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# JURISPRUDENCE

## PROBLEMS OF CRIMINAL LEGAL CHARACTERIZATION OF CRIMES RELATED TO ILLEGAL TRANSPLANTATION COMMITTED BY TRANSNATIONAL ORGANIZATIONS UNDER UKRAINIAN CRIMINAL LAW

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### Abstract

In the article, the author analyses the main problems encountered in determining the criminal legal characteristics of crimes related to illegal transplantation committed by transnational organizations under Ukrainian criminal law. The Ukrainian judicial statistics on criminal proceedings involving transnational organizations performing illegal transplants are considered. Based on the results of the study, the author proposes concrete proposals to improve the national criminal legislation of Ukraine in order to overcome the problems considered, which arise in practice when characterizing crimes related to illegal transplantation committed by transnational organizations.

**Keywords:** transplantation, human anatomical materials, transnational organization, transnational organized crime, a transnational organized criminal group.

Today, the problem of transplantation of human anatomical materials should be considered not only from a medical (biological), philosophical, moral and ethical, but primarily from a legal (legal) point of view. After all, it should be noted that the transplantation of anatomical materials primarily concerns the problems of human life and health, as well as the rights and obligations of participants in public relations in the field of health, namely the donor and recipient, the violation of which can lead to criminal liability.

Ensuring an adequate and appropriate level of legal responsibility for the commission of socially dangerous acts in the field of transplantation is enshrined in the Criminal Code of Ukraine.

The relevance of the study is due to the fact that recently the structure of crime related to illegal transplantation has been changing in the world: individual crime gives way to group crime, group crime develops into organized crime, and the latter, reaching the international level, becomes transnational.

This type of crime in the area of illegal transplantation has become particularly relevant in recent years. In particular, in 2010, the law enforcement agencies of Ukraine exposed a transnational criminal group that was engaged in illegal transplantation. It was found that in the criminal scheme there were an organizer (an Israeli citizen), intermediaries (they were looking for donors who would agree to sell their organ and recipients), and doctors (Ukrainian citizens) (who made transplants or assisted with operations). Donors for a reward of \$10,000 seized a kidney, and the operations themselves were carried out in Baku. According to the legislation of Ukraine, only a relative of a patient can be a living donor of any organ. In Azerbaijan, transplants from outsiders are allowed, provided that it is free, and operations were carried out in Baku.

This criminal proceedings, apart from Azerbaijan, are also being considered in Ukraine, since the crime scene is here, since it was in our state that people were

agitated and selected for illegal transplants, they were paid money, entered into oral agreements and exported to Azerbaijan to make operations there.

Doctors were finally charged under articles 255 of the Criminal Code (establishment of a criminal organization), 149 of the Criminal Code (human trafficking), 143 of the Criminal Code (violation of the procedure established by law for transplantation of human anatomical materials) [7]. However, it was not possible to prove the crime of acts and on July 18, 2012 the Pechersk District Court of Kiev changed the preventive measure to three doctors from arrest to cash bail at the request of the accused, and on August 5, 2013 the Obolonsky District Court of Kiev decided to close the proceedings against the accused transplantologists after the statute of limitations of the case [11].

Here is an example of another criminal proceeding opened in 2015. Law enforcement agencies of Ukraine detained three citizens of Ukraine and a citizen of one of the countries of the East – members of a transnational organized criminal group specializing in illegal transplantation of human organs. These individuals, having connections in medical institutions of Asian countries, during 2013-2015. Potential kidney donors were recruited in Ukraine among low-income villagers. Donors were then transferred across the border to participate in illegal organ transplantation operations. In total, 25 donors – citizens of Ukraine and neighboring countries – were transported abroad by criminals. Members of a transnational group were informed of suspicion under Part 3 of Art. 28 and Part 1 of Art. 143 of the Criminal Code of Ukraine (violation of the procedure established by law for transplantation of human organs or tissues committed by an organized group) [12].

In 2017, in Ukraine, the SBU detained a gang that included citizens of Ukraine, Belarus, Turkey. According to law enforcement officers, members of this group searched Ukraine through the Internet for low-income

citizens who had debts and offered them to sell a kidney. They created a commercial company that was engaged in medical tourism. Donors were paid between \$13 and \$20,000. They themselves received from 80 to 100,000 dollars from the client. The criminal scheme was organized as follows: Ukrainians agreed to have the organ seized from them, then they were bought tickets and transported to Turkey or the Philippines for the operation. Over the month, 4-5 "medical tourists" traveled abroad. Abroad, they were met by girls who settled in the hotel, escorted to clinics for medical examination and commission. At the commission, they had to say that they were long-time friends of the recipients, this was the main condition for obtaining permission for the operation [14].

Another criminal proceeding was opened in 2019 by a Kazakhstani surgeon who is suspected of illegally seizing human anatomical materials, as well as in cooperation with a transnational criminal organization that was engaged in "black transplantology." His donors were also Ukrainians, and the buyers of the bodies were Israelis. According to investigators, this doctor personally performed 20 illegal operations. Also, doctors from Kazakhstan and Kyrgyzstan were detained in this criminal proceedings [1].

According to investigators, the research center where the surgeon works concluded an agreement with a foreign organ transplant company, and the doctor accepted funds for his services, and on one organ the criminal group earned about 150 thousand dollars, and donors, including Ukrainian, were paid 10-15 thousand dollars [14]. One of the interrogated Ukrainian said that he sold his kidney to pay for the treatment of his wife, who suffers from oncology. The second said that he needed money for life. The surgeon's defense comments that their client did not violate the will of either donors or recipients, and allegedly all donors voluntarily came to Kazakhstan to earn money [13].

Unfortunately, quite often people themselves decide to sell the organ in order to earn money. They may have many reasons. Someone owes unpaid loans or debts, who wants to pay for the treatment of a close relative, someone lost gambling, and another just wants to earn money on an apartment. They find on the Internet those who can mediate and help them sell their organ [14].

Thus, the issues of criminal responsibility for crimes related to the illegal transplantation of anatomical materials committed by transnational criminal groups are indeed important and require legislative changes and settlement.

Traditionally, transnational crime is defined as the totality of crimes committed over a certain period (persons who have committed them) that are detrimental to the relations of two or more States, or to the interests of legal or natural persons of two or more States, for which responsibility is provided for in acts of international criminal law or in national criminal law [6].

Transnational organizations that commit crimes related to illegal transplantation include organizations that systematically seize from people by coercing or deceiving their anatomical materials for transplantation to

recipients who are in other countries and/or international trafficking in organs or tissues of living or deceased people. Transnational crime is a global problem, which is the highest manifestation of organized crime and causes great damage to the economy, social and psychological culture of the population and undermines the national security of States.

A significant range of issues related to the study of globalization-related trends in transnational crime in trafficking in human anatomical materials, reflected in the scientific works of domestic scientists V.I. Borisov, Yu.V. Baulin, S.V. Grinchak, L.N. Demidova, L.V. Dorosh, A.V. Ilyashenko, Yu.A. Lisitsyna and others, which provide an opportunity to provide a criminal legal description of the type of criminal activity being studied.

The aim of the study is to identify the main problems that arise in the application of criminal liability for crimes related to illegal transplantation committed by transnational organizations in Ukraine and to provide proposals to solve them and improve the criminal legislation of Ukraine.

Part 5 of Art. 143 of the Criminal Code provides for criminal liability for participation in transnational organizations engaged in the seizure from a person by coercion, deception of his anatomical materials for the purpose of transplantation, or the commission of such actions against persons in a helpless state or in material or other dependence on the perpetrator, or illegal trade in human anatomical materials [5].

It is worth noting that part 5 of Art. 143 of the Criminal Code is considered as an independent corpus delicti, and not as a particularly qualifying feature.

It should be noted that the direct object of the vast majority of crimes under Art. 143 of the Criminal Code of Ukraine "Violation of the procedure established by law for transplantation of anatomical materials of a person" life, health and bodily integrity of a person. However, for the corpus delicti specified in Part 5 of Art. 143 of the Criminal Code of Ukraine, it is necessary to establish an additional mandatory direct object, since such a crime regarding participation in transnational organizations violates the rights not only of individuals, but also encroaches on the security of society and the state from the activities of such an organization. That is why an additional mandatory direct object for this crime is legal relations in the field of public security.

An analysis of the objective side of the said corpus delicti should begin with the concept of a transnational organization. The concept of "transnational organization" in the Criminal Code of Ukraine is declared in one article 143. However, the legislator and in this article did not describe this concept and did not define any signs of it. There is no such definition in the Decision of the Plenum of the Supreme Court of Ukraine "On the practice of courts in considering criminal cases of crimes committed by stable criminal associations" dated December 23, 2005 No. 13 [10].

To clarify the concept of transnational crime in general and transnational organization in particular, reference should be made to the United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25 of

15 November 2000 and ratified by Ukraine on 4 February 2004 [4]

Article 3 of the Convention provides that it shall be used to prevent, investigate and prosecute certain crimes if they are of a transnational nature and are committed with the participation of an organized criminal group.

According to Part 2 of Art. 3 of the Convention, the crime is transnational in nature under the following conditions:

(a) it is committed in more than one State;

(b) it is committed in one State, but a substantial part of its preparation, planning, direction or control takes place in another State;

(c) It is committed in one State but with the participation of an organized criminal group which carries out criminal activities in more than one State; or

(d) it is committed in one State, but its material effects take place in another State [4].

Based on the provisions of the UN Convention, one of the signs of a transnational organization is the prevalence of such an organization in the territory of several states. In addition, the Convention actually refers to this form of complicity, as an organized group, in which, in accordance with paragraph A. of Art. 2, should be understood as a structured group of three or more persons, existing for a period of time and acting in concert to commit one or more serious crimes or crimes, recognized as such under this Convention in order to obtain, directly or indirectly, a financial or other material benefit [4]. According to article 2, paragraph B., of the Convention, "serious crime" means an offence punishable by imprisonment for a maximum term of at least four years or a more severe penalty. Thus, in Ukrainian legislation on criminal liability, the concept of "serious crime" is "a crime of moderate gravity," for which a sentence of imprisonment of at least four years is imposed, as well as a "serious" or "especially serious crime."

Regarding crimes in the field of transplantation of human anatomical materials, transnational organizations are organizations that systematically engage in the seizure of anatomical materials from people (human) by coercion or deception in order to transplant them to recipients who are in other countries, and/or international illegal trade in anatomical materials of living or deceased people. Such organizations may include a stable hierarchical association of three or more people, whose members or structural parts, by prior agreement, were organized for joint activities in order to commit acts provided for in parts 2, 3, 4 of article 143 of the Criminal Code of Ukraine [8, p. 309].

The definition of "transnational organization" we have considered has the characteristics of both an organized group and a criminal organization under Art. 28 of the Criminal Code of Ukraine, but does not fully reproduce one of the forms of complicity provided for by Art. 28 of the Criminal Code of Ukraine.

Among scientists, there are discussions about the appropriateness of the existence of such a corpus delicti as participation in transnational organizations, engaged in the seizure from a person by coercion or deception of his anatomical materials for the purpose of their

transplantation, or the commission of such acts against persons in a helpless state or in material or other dependence on the perpetrator, or who engage in the illegal trade in human anatomical materials (part 5 of article 143 of the Criminal Code of Ukraine). First of all, doubts about such expediency give rise to the problem of the possibility of applying this part of the Criminal Code of Ukraine. Thus, a transnational organization, which is a type of criminal organization under Part 4 of Art. 28 of the Criminal Code of Ukraine, must include all the specific features of a criminal organization, namely: 1) a quantitative characteristic – the number of participants united; 2) qualitative features: a) objective: hierarchy of the association; b) subjective: the purpose of creating a criminal organization; c) objective-subjective: the stability of the association [3, p. 39].

In turn, the purpose of creating a criminal organization under part 4 of Art. 28 of the Criminal Code of Ukraine may be: 1) direct commission of serious or especially serious crimes by members of this organization; or (2) directing or coordinating the criminal activities of other persons; or (3) the functioning of both the criminal organization itself and other criminal groups. Part 5 of Art. 143 of the Criminal Code of Ukraine provides for only one purpose - the direct commission of crimes under parts 2, 3, 4 of Art. 143 of the Criminal Code of Ukraine by members of a transnational organization. The problem is that in accordance with part 4 of Art. 12 of the Criminal Code, a serious crime is only a crime, Under article 143, paragraph 3, of the Criminal Code, and under article 143, paragraphs 2 and 4, of the Criminal Code, according to part 3 of Art. 12 of the Criminal Code of Ukraine crimes of moderate severity, and this excludes the possibility of applying part 5 of Art. 143 of the Criminal Code, since an association whose members have organized themselves for the purpose of committing crimes of minor or moderate gravity may be considered a criminal organization [9, p. 45]. Thus, the legislator probably did not take into account that this corpus delicti does not contain all the characteristics of a criminal organization provided for in the provisions of the General Part of the Criminal Code of Ukraine [2, p. 245].

Scientists suggest different ways to solve the problem that a transnational organization does not include all the signs of a criminal organization, S.V. Grinchak, for example, proposes to exclude from Part 5 of Art. 143 of the Criminal Code of Ukraine an indication of criminal liability for "participation in transnational organizations, engaged in such activities, "since participation in criminal organizations, of which transnational organization is a type, provided as an independent corpus delicti in Art. 255 of the Criminal Code of Ukraine [2, p. 246].

The scientific views of Yu.A. Lisitsyna on this problem differ from the proposals of S.V. Grinchak. Yu.A. Lisitsyna claims that: "in order to avoid ambiguities in the law enforcement process, taking into account the above provisions and the fact that the concept of transnational organization is not enshrined at the legislative level, it is advisable to replace the concept of 'transnational organization "with" organized group "in part 5 of Art. 143 of the Criminal Code of Ukraine.



Also, this scientist identifies the presence of a gap in criminal law on the issue of criminal legal assessment of the activities of the person who created such an organized group, that is, in fact, is its organizer. According to the current version of the disposition, part 5 of Art. 143 of the Criminal Code of Ukraine, the actions of such a person will obviously be qualified on an equal footing with ordinary members of this organized group, and this to a certain extent contradicts the procedure established in Art. 30 of the Criminal Code of Ukraine for differentiating the criminal liability of the organizer and members of the organized group. Therefore, Yu. A. Lisitsyna proposes to supplement part 5 of Art. 143 of the Criminal Code of Ukraine with the following provision: "the creation of an organized group for the purpose of committing crimes provided for in parts 2, 3, 4 of this article or participation in such a group" [6].

We do not share the scientific views of S.V. Grinchak and Yu. A. Lisitsyna and believe that participation in transnational organizations engaged in such activities should not be excluded by Art. 143 of the Criminal Code of Ukraine. After all, this type of crime covers several countries, and this article 255 of the Criminal Code of Ukraine does not refer to interstate crimes. In our opinion, the concept of "transnational organization" should be replaced by "transnational organized criminal group" and supplemented by Art. 28 of the Criminal Code of Ukraine with the definition of a transnational criminal organized group.

So, we propose to supplement Art. 28 of the Criminal Code of Ukraine part 5 and set out the article in the following wording:

**"Article 28.** *Commission of a crime by a group of persons, a group of persons by prior conspiracy, an organized group, a criminal organization or transnational organized criminal groups.*

*A crime is recognized as committed by transnational organized criminal groups if it is committed by a stable hierarchical association of several persons (three or more) whose members or structural parts, by prior agreement, were organized to commit one or more crimes in the territory of two or more States, or in one State, but its preparation, planning, direction or effect takes place in another State or in one State, but with the participation of nationals of other States."*

*It is immediately necessary to amend article 30 of the Criminal Code of Ukraine:*

**"Article 30.** *Criminal liability of organizers and members of an organized group, criminal organization or transnational organized criminal group*

*1. The organizer of an organized group, criminal organization or transnational organized criminal group shall be criminally liable for all crimes committed by an organized group, criminal organization or transnational organized criminal group if they were covered by its intent.*

*2. Other members of an organized group, criminal organization or transnational organized criminal group shall be criminally liable for the crimes in which they have prepared or participated, regardless of the role played by each of them in the crime."*

A transnational organized criminal group is a type of criminal organization, but it is an independent type

of criminal organization that has its own characteristics. In accordance with article 255 of the Criminal Code of Ukraine, for the creation of a criminal organization for the purpose of committing a serious or especially serious crime, as well as the leadership or participation in such an organization, or participation in crimes committed by such an organization, as well as the organization, direction or facilitation of a meeting (gathering) of representatives of criminal organizations or organized groups to develop plans and conditions for the joint commission of crimes, material support for criminal activities or coordination of actions of associations of criminal organizations or organized groups is punishable by imprisonment for a term of five to twelve years. And under part 5 of Art. 143 of the Criminal Code of Ukraine for participation in transnational organizations engaged in activities under part 2, 3 and 4 of Art. 143 of the Criminal Code of Ukraine is punishable by imprisonment from five to eight years. We consider such a punishment too "lenient" for this type of crime and believe that responsibility should be established on the basis of common article 255 of the Criminal Code of Ukraine. But, since criminal organizations also commit especially serious crimes, and transnational organized criminal groups, as we established, only commit crimes of moderate gravity and serious crimes, then in accordance with the limits of deprivation of liberty should be slightly less from Art. 255 of the Criminal Code of Ukraine.

So, we propose to state part 5 of Art. 143 of the Criminal Code of Ukraine here is our own established version:

*"5. The acts provided for in parts two, three or four of this article, committed by prior conspiracy by a group of persons, or participation in a transnational criminal organized community engaged in such activities, shall be:*

*shall be punished by imprisonment for a term of five to ten years with deprivation of the right to hold certain posts and engage in certain activities for a term of up to five years."*

The subject of illegal transplants, provided for in part 5 of p. 143 of the Criminal Code of Ukraine, medical workers illegally seize anatomical materials from a person. The subject of a crime under Part 5 of Art. 143 of the Criminal Code of Ukraine regarding participation in transnational organizations engaged in the illegal trade in human anatomical materials can be any person who has reached the age of 16 years and is a member of such a transnational organization.

The subjective side of the criminal act under Part 5 of Art. 143 of the Criminal Code of Ukraine provides for the presence of direct intent and a special purpose – the seizure from a person of its anatomical materials for the purpose of transplantation or the trade in these anatomical materials with a selfish motive for obtaining financial benefit.

Confirmation of the fact that the responsibility of transnational organizations for these crimes should not be excluded from article 143 of the Criminal Code of Ukraine and the limits of punishment should also be increased and criminal offenses analyzed in article.

So, as we see, there are a lot of examples of judicial statistics on criminal proceedings involving transnational organizations that commit illegal transplants, but in most cases such criminal proceedings are closed for the unproven guilt of suspects in the commission of these crimes. Another problem is the latency of this type of crime. All this shows that the proposed proposals are really aimed at improving the current criminal legislation on illegal transplants in accordance with the positive European practice in this direction.

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