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# Establishing Trafficking in Human Beings for the Purpose of Organ Removal and Improving Cross-Border Collaboration in Criminal Cases: Recommendations

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**Abstract:** In this short summary report on the legal definition of trafficking in human beings for the purpose of organ removal and improving cross-border collaboration in criminal cases, challenges, and recommendations in the areas of defining the crime, criminal investigation and prosecution, and cross-border cooperation are made. These are the outcomes of a working group discussion during the writers' conference of the HOTT project, a European Union-funded project against trafficking in human beings for the purpose of organ removal.

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The conclusions and recommendations set out below represent a composite summary of the findings of the members of group 3 and reflect their collective views, developed from detailed professional experience, in-depth consideration of the various project reports, and the outcomes of the group discussions.

The summary is also posited within the context that trafficking in human beings (THB) for the purpose of organ removal (THBOR) should not be viewed as a predominantly global challenge taking place outside Europe; on the contrary, as a number of the case studies and group discussions demonstrate, the crime of THBOR can not only involve European citizens because both donors and recipients within the global context of the crime, but that the principal

elements of the criminal enterprise also occur on the continent of Europe.

## ESTABLISHING THE CRIME

### Legislation

### Challenges

Treaty ratifications on THBOR are inconsistent, and the international legal benchmark definitions of THBOR are not consistently transposed into domestic legislation.

In general terms, there is a degree of confusion among criminal justice practitioners on the interpretation of THBOR as defined under Article 3 of the Trafficking Protocol (2000), Article 2 of EC Directive 2011/36/EU and Article 4 of the Council of Europe Convention against Trafficking in Persons

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(2005). Moreover, confusion between trafficking for the removal of organs and trade in organs further complicates the understanding of practices. The Council of Europe Convention on Trafficking in Human Organs adopted in July 2014 is an example thereof.

More specifically, there is a lack of clarity in respect of the legal interpretation of the definition of “organ,” the classification of a “perpetrator” and “victim” and of the application of their rights and protections and, in particular, establishing the requisite “means” under Article 3, most especially with regard to the abuse of a position of vulnerability.

A number of other criminal offences that are characteristically related to THBOR are either not covered by domestic legislation or are not sufficiently identified and investigated by practitioners, or both.

Among both criminal justice and medical practitioners, legal and ethical confusion exists in respect of the interface between the oath of medical secrecy in relation of doctor-patient confidentiality and the (existence of a) duty on medical practitioners to disclose cases of THBOR.

## Recommendations

- (1) Article 3 of the Trafficking Protocol remains the benchmark definition and criminal justice practitioners should adhere to its primacy, especially in respect of the “prevention, protection, prosecution and partnership” ethos contained within its terms.
- (2) Both legislative and nonlegislative responses are required to improve cross-border collaboration in criminal cases. In many instances, legislative measures are a precondition for improving the nonlegislative response.
- (3) Further clarification on the circumstances under which a person is considered a “perpetrator” or “victim” of THBOR is needed.
- (4) Legislators should ensure that a victim-centred, rights-based approach to THBOR is consistently applied to the transposition and application of THBOR in domestic legislation in compliance with the international benchmarks and that victims have full access to compensation and restitution remedies.
- (5) Legislators should ensure THBOR offences are extraditable, states can claim extraterritorial jurisdiction and predicate for the purposes of assets confiscation.
- (6) Legislators should ensure that the full range of subsidiary criminal offences related to THBOR (eg, buying and selling of organs, receiving an organ that has been obtained through THBOR) are fully available to prosecutors, provided that the sanctions for such related offences are commensurate with the gravity of the crime and that they include access to the same standard of rights and protections to the victims as conveyed by the full offence of THBOR.
- (7) Based on the empirical evidence of the crucial importance of “whistleblowers” to the disclosure of THBOR, legislators should ensure that full legal protection is available to those persons that act in such a role.
- (8) The relevant legal-medical actors (national, European, and international transplant organizations, medical ethical committees, World Health Organization) should clearly establish a binding rule that the ultimate responsibility for ensuring full legal and ethical compliance of transplant procedures remains with the transplanting surgeon and cannot be delegated.
- (9) Given the prevailing goodwill and preparedness that exists on both sides, the appropriate global-regional structures

within the criminal justice and medical professions should establish a joint technical working group to draft a cooperation agreement between both sides that precisely sets out the nature and extent of the duty of doctor-patient confidentiality and the conditions under which medical professionals would be obliged to disclose information indicating THBOR and the extent and nature of the information that should be disclosed by them to the appropriate criminal justice authorities.

## Investigation and Prosecution

### Challenges

It is recognized that THBOR is an extremely complex crime to combat but this factor is currently compounded by either a general lack of awareness of the crime among criminal justice practitioners, or a reluctance to acknowledge the existence of the crime or a lack of political will to combat it—and often a combination of all 3.

There is a reluctance to prosecute senior medical professionals and other complicit officials for a crime that is not well understood at any of the investigator-prosecutor-judiciary levels.

The particular modus operandi of THBOR results in considerable confusion among practitioners in terms of the interpretation of the requisite means used to commit the crime and role of consent.

The current response of law enforcement agencies to THBOR is almost entirely reactive, with little sign of a proactive, multiagency, multidisciplinary approach to achieve early disclosure of the crime.

Where these complex investigations do take place, they tend to lack proper multiagency coordination and are under-resourced. Investigators and prosecutors lack comprehensive, specialized, and case-based guidance on how to build and prosecute these cases, and there is no specialist training provided to assist them in the task.

## Recommendations

- (1) *Proactive approach*: law enforcement agencies should take the lead in developing a coordinated, multiagency proactive approach to detecting THBOR, and this should include the development and application of THBOR-specific indicators as an integral part of programmatic proactive monitoring of relevant sectors.
- (2) Existing multiagency THB networks should be strengthened and develop an increased focus on THBOR. Relevant actors, especially criminal justice and medical networks, should appoint specific THBOR focal points within their structures to facilitate and build more effective information sharing partnerships.
- (3) In common with current requirements for customs declarations and such like, legislators and immigration/border police agencies should create a legal requirement for all persons entering or departing the territory of the State or the European Union to declare the fact if they are travelling for transplant purposes. This measure intends to work on 2 levels: it provides the authorities with increased capacity to monitor such movement and can act as a disincentive for travelling recipients and make the modus operandi more problematical for the traffickers.
- (4) *Investigation and prosecution*: legislators and other relevant authorities should provide clear guidance to investigators and prosecutors on the interpretation of the

means of “a position of vulnerability” and the role of “consent” in THBOR cases, in line with the recent guidance papers issued by United Nations Office on Drugs and Crime on these topics, together with clear policy guidance on the approach to be taken by prosecutors in respect of any implied criminal liability in respect of the role played by donors and recipients in THBOR cases.

- (5) To effectively investigate THBOR, criminal justice professionals require specialist knowledge of the procedures and medical protocols attached to legal transplantation, as proving deviations from those practices is a critical element of successful prosecution. To this end, appropriate criminal justice and medical professionals should collaborate to produce a detailed, step-by-step breakdown of the entire legal transplant process, encompassing initial assessment practice, transplant procedures, the medical actors, and the documentation trail for the whole process.
- (6) Based on the above, investigators and prosecutors should develop detailed and case-based guidance for THBOR cases that should include parallel financial investigation guidance and checklist-style templates for use in the interviews of donors, recipients, and suspects and which focus especially on the use of means of deception and vulnerability and the issue of consent.
- (7) Building on existing specialized THB training programs, capacity should be strengthened by the addition of THBOR-specific, tailored training modules for law enforcement and prosecutorial agencies, together with awareness-raising initiatives for members of the judiciary.

## IMPROVED CROSS-BORDER COOPERATION

### Challenges

The challenges associated with cross-border cooperation in THBOR cases replicate those that already characterize cross-border cooperation generally, and the general lack of awareness, complexity, and multidimensional nature of THBOR cases complicates the overall picture.

In legislative terms, the challenges are exacerbated by inconsistent treaty approaches, differences in interpretation of THB law generally and THBOR in particular, and sig-

nificance variations in procedural rules appertaining to the admissibility of evidence and duty of disclosure in criminal cases.

In practical terms, variations in national priorities, a tendency by practitioners to focus only on the domestic dimension of THBOR, combined with a general lack of coordination and an inexplicable reluctance to use existing support structures for cross-border cooperation all serve to impede significant improvements in cross-border cooperation.

### Recommendations

- (1) Investigators and prosecutors should make greater use of existing transnational cooperation structures, such as European Police Office, International Police Office and Eurojust, and the expertise located within national central authorities.
- (2) These organizations should either establish or strengthen existing focal point capacity to ensure a proper level of focus on and response to THBOR cases.
- (3) More use should be made of joint investigation team techniques to address transnational THBOR cases.
- (4) Greater use should be made of video testimony provisions for taking the testimony of donors, recipients, and other witnesses.
- (5) Transnational law enforcement structures, such as European Police Office and International Police Office, should cultivate higher levels of cross-border information sharing between practitioners and use their existing criminal analysis capacity to develop a more accurate assessment of the scale, location, and modus operandi of THBOR and to identify high-risk locations.

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