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Title: The Invisible Issue of Organ Laundering

Introduction

In recent years, global institutions including the United Nations (UN), the Council of Europe [1], the World Health Organization (WHO) [2] and the European Union (EU) [3] have declared measures to deter organ trafficking, whilst reiterating the lack of official statistics about this illegal trade. A professional response through international societies culminated in the Declaration of Istanbul on Organ Trafficking and Transplant Tourism [4], establishing a set of principles to guide professional conduct and government policy. The crucial link between human trafficking and trafficking of human organs was recognised by the UN more than a decade ago [5] and, more recently, a joint study with the Council of Europe [1] identified the need to differentiate trafficking in human beings for the purpose of the removal of organs from the trafficking in human organs *per se*.¹

All these initiatives reiterate two key issues that hinder global action against these crimes: the absence of an internationally agreed definition of “trafficking in organs, tissues and cells” and the lack of reliable official data about the illegal organ trade [1]. The lack of global definitions is exploited by traffickers and middlemen who take advantage of the differences between legal systems in their transnational crime. The

¹ While acknowledging the scientific debate on differences, confusion and overlap between organ trafficking and trafficking in human beings for the purpose of organ removal [9], in this paper we refer to both crimes jointly focusing on their similarities.

problem of gathering reliable data versus apocryphal stories is a key factor in these investigations [6]. In this article, however, we focus on the reasons why organ trafficking remains unreported. We argue that once organs are trafficked there are certain factors that allow for "laundering" in the purchaser's country, thus giving the veneer of legitimacy while hindering accurate estimation of the problem. In effect, illicitly purchased organs are transformed into legitimate organs by the process of integration into mainstream financial institutions (reimbursement by insurers) and health services (follow-up treatment).

The 'Dark Figure' of Organ Trafficking Crime

Criminologists are familiar with "invisible" crime and the inadequacy of official records to reflect the true extent of criminality. This phenomenon - known as the "dark figure of crime" [7] or "the iceberg of crime theory" [8] - describes how only a small proportion of crime is visible. One of the reasons crime remains unreported is the reluctance to accept victim status for fear of embarrassment, stigmatisation or the possibility of implicating themselves in criminal acts. Crimes also go unnoticed due to the absence of reliable witnesses, because illicit goods are difficult to trace or because of the high status of the offenders (white-collar crime). Well known reasons for underreporting this crime [6] perpetuate invisibility but other aspects typical of organised criminal activity [9] and crimes of the powerful are also crucial. The following five areas of discussion explore how a "legitimate business – such as organ transplantation – can turn into an illegitimate one" [6] and then be disguised as legitimate again.

A. Globalization, Jurisdiction and Law Enforcement

Organ trafficking can be – but it is not exclusively – a transnational crime. The characteristics of organised transnational crime jeopardise possibilities of detection, prevention and prosecution. As indicated, organ trafficking offences are complex [10] and span several jurisdictions with sellers originating in different continents to the recipients. As with ‘layering’ in money laundering [11], organ brokers and traffickers often locate their operation bases in unrelated countries, further complicating traceability.

The de-regulation of the global market place and the online accessibility of medical tourism companies [12] enhance opportunities for cross-border crime [13]. A parallel can be drawn with the international narcotics trade. Confronted with cross-border crimes, nation states may struggle to prosecute their citizens for crimes committed abroad. Effective responses to the extra-jurisdictional challenges in illicit organ trade require a transnational criminal law approach [14].

Discretion forms a key aspect of police and law-enforcement activity [15]. Strategic decisions over which activities to prioritize are often based on chances of securing successful convictions. Prohibition may not, then, always be accompanied by rigorous enforcement when the police face both the challenges of international investigations and proving that a transplanted organ was illegally bought.

B. Power and Status in Healthcare Professions

Crimes committed by high status individuals are frequently unrepresented in official figures [8] and often treated with relative impunity. Successful organ trafficking

requires the involvement of medical professionals and sophisticated cooperation between licensed professionals and licensed facilities [16]. A range of logistical coordination and technical expertise is also necessary including, but not limited to, medical directors of transplant units, hospital and medical staff, technicians in blood and tissue laboratories, dual surgical teams, nephrologists and postoperative nurses [17].

Surgeons are key players but most international legislations - with the exception of Switzerland, which sets a higher penalty for health professionals - do not explicitly distinguish between medical staff and other actors. Only in Czech Republic, Iceland, Ireland, Panama and China is a medical practice ban imposed for health professionals involved in trafficking [18].

The impunity of surgeons performing illegal extractions and transplants of organs may be exacerbated by their high status in many countries and aggravated by issues of self-regulation and detection of crime being contingent on medical professionals reporting their colleagues. In 2010, an organ trafficking network uncovered in South Africa included four surgeons and one nephrologist [19]. South Africa's biggest private hospital group admitted 102 counts relating to illegal operations. In this network, Brazilians sold their kidneys to Israeli patients with transplantation taking place in South Africa. While the kidney sellers were imprisoned in their home countries, the nephrologist was fined \$15,000 and the four transplant surgeons, originally charged with assisting in 90 illegal transplant operations, had all charges against them withdrawn [20]. While sanctions against health care staff, including licence revocation, have been applied, it is unclear whether these are effective

deterrents [9]. Complex and multifactorial solutions have therefore been proposed elsewhere [17] [21].

C. Reimbursement of Transplantation Costs Abroad by Insurers

It has been reported that some countries reimburse the cost of transplantation of trafficked organs to medically insured mobile transplant patients. Public and private insurance companies promote and enable transplants to occur abroad without regard to the source of the organ [21]. The case of Israeli insurance companies reimbursing transplant organs sourced abroad regardless of origin has been well described and the banning of this practice came into effect in 2008 [22] [23]². In the US, some medical insurance programs encourage policyholders to travel to foreign countries for organ transplantation. Savings for agreeing to “medical value” procedures abroad are then passed to the employee as a bonus for lowering corporate health care expenses [24]. The promotion of transplantation abroad as a money-saving proposition has the potential to ignore the extraterritorial criminalization of the activity.

In 2010, the Netherlands amended legislation that ensured reimbursement for transplants abroad regardless of whether the organ had been purchased, despite conflicting with ethical and legal norms. The present agreement allows only for intra-EU member reimbursement [25] but may fail to acknowledge the social, health and economic inequalities between new EU member states [26].

D. Sellers: Donor Vulnerability and Ambivalence of the Victim Status

² The prohibition of reimbursement for transplantation abroad that contravenes local and Israeli law- and other measures implemented at the same time- seem to have reduced transplantation abroad in Israel. [23]

In organ trafficking, there are blurred divisions between perpetrators and victims. In legal terms, issues of coercion, informed consent and exploitation are complicated. Victims may consent to the removal of their organs but this may be under duress or without being fully aware of risks and long-term health impacts. The duress may be external (by force, as in the well documented case of prisoners in China [21]), but it may also be internal (driven by financial need) since vulnerable populations are the sources of trafficked organs. There may be deception as to the amount of payment for the organ [27] [28] or no payment at all. The exploitation of vendors in the process of the offence is reinforced by the lasting psychological, financial, social and health consequences [29] - [33].

Victims are unlikely to take action against traffickers since they may perceive themselves as being complicit in the offence or for fear reprisal from concomitant offences such as providing false information or illegal border crossing. The stigma and discrimination associated with selling organs may also hinder crime reporting [1][34].

Vendors are in fact more likely to be prosecuted. Some criminals are more tolerated than others and it seems that across the globe, the majority of convicted offenders are younger men from lower socioeconomic backgrounds. Research has noted that this could be an artefact of social inequalities in the detection, prosecution and sentencing of criminal behaviour [35]. Crimes committed by 'high-status' powerful offenders [36] are more tolerated, while crimes of the powerless stand more chance of prosecution. Organ trafficking is therefore no different from crimes such as drug trafficking where the criminalisation of the vulnerable (i.e. drug mules) is evident [37].

It is illegal to sell an organ to a non-related person for profit in many countries and kidney vendors have been sentenced in countries like Romania [38], Brazil [19], Jordan [39] and Singapore [40].

E. Buyers: Recipient Vulnerability and Ambivalence of the Offender Status

Buyers of illicit organs are likely to have made false statements, claiming to be blood related to the seller or holding false documentation. Although organ buyers have been referred to as “ethically obtuse”, displaying disregard for other human beings [33], others consider the desperate situation of the seriously or mortally ill as justifying the ends to which they resort. In effect, the criminal liability of buyers is contested. Caplan et al. [1] noted that several EU states objected to criminalising buyers and that no agreement among states could be reached about this provision. Some countries (Finland, Morocco, the Netherlands, New Zealand [18], Japan [41], Spain [42]) criminalise buyers but convictions are rare.

A high percentage of buyers of organs abroad are not included on waiting lists in their countries since there may be supply/demand problems; strict listing criteria for transplantation may apply; and some buyers may be deemed medically unfit to receive a transplant. Studies in Europe [43] [44] and North America [45] [46] have identified a tendency of ethnic minorities to buy from their countries of origin, a phenomenon promoted by their reduced chances to be allocated organs in their resident countries.

In general, organ recipients are treated as witnesses in criminal prosecutions but they have also been convicted in South Africa [19], Japan [41] and Singapore [39]. Organ vendors and organ recipients share the fear of prosecution as a strong motivation for maintaining the secrecy of their involvement.

The Issue of Organ Laundering

Through the processes outlined above organs obtained illicitly can take on the veneer of a licit transaction. Organ transplantation in a foreign country is legal while the purchase of the organ is illicit. Illegal transplants tend to be concealed or disguised as altruistic donations. How determined the professional staff are to understand the true nature of the donor/recipient relationship is a key issue. This is the case in the countries where transplants take place but also for clinical teams in the home countries. Before or after travelling, potential buyers may report their intention to have organ transplantation abroad; they may need to take with them medical records but they also need to ensure their long-term medication needs will be provided by their medical centres and covered by their insurance companies.

Clinicians are expected to deter crime by discouraging their patients from travelling abroad and, in countries like Spain [42], reporting the recipient to authorities is compulsory if follow-up care is requested³. The traditional clinician role transfers from medical carer to controlling agent, encouraged to deter, prevent and police transplant tourism [45] [46]. Figure 1 illustrates how in this complex transnational crime, home countries unknowingly play an important role in laundering trafficked

³ The Spanish Penal Code requires citizens to report crimes of which they are aware. Consequently, since consenting of transplantation knowing the illicit origin of an organ is a crime, it is inferred that doctors must report recipients.

organs into mainstream services by facilitating and paying for follow-up treatments. Ethical issues must not be underestimated; recipients should always be treated but professional guidelines that safeguard donors, recipients and healthcare teams should be implemented.

With a limited amount of information available from official sources, statistical invisibility is a well-defined characteristic of organ trafficking. The factors described above promote and perpetuate invisibility and are likely to obstruct the effectiveness of legislation and policing of this crime. Acknowledging the contested legalities and illegalities in the traffic of human organs [47], it is reasonable to say that the time has now come for a serious discussion about the current failures evident in local legislations that unintentionally promote this trade. This is necessary so that innovative, effective measures can be put in place to deter this phenomenon.

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