... Participants in the Istanbul Summit concluded that transplant commercialism, which targets the vulnerable, transplant tourism, and organ trafficking should be prohibited. ... The legacy of transplantation is threatened by organ trafficking and transplant tourism. ... The legacy of transplantation must not be the impoverished victims of organ trafficking and transplant tourism".

The Declaration itself stated:

"6. Organ trafficking and transplant tourism violate the principles of equity, justice, and respect for human dignity and should be prohibited. Because transplant commercialism targets impoverished and otherwise vulnerable donors, it leads inexorably to inequity and injustice 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.
- b. Such prohibitions should also include penalties for acts, such as medically screening donors or organs, or transplanting organs, that aid, encourage, or use the products of, organ trafficking or transplant tourism."⁹

A Custodian Group remains in place to promote, implement and uphold the Declaration.

On transplant tourism, the Transplantation Society Policy and Ethics in a statement dated November 2006 provided:

"Transplant tourism is a recently described phenomenon that may entail exploitive

⁹ 1228 Clinical Journal of the American Society of Nephrology Clin J Am Soc Nephrol 3: 1227 - 1231, 2008

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."

The Declaration of Istanbul on Organ Trafficking and Transplant Tourism defines transplant tourism to be travel for transplantation which

"involves organ trafficking and/or transplant commercialism or if the resources (organs, professionals and transplant centers) devoted to providing transplants to patients from outside a country undermine the country's ability to provide transplant services for its own population."

It may well be that not every aspect of transplant tourism is encompassed by the two Council of Europe Conventions and the UN Protocol. Nonetheless, all these instruments, I am confident, encompass travel for transplantation which involves the purchase of an organ sourced from a prisoner of conscience killed for an organ.

The Council of Europe organ trafficking treaty is a lot more specific than the treaties on human trafficking about the offences which need to be enacted. The Council of organ trafficking treaty provides:

"Article 4 - Illicit removal of human organs

1 Each Party shall take the necessary legislative and other measures to establish as a criminal offence under its domestic law, when committed intentionally, the removal of human organs from living or deceased donors:

b. where, in exchange for the removal of organs, the living donor, or a third party, has been offered or has received a financial gain or comparable advantage;

c. where in exchange for the removal of organs from a deceased donor, a third party has been offered or has received a financial gain or comparable advantage."

Article 7 - Illicit solicitation, recruitment, offering and requesting of undue advantages

1 Each Party shall take the necessary legislative and other measures to establish as a criminal offence under its domestic law, when committed intentionally, the solicitation and recruitment of an organ donor or a recipient, where carried out for financial gain or comparable advantage for the person soliciting or recruiting, or for a third party.

2 Each Party shall take the necessary legislative and other measures to establish as a criminal offence, when committed intentionally, the promising, offering or giving by any person, directly or indirectly, of any undue advantage to healthcare professionals, its public officials or persons who direct or work for private sector entities, in any capacity, with a view to having a removal or implantation of a human organ performed or facilitated, where such removal or implantation takes place under the circumstances described in Article 4, paragraph 1,....

3 Each Party shall take the necessary legislative and other measures to establish as a criminal offence, when committed intentionally, the request or receipt by healthcare professionals, its public officials or persons who direct or work for private sector entities, in any capacity, of any undue advantage with a view to performing or facilitating the performance of a removal or implantation of a human organ, where such removal or implantation takes place under the circumstances described in Article 4, paragraph 1"

Both Council of Europe Conventions address specifically extraterritoriality. Both Council of Europe Conventions though limit extraterritoriality to nationals. They do not set out universal jurisdiction offences.

On extraterritoriality, the UN Convention and Protocol are different from the two Council of Europe Conventions. The Council of Europe Conventions require it, using the word "shall". The UN Convention and Protocol allow it but do not require it, using the word "may".

The Council of Europe Convention against Trafficking in Human Organs, in my view, needs two changes. One is compulsory reporting by transplant professionals of organ transplant tourism they learn about from their patients. There is compulsory reporting language in proposed Canadian and French legislation. The link to the proposed Canadian law is this

http://www.parl.gc.ca/content/hoc/Bills/412/Private/C-561/C-561_1/C-561_1.PDF

The link to the proposed French law is this:

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

The second change I would propose to the Council of Europe Convention is to change Article 10(1) to add (f) "by a person who is present in its territory" and to modify 10(6) to take out the words "solely on the basis of his or her nationality". This change would take organ trafficking an international or universal jurisdiction crime so that anyone physically present in the territory could be prosecuted, whether a national or not.

This issue, whether the draft Convention should create an international offence of universal jurisdiction, caused division within the Council at the drafting stage, with 18 states supporting excision of the quoted words and 20 opposed. Because excision could not get majority support, I suggest that the Convention have an optional protocol with the quoted words excised and the proposed words added. The willing states could then sign the protocol.

Both of the amendments I propose are in my view essential to the combat against transplant tourism. It is striking that the second should be so controversial, cleaving Europe in half. The division illustrates the gap in the field. Not only in Europe, except for Spain, is the legislation not in place. There is no agreement in principle that it should be in place.

Transplant tourism is, to be sure, a scourge. But ending transplant tourism is not the answer to ending transplant abuse in China. The problem in China is primarily not the demand - the customer or patient or organ recipient. The problem in China is the supply - prisoners of conscience. The internal demand for organs in China is so great that cutting transplant tourism means just shifting the demand from one group to another.

That is, in fact, what happened. When the Chinese focus was on the foreign market, waiting times for foreign customers were much shorter than waiting times for Chinese nationals. Chinese nationals waiting for transplants were understandably miffed by this preferential treatment to foreigners.

According to Chinese official sources, there are 1.5 million people who in China who suffer from organ failures and need transplants every year.¹⁰ The Ministry of Health of the Government of China announced that from June 26, 2007 Chinese patients would be given priority access to organ transplants over foreigners.¹¹

The figure of 1.5 million, like more or less all statistics coming from the Communist Party/Chinese state, can not be verified. The official version moreover constantly changes.

¹⁰ "Success Leads to More Liver Transplants" China Daily, August 15, 2007.

¹¹ Jim Warren "China moving rapidly to change transplant system" Transplant News, September 2007

The numbers needing transplants in China was later revised downwards from 1.5 million to 300,000. It was in this year, 2015, revised downward yet again to 22,000.¹²

The website Yibada reports:

"China's former vice-minister of health Huang Jiefu claimed that the demand for organs in the country is just twice and not 150 times more than the supply, contrary to reports in the past years. Currently, around 22,000 patients are on the organ transplant waiting list, with 10,000 to 12,000 organ transplant operations expected to be made in 2015. ... China's Ministry of Health reported in 2012 that around 1.5 million people in the country need organ transplants. Huang disputed that number and said that only around 300,000 out of those are in real need of a transplant, since some of them are not suitable for surgery, such as liver cancer patients."

The figure of 22,000 on a waiting list for a system Huang Jiefu control does not mean, as Huang suggests, that there are only 22,000 patients who need organs. It suggests rather that the vast bulk of those who need organs are going elsewhere, not using Huang's system. Given the large numbers in China of those who need organs and the tiny demand directed to the system Huang controls, that system seems to be quite unpopular. Are those not on Huang's waiting list buying organs of prisoners from military hospitals?

In any case, whatever the figures for organ demand within China, the shift in priority was real. That shift served four purposes at once. It appeared to be responsive to the global concern about transplant tourism. It helped to placate Chinese nationals previously given

¹² Cesar Tordesillas "China Able to Supply Half of Organ Demand for Transplantation" Yibada March 11, 2015
<http://en.yibada.com/articles/18537/20150311/organ-transplant-organ-donation-chinese-patients-chinese-organ-donors.htm>

a lower priority for transplant. It allowed the sourcing of organs from prisoners of conscience to continue unabated. And it aided the cover up of this abuse, because Chinese transplant patients are a lot harder to interview and much easier to intimidate into silence than foreign transplant patients, even foreign transplant tourists.

Contact and collaboration

A third way into this labyrinth of Chinese organ transplant abuse is policies opposing contact and collaboration with Chinese transplant professionals who perpetrate the abuse. The Transplantation Society developed such a policy, directed specifically to China, dated November 2006.

The Society said 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 206 treated collaboration on studies the same way. It stated:

"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."

The Society policy was to 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 came to clinical or pre-clinical trainees from transplant programs that use organs or tissues from executed prisoners, the policy stated 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".

Ostracism has been a vehicle for change in China. The China Medical Tribune reported the refusal to allow 35 Chinese participants for ethical reasons to attend the World Transplant Congress in San Francisco in July 2014.¹³ It also noted that for the most recent Hangzhou, China transplant conference "many overseas transplant experts failed to attend". A year before, in October 2013, the China Transplant Congress, also held in Hangzhou, had a raft of foreign expert attendees.

The NGO Doctors against Forced Organ Harvesting (DAFOH) on October 20th released a statement which provided that

"we would consider it unethical for any foreign transplant professional to attend this transplant congress in Hangzhou given the rampant and unrepentant transplant abuse in China, unless the person is going with the express and sole purpose of speaking out against it."

This statement, along with other developments, would have been a drag on overseas transplant expert attendance.

Avoiding collaboration can take the form of avoiding training. Neil Laurie, Clerk of the

http://www.cmt.com.cn/detail/623923.html&usg=ALkJrhj1Ume7SWS_04UtatL3pWKYRbFqxq

See Matthew Robertson, "From Attack to Defense, China Changes Narrative on Organ Harvesting" Epoch Times, November 24, 2014,

http://m.theepochtimes.com/n3/1099775_from_attack_to_defense_china_changes_narrative_on_organ_harvesting/?sidebar=hotarticle

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 Health, 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'.

The Prince Charles Hospital is one of the 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.

Doctors Danovitch, Shapiro, and Lavee, in a 2011 article, wrote

"Training of Chinese transplant professionals by the international community must be conditioned on commitments that trainees will not engage, directly or indirectly, in the use of organs from executed prisoners."¹⁴

Yet, another form of avoiding complicity is refusal to publish research of Chinese transplant professionals using data garnered from organ transplant abuse. The Editors and Associate Editors of the journal *Liver Transplantation*, wrote in 2007 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."¹⁵

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

¹⁴ G.M. Danovitch, M.E. Shapiro, and J. Lavee "The Use of Executed Prisoners as Sources of Organ Transplants in China Must Stop" Volume 11 pages 426 428.

¹⁵ Issue 13:182, 2007

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

The Danovitch, M.E. Shapiro, and J. Lavee, in the article just cited, state:

"International and national professional medical societies and journals should not accept abstracts, publications or presentations from Chinese transplant centers unless the authors clearly indicate that the data presented is in concordance with the most recent Chinese government regulations regarding transplant tourism and that executed prisoners were not the source of organs."

One form of ostracism, found in local but not international law, is immigration control. US visa application forms from 2012 ask visa applicants this question: "Have you ever been directly involved in the coercive transplantation of human organs or bodily tissue?"¹⁶

The likelihood of a person answering yes to such a question is small. The question all the same has a significant value, practical as well as symbolic. Those directly involved in the coercive transplantation of human organs or bodily tissue may well, in the face of such a question, be discouraged from applying for a visa.

Moreover, if the question is asked and a person directly involved in the coercive transplantation of human organs or bodily tissue lies on application, that lie can have legal consequences. An applicant for a visa can be barred from entry on the basis that the applicant has foreclosed relevant inquiries. It is not necessary to establish that the inquiries, if made, would have led to a finding of inadmissibility on a ground other than the

¹⁶ Immigration form DS 160

misrepresentation.

Moreover, a misrepresentation once made can have consequences for the rest of the life of that person. Once the lie is uttered, then any status acquired on the basis of that lie, even citizenship, can be later unravelled because of that lie. For revocation of citizenship or permanent residence as well as for entry, authorities need not prove that the person was directly involved in the coercive transplantation of human organs or bodily tissue. It is sufficient for the authorities to establish that the lie foreclosed enquiries whether the person was directly involved in the coercive transplantation of human organs or bodily tissue.

A similar provision was proposed in December 2013 to the Canadian Parliament by Member of Parliament Irwin Cotler. His Bill, Section that a foreign national would be

"inadmissible of grounds of violating human or international rights if that individual is an individual who the Minister believes, on reasonable grounds, has knowingly participated in or facilitated the obtaining or acquisition of a human organ or other body part, and knew, at the time of the obtaining or acquisition or earlier, that the organ or other body part was obtained or acquired as a consequence of a direct or indirect financial transaction;"¹⁷

The refusal to allow 35 Chinese participants for ethical reasons to attend the World Transplant Congress in San Francisco in July 2014 and failure of many overseas transplant experts to attend the Hangzhou, China transplant conference on October 2014 had a profound impact on Chinese transplant officials. Many attendees to the 2014 Hangzhou conference were likely asking where all the overseas transplant experts were. Those doctors who applied to attend and participate in the World Transplant Congress in San Francisco in July 2014 and were rejected, and their colleagues who knew they were applying to attend, also needed an explanation.

¹⁷ Bill 561

The Communist Party may have felt that they could ignore the evidence of the killing of Falun Gong for their organs. However, they could not ignore the fact that Chinese transplant doctors were denied admission to an international transplant congress or that foreign transplant doctors who had come before to China were no longer coming.

In response to this ostracism, the Communist Party/State made no substantive changes but did make a wide variety of contradictory statements about how the situation either is better now or would get better in the future. I have set out these statements, at length, in a talk I gave in April, 2015 in Bern, Switzerland to the International Society of Human Rights. The bottom line driving all the remarks was a desire to end the ostracism. The peer pressure of the international profession at the very least got the attention of Chinese authorities in the way that no other initiative had.

There is a Chinese transplant conference scheduled for 6-8 August 2015 at East Lake in Hubei Province at the International Conference Centre. The propaganda flowing out of the Party has had an effect on at least some of the international transplantation profession many of whom plan to attend this Conference.

While we will not know for sure until the August conference has come and gone if the peer pressure from the global profession will collapse, those are the early signs. That collapse would be regrettable.

The criteria for reconnection between the Chinese and international transplant community should be these:

- 1) an admission of past wrongdoing, including full disclosure of the sourcing of organ transplants in the past;
- 2) a commitment to bring to justice all perpetrators of past organ transplant abuse and

commencement of proceedings;

- 3) expulsion from the Chinese Medical Association of transplant professionals who can not establish beyond a reasonable doubt that their sourcing of organs is proper;
- 4) cooperation with an international investigation into present and past sourcing of organs for transplant;
- 5) publication of present and past death penalty statistics;
- 6) public access to the past and present aggregates of the four Chinese transplant registries - lung, liver, heart and kidney;
- 7) full, independently verifiable transparency of current sourcing of organs for transplant;
- 8) establishment of a system of traceability of sources for transplants and use of that system; and
- 9) cooperation with an outside, independent verification system for compliance with international standards.

Transparency

A fourth and more specific approach to Chinese organ transplant abuse is a push for transparency on sources of organs for transplants. The onus falls on each state to show that it is sourcing organs properly, not on outsiders to show that any state is sourcing organs improperly.

The Declaration of Istanbul on Organ Trafficking and Transplant Tourism provides:

"4. Systems and structures should ensure standardization, transparency, and accountability of support for donation.

a. Mechanisms for transparency of process and follow-up should be established;"

The European Parliament passed a resolution on December 12, 2013 which says in part:

"2. calls on the Government of the People's Republic of China to end

immediately the practice of harvesting organs from prisoners of conscience and members of religious and ethnic minority groups;

3. Calls for the EU and its Member States to raise the issue of organ harvesting in China; recommends that the Union and its Member States publicly condemn organ transplant abuses in China and raise awareness of this issue among their citizens travelling to China; calls for a full and transparent investigation by the EU into organ transplant practices in China, and for the prosecution of those found to have engaged in such unethical practices;

4. Calls on the Chinese authorities to respond thoroughly to the requests of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the UN Special Rapporteur on freedom of religion or belief asking the Chinese Government to explain the sources of extra organs following the increase in the number of organ transplant operations, and to allow them to conduct an investigation into organ transplant practices in China;

5. Calls for the immediate release of all prisoners of conscience in China, including Falun Gong practitioners;"

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 traceability¹⁸ and transparency.¹⁹

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

¹⁸ Guiding principle 10

¹⁹ Guiding principle 11

for scholarly study and governmental oversight and to identify risks and facilitate their correction.

The World Health Organization Executive Board in January 2015 passed a resolution which stated:

"The Executive Board, having considered the report by the Secretariat on blood and other medical products of human origin,

(3) recognized that protection of the donor is a prerequisite in order to meet the needs of patients for access to safe medical products of human origin, which is of high importance in the context of access to health and universal health coverage;

(5) recognized that global consensus on the donation and management of medical products of human origin intended for human clinical application, based on good governance mechanisms, is needed in order to protect the fundamental human rights of donors;

(6) further recognized that appropriate standards to guarantee quality and safety of medical products of human origin and to ensure traceability, vigilance, surveillance and equitable access to these products are essential for the well-being of recipients;

(7) requested that the Director-General convene consultations with Member States and international partners, to support the development of global consensus on guiding ethical principles for the donation and management of the mentioned medical products of human origin; good governance mechanisms; and common tools to ensure quality, safety and traceability, as well as equitable access and availability, as applicable, to result in a document to be submitted to the Seventieth World Health Assembly for its consideration."²⁰

The Seventieth World Health Assembly is scheduled for May 2017 in Geneva, Switzerland.

²⁰ Decision EB 136(2) "Principles for global consensus on the donation and management of blood, blood components and medical products of human origin" (Tenth meeting, 30 January 2015) EB136/DIV./3 136th session 12 February 2015

United Nations Rapporteur on Torture Manfred Nowak and UN Rapporteur on Religious Intolerance Asma Jahangir both in their 2007 and 2008 reports asked China to explain the discrepancy between the volume of transplants and the volume of identified sources. They wrote in 2007:

"Allegation transmitted: 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 sourcesIt 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 Government of China responded but without addressing the concerns raised. As a result, the Rapporteurs reiterated their concerns in 2008 saying in part:

"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 ... 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. ... 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."

The UN Committee against Torture in its November 2008 concluding observations of the state report of China picked up this theme that there needed to be some accounting for the numbers. The Committee wrote:

"... the Committee takes cognizance of the allegations presented to the Special Rapporteur on Torture who has noted that an increase in organ transplant operations coincides with 'the beginning of the persecution of [Falun Gong practitioners]' and who asked for 'a full explanation of the source of organ transplants' The Committee is further concerned with information received that Falun Gong practitioners have been extensively subjected to torture and ill treatment in prisons and that some of them have been used for organ transplants.

The State party should immediately conduct or commission an independent investigation of the claims that some Falun Gong practitioners have been subjected to torture and used for organ transplants and take measures, as appropriate, to ensure that those responsible for such abuses are prosecuted and punished ."

At the United Nations Universal Periodic Review Working Group in February 2009, Canada recommended that China implement the recommendations of the Committee against Torture. The Government of China explicitly, in writing, rejected this recommendation.

Canada, Switzerland, United Kingdom, France, Austria, Italy recommended that China publish death penalty statistics. This information would be telling in light of the fact that China was stating that virtually all transplants came from prisoners sentenced to death and then executed. The Government of China said no to this recommendation too.

The turn of China at the United Nations Universal Periodic Review Working Group came up again in October 2013. This same recommendation on death penalty statistics was repeated then by Belgium, France, New Zealand, Norway, Switzerland, UK, and Italy. This time China said, we'll see.

Yet, China is moving further and further away from transparency. Data sources emanating from the Government of China disappear as soon as they are used to estimate transplant

volumes.

One example of the progressive degradation of availability of information is the China Liver Transplant Registry. For *Bloody Harvest*, I was able to garner useful information about transplant volumes from the China Liver Transplant Registry in Hong Kong. After *Bloody Harvest* was published, the China Liver Transplant Registry shut down public access to statistical aggregate data on its site. Access is available only to those who have a Registry issued login name and password.

At The Transplantation Congress in Vancouver in August 2010, Haibo Wang, who was then assistant director of the China Liver Transplant Registry, presented at the same session I did. I asked him why public access to the data on the Registry website was shut down and if it could be restored. His answer was that public access was shut down because people were, so he said, 'misinterpreting' the data. If anyone was now to get access, the Registry had to know first the purpose for which the data was being used and some confidence that the data would not be, in his view, 'misinterpreted'.

The Chinese health system runs four transplant registries, one each for liver, kidney, heart and lung. The other three are located in mainland China - kidney and heart in Beijing and lung in Wuxi. The data on the other three sites is also accessible only to those who have registry issued login names and passwords.

Conclusion

Where do we go from here? The initiatives so far are the beginnings of a web which, once spun, should catch any transplant abuse. The web would consist of both national and international strands.

The governing rules of national or state/provincial professional societies are sources of local law. Legislatures grant professional societies delegated jurisdiction to make rules binding on their members. Professional societies use these delegated powers to establish rules for practice of the profession, including ethical standards which members of the profession must follow.

Something similar happens with international professional associations. International professional associations set standards for their professions globally. National and provincial or state professional associations then seek to respect these international standards, in part to maintain goodwill with the profession globally, in part to maintain their international memberships in good standing, in part to conform to international peer pressure.

The content and meaning of local professional standards, which have the force of law by virtue of legislative delegation, are impacted by the standards which international professional associations develop. The standards that international professional associations develop thus become a source of local law binding on the international professional community.

While relevant local law is not necessary to draft or adhere to an international instrument, it surely helps. An international treaty will much more likely to be drafted, approved, ratified and enter into force if national laws are already in place which allow for immediate respect for the treaty. International standards and mechanisms serve the same function internationally as entrenched bills of rights and judicial review serve locally.

Decisions on the application of professional standards locally can be subject to local judicial review. In turn, national decision on the application of professional standards, including

judicial review of those decisions, can be subject to supervision by international mechanisms established under international instruments. The system of delegated law within which professional associations now function can be easily adapted to incorporate professional ethical transplantation standards.

Professional association discipline, at the extreme, functions by way of disqualification. Moreover, the associations encompass professionals only, and not brokers or advertisers or facilitators. Only the state can prosecute, convict and sentence.

Both a disciplinary and regulatory regime are necessary. They can and should function in a complementary fashion. Professional discipline can be a powerful spur to proper behaviour not just in the local profession but, as we have seen with Chinese transplant professionals, in a foreign profession because of the desire of foreign professionals to interact with local professionals.

It seems that things must go badly wrong before we can get them right. There is a direct connection between the dawning awareness that the Communist Party of China has been killing prisoners of conscience, primarily practitioners of Falun Gong, for their organs and the improvements, however tentative, in organ transplant standards and remedies.

Transplant technology, though designed for human betterment is, like all technology, morally neutral. The innovators of transplant technology never imagined that what they developed would be used to murder prisoners of conscience and sell their organs for huge sums. 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 defenses against it.

The transplant profession has been important in combating organ transplant abuse in China. Yet, we should not place more expectations on the shoulders of transplant professionals than they can realistically be expected to bear.

Transplant professionals are after all not sinologists. They are not experts in Communist Party criminality, propaganda techniques, cover up and dissimulation.

They are moreover, a constantly changing lot. They are by career transplant professionals, but not transplant organization professionals. The positions in the various organizations representing transplant professionals have new incumbents virtually every year.

When it comes to dealing with the Communist Party of China, transplant professionals are amateurs. We can not realistically expect a continually shifting cast of amateurs to solve on their own the deep seated problem in China of the killing of prisoners of conscience for their organs.

While we have to welcome the efforts they have made, ending organ transplant abuse in China is not just a transplant professional challenge. It is a human rights challenge which we all must confront.

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