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The EULOD Project
Living Organ Donation
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Results and Recommendations



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Organ Trafficking, Organ Trade. Recommendations for a More Nuanced Legal Policy

Judit Sándor*, Violeta Beširević**, Enikő Demény***, Natalia Codreanu****,
George Florea***

* Faculty of Political Science, Legal Studies and Gender Studies of the Central European
University (CEU), Budapest, Hungary

** Union University Law School Belgrade, Serbia

*** Center for Ethics and Law in Biomedicine (CELAB), Budapest, Hungary

**** Renal Foundation of Moldova, Chisinau, Moldova

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Introduction

By the twenty-first century, neither the number of available organs, nor the infrastructural and financial means could keep pace with the increasing need and the technological capacity for transplantation in the developed countries. National waiting lists have become full and long, and the number of people who died while waiting in the line has also increased. Furthermore, globalization created tension between developed and less developed countries, which resulted division between “organ recipient” and “organ donor” countries. Patients’ mobility has also increased and in many countries patients no longer feel bound to the capacity of one health care sector. It is easier to travel and it is no longer regarded as an exceptional luxury to seek health care beyond the national frontiers.

During our two year term project, in our work package within the EULOD project we attempted to map and to analyze laws, practices, cases, problems with regard the violation of organ transplantation laws. From the minor violation of selecting donor for the recipient to major and severe forms of violation of human rights, such as organ trafficking cases were collected and analyzed. We also examined selected laws and practices in order to develop recommendations which may serve for legislation, ethics committees and further research.

This chapter highlights different legislative and law enforcement strategies that could be employed in reducing and eliminating organ trafficking in the European region. The focus will be put both on the perpetrator of the crime and on its victim, while scrutinizing how the obligation of the states to reach this end is fulfilled.

Before going into it, it is important to emphasize the difference between an illegal organ sale, wherein organs are purchased from living donors or extracted from corpses and then transported for sale, quite often to different countries, and the practice of *human trafficking for the purpose of organ removal*, which usually involves transport of the “donor” followed by violent removal and even his/her death.¹ When it comes to law enforcement strategies, this distinction becomes crucial since, although both are global phenomena, so far only *human trafficking for organ removal* has been fully outlawed on the universal and the regional levels. Namely, human trafficking for organ removal and organ trade include both a domestic and an international dimension, which makes these illegal practices an issue of local and global concern and a subject of domestic and international legal regulations. A lack of universal agreement on what constitutes organ trade and insufficient information from official sources so far have prevented the efforts to ban organ trade on the international level. This, however, should be soon changed, since on the European level much emphasis has already been put on drafting a new criminal law convention against trafficking in human organs² – while there are also strong voices lobbying for adopting similar convention on the universal level.³ Due to the current differences, however, legislative and law enforcement strategies to combat trafficking in human beings for organ removal and those to combat organ trade will be addressed separately in this chapter.

¹ For more on the categorization see Raneé Khooshie Lal Panjabi, *The Sum of a Human's Parts: Global Organ Trafficking in the Twenty-First Century*, *Pace Environmental Law Review*, vol. 28, no. 1 (Fall 2010): 1–144, pp. 16–17.

² For more see Michael Plachta, *Council of Europe Takes Up Problem of International Trafficking in Human Organs*, *International Enforcement Law Reporter*, Section: *Trafficking in Human Beings and Organs*, vol. 28, no. 8 (2012): 285.

³ Panjabi (2010), pp. 123–124.

Human Trafficking for Organ Removal and Organ Trade in Europe

The news headlines coming from different parts of the world about organ trafficking confirm Michael Bos’ warning that organ trafficking “is all about money, not patients.”⁴ In one of the recent reports an extensive Southeast European network is uncovered. According to the investigation by the German weekly Spiegel, there are Israeli, Turkish, Belarusian, Moldovan, and German agents involved in organ trafficking through Kosovo.⁵ Among other charges, it is alleged that the Priština-based Medicus Clinic is sending human organs from the black market to clinics across Germany.⁶ There is already an ongoing trial in the so-called *Medicus Clinic* case before the District Court of Priština, against seven defendants who face charges of human trafficking for organ removal, organized crime, unlawful exercise of medical activity, including illegal organ transplants, and abuse of official position or authority.⁷ The investigation concerning these alleged crimes was launched in 2008 when a young Turkish man collapsed at the Priština airport after donating a kidney to an Israeli man.⁸ In addition, separate investigations are pending with regard to organ trafficking during the armed conflict in Kosovo. The Serbian War Crimes Prosecutor Office, for example, has launched an investigation in the case *Trafficking in Human Organs*, indicating that the crimes were committed from 1998 to 2001.⁹ The Council of Europe appointed a Special Rapporteur Dick Marty who, late in 2010, drafted the report on *Inhuman Treatment of People and Illicit Trafficking in Human Organs in Kosovo*.¹⁰ The Parliamentary Assembly of the Council of Europe adopted a resolution based on the report and requested follow-up investigations.¹¹ In direct response to the Report, EULEX (European Union Rule of Law Mission) has opened an investigation and recently appointed US prosecutor John Clint Williamson to run it.¹²

The developments in Kosovo brought organ trafficking at the forefront of Europe’s concern. Despite the fact that most of the European countries have signed and ratified the European Convention on Action against Trafficking in Human Beings (Anti-Trafficking Convention), the most comprehensive international anti-trafficking regulation, and despite the fact that organ trade in all of the European countries is illegal, it appears that organ trafficking, in its varied manifestations – both trafficking in persons for organ removal and organ trade – persists and prevails in many parts of Europe and may even be increasing in some areas such as the former Soviet Union and South East Europe. The crime is blossoming due to insufficient regular supply – according to the aforementioned report by Spiegel, 40,000 seriously ill patients, in Europe alone, are waiting for a new kidney, which is still the most sought-after organ.¹³

⁴ Michael A. Bos, *An Update on Global Organ Trafficking* (2008), p. 6, at www.esot.org/Files/Elpat/Content_Files/CTpiTSydneyPresentationBos.pdf (last accessed on September 16, 2012).

⁵ See: Arndt Ginzel, Martin Kraushaar and Steffen Winter, *Desperation, Greed and the Global Organ Trade*, Spiegel, International Edition, August 3, 2012, available at www.spiegel.de/international/world/the-illegal-trade-in-organ-is-fueled-by-desperation-and-growing-a-847473.html (last accessed on September 22, 2012).

⁶ Ibid.

⁷ See the Ruling Confirming the Indictment, District Court of Priština, KA 278/10, P 309/10 and KA 309/10, P 340/10 at www.eulex-kosovo.eu/en/judgments/CM-District-Court-of-Pristina.php (last accessed on September 16, 2012).

⁸ See at <http://www.eubusiness.com/news-eu/kosovo-turkey.cqc> (last visited September 16, 2012).

⁹ The War Crimes Prosecutor Office of the Republic of Serbia, *Trafficking in Human Organs*, KTRR 33/08, p. 4. The file was inspected exclusively for the academic purposes.

¹⁰ See Council of Europe Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *Inhuman Treatment of People and Illicit Trafficking in Human Organs in Kosovo*, Report, Rapporteur: Dick Marty (December 12, 2010), available at www.assembly.coe.int/CommitteeDocs/2010/ajdoc462010prov.pdf (last accessed on September 16, 2012).

¹¹ See Resolution 1782 (2011), available at assembly.coe.int/Documents/AdoptedText/ta11/ERES1782.htm (last accessed on September 22, 2012).

¹² www.eulex-kosovo.eu/en/pressreleases/0177.php (last accessed on September 16, 2012).

¹³ Ginzel, Kraushaar & Winter (2012).

Legislative and Law Enforcement Strategies to Combat Human Trafficking for Organ Removal

Trafficking in persons for organ removal is a form of trafficking in human beings that is currently banned both on the international and domestic level. It is not only an act of an organized and transnational crime, but also the practice that leads to direct infringement of a number of the victim's rights, including the right to life, the right to human dignity, freedom of movement, the prohibition of torture and other cruel, inhuman and degrading treatment, the right to health and the prohibition of discrimination. For the purpose of law enforcement strategies, the fact that this practice has been assimilated with slavery is not without merits: "Trafficking in human beings is the slavery of our times. Victims are often recruited, transported or harbored by force, coercion or fraud in exploitative conditions, including sexual exploitation, forced labor or services, begging, criminal activities, or the removal of organs."¹⁴ Thus, extremely similar to the classical forms of slavery, trafficking in human beings requires international measures similar to those once applied to eliminate the practice of slavery.¹⁵

International documents specifically addressing trafficking in human beings list measures that states have to adopt in combating this illegal practice, the most important being those listed in the UN Trafficking Protocol (the Palermo Protocol) which supplements the UN Convention against Transnational Organized Crimes, and the aforementioned European Anti-Trafficking Convention. Since recently, the standards set in the European Court of Human Rights' case law also impose positive and negative obligations on the European states to be undertaken in order to reduce and eliminate human trafficking.¹⁶ Finally, among different EU documents, the brand new EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016, released in June 2012, lists the measures and identifies top priorities the EU should focus on in order to address the issues in trafficking in human beings.¹⁷ The measures envisaged on both international and domestic level testify that the progression has been made from approaching the problem with an exclusive focus on the punishment of the perpetrator to focusing on the rights and interests of the victim from a more holistic perspective.¹⁸

Thus, the Palermo Protocol and the Anti-Trafficking Convention require from the states to criminalize trafficking in human beings, including trafficking for organ removal, adopt comprehensive prevention programs, aid victims and respect their human rights and interests as well as to cooperate with other states in eliminating this modern evil. In its landmark 2010 ruling in the *Rantsev v. Cyprus and Russia* case, the European Court of Human Rights observed that the Palermo Protocol and the Anti-Trafficking Convention refer to the need for a comprehensive approach to combat trafficking which includes measures to prevent trafficking and protect victims, in addition to measures to punish traffickers.¹⁹ According to the Court, such measures range from raising awareness about the phenomenon of human trafficking, training law enforcement and immigration officials on issues related to human trafficking, implementing administrative measures to regulate the operation of businesses that cover up human trafficking, and instituting necessary changes in the policy

¹⁴ See EU Strategy towards the Eradication of Trafficking in Human Beings, 2012–2016, at www.ungift.org/knowledgehub/stories/august2012/eu-commission-adopts-anti-human-trafficking-strategy.html (last accessed on September 16, 2012).

¹⁵ Anna Gekht, Shared but Differentiated Responsibility: Integration of International Obligations in Fight Against Trafficking in Human Beings, *Denver Journal of International Law and Policy*, vol. 37, no. 1 (Winter 2008): 29–62, p. 61.

¹⁶ Among many, see the landmark case *Rantsev v. Cyprus and Russia*, Judgment from January 7, 2010.

¹⁷ See EU Strategy (2012).

¹⁸ Roza Pati, States' Positive Obligations with Respect to Human Trafficking: The European Court of Human Rights Breaks New Ground in *Rantsev v. Cyprus and Russia*, *Boston University International Law Journal*, vol. 29, no. 1. (Spring 2011): 79–142, p. 28.

¹⁹ *Rantsev v. Cyprus and Russia*, par. 289.

and the law related to immigration, criminalization, investigation and prosecution of all aspects of trafficking, to practically and effectively protecting victims' rights.²⁰ The EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016, identifies the following five policy measures aimed at eliminating trafficking in human beings: identifying, protecting and assisting victims of trafficking; stepping up the prevention of trafficking in human beings; increased prosecution of traffickers; enhanced coordination and cooperation among key actors and policy coherence; increased knowledge of and effective response to emerging concerns related to all forms of trafficking in human beings.²¹

Despite of these normative and judicial developments, traffickers, including those who engage in this lucrative practice for organ removal, still mostly operate with impunity. Several factors contribute to the undisturbed continuation of their businesses: anti-trafficking regulations are not effectively harmonized; their implementation is inconsistent; while government officials and law enforcement institutions close their eyes on this practice or even remain involved in it. The *Medicus Clinic* case in Kosovo illustrates all facets of this tragic business. Additionally, according to INTERPOL, an ageing population and increased incidence of diabetes in many developed countries is likely to increase the need for organ transplants and make this crime even more lucrative.²²

What can be done to make prohibition on human trafficking for organ removal more effective? In what follows, some possible measures that fit well in the framework of the EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016 are going to be further elaborated.

In the realm of law and order, much ink has been spilled in attempts to emphasize the need to adopt adequate legislation, impose punishments on offenders, strengthen police cooperation and improve the number of prosecutions and convictions of traffickers.²³ For the purpose of this chapter, one can assert that such policy-oriented measures are providing grounds for effective investigation in order to eliminate non-impunity for traffickers and increasing governmental cooperation in law enforcement, represent the way forward in achieving accountability for traffickers. Consider the following.

When a person is trafficked from one state to another, trafficking offences may occur in the state of origin, any state of transit, and the state of destination. As a consequence, it is a fundamental question which criminal jurisdiction is affected and involved and it tests the limits of state sovereignty and the role the international legal order can play. In order to secure that none of the traffickers remain unpunished and make fights against this illegal practice more effective, the states should be encouraged to employ different jurisdictional tools.²⁴

The first is the territorial jurisdiction, which is the most common and it is specified in the Anti-Trafficking Convention: member states are required to establish jurisdiction over any trafficking offence committed in its territory.²⁵ In *Rantsev*, the European Court of Human Rights concluded that the obligation to investigate alleged trafficking offences was incumbent on all States under Article 4 of the Convention.²⁶

²⁰ Pati (2011) pp. 95–97.

²¹ EU Strategy (2012).

²² Interpol, Trafficking in Human Beings, Fact Sheet COM/FS/2009-12/THB-02, at <http://www.interpol.int/Public/ICPO/FactSheets/THB02.pdf> (last visited September 16, 2012).

²³ See Gekht (2008), Pati (2011), and also Salvador A. Cicero-Dominguez, Lessons from the Road: Ecuador, Jamaica, and Other Efforts to Combat Trafficking in Persons in the Americas, *Northern Illinois University Law Review*, vol. 31, no. 3. (Summer 2011): 521–551.

²⁴ The term jurisdiction, whether it applies to civil or criminal matters, includes the powers to prescribe, adjudicate, and enforce. It also includes the means by which the exercise of jurisdiction is obtained over a person. See M. Cherif Bassiouni, Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice, *Virginia Journal of International Law*, vol. 42, no. 1 (Fall 2001): 81–162.

²⁵ See Article 31 (a) (b) (c) of the Anti-Trafficking Convention.

²⁶ *Rantsev v. Cyprus and Russia*, par. 288.

The second is extraterritorial jurisdiction also specified in the Anti-Trafficking Convention: applying extraterritoriality principle, states would be in a position to establish jurisdiction over its citizens who have committed the crime of human trafficking for organ removal outside of its territory or against the perpetrators who have committed this crime against their citizens in the foreign country.²⁷ Allowing the enforcement state to extend extraterritorially in cases of a valid legal nexus would secure that no offender evade criminal investigation.

The third jurisdictional tool – universal jurisdiction – is the most controversial, but at the same time potentially the most effective jurisdictional tool to prevent impunity for international and transnational crimes such as human trafficking for organ removal. Universal jurisdiction allows states to claim criminal jurisdiction over persons whose alleged crimes have been committed outside its boundaries, regardless of nationality, country of residence or any other relation with the prosecuting country. The rationale behind the exercise of such jurisdiction is:

- (1) no other state can exercise jurisdiction on the basis of the traditional jurisdictional grounds;
- (2) no other state has a direct interest; and
- (3) there is an interest of the international community to enforce.²⁸

By exercising universal jurisdiction the state acts as a surrogate for the international community and conducts investigation against persons who are *hostis humani generis*.²⁹ Universal jurisdiction is most often reserved for the most serious international crimes, including genocide, war crimes, crime against humanity, slavery, torture and some other international crimes that have risen to the level of *jus cogens*, which implies the existence of universal jurisdiction. However, universal jurisdiction is not without flaws: it can produce conflicts of jurisdiction between states that can undermine world order, subject individuals to abuses of judicial processes and human rights violations. It may also be perceived as hegemonic jurisdiction exercised mainly by some Western powers against persons from developing nations.³⁰

After the European Court's ruling in *Rantsev*, it seems that necessary ground implying universal jurisdiction for human trafficking, including trafficking for organ removal, was established. Although in rather contradictory manner the Court concluded that Article 4 of the European Convention on Human Rights and Fundamental Freedoms is a tool to considering the issue of trafficking³¹, it nevertheless recognized two important points which could encourage states to claim universal jurisdiction with regard to human trafficking for organ removal. The first concerns the fact that the Court assimilated trafficking in human beings with slavery.³² Although the related provisions in all the treaties relevant to slavery and slave-related practices reflect the principle of *aut dedere aut judicare*,³³ customary international law and the writings of scholars have recognized slavery and slave-related practices as a *jus cogens* international crime, which may authorize states to practice universal jurisdiction in their efforts to confront these practices.³⁴ Namely, what actually urges the recognition of universal jurisdiction is the maxim *aut dedere aut judicare*, which refers to the obligation of the state either to prosecute the trafficker or extradite him/her to the state having jurisdiction. If one has in mind that the Anti-Trafficking Convention recognizes the principle *aut dedere aut judicare*, then the recognition of universal jurisdiction represents a means of achieving the ultimate

²⁷ See Article 31 (d) (e) of the Anti-Trafficking Convention.

²⁸ For a detailed discussion see Bassiouni (2001).

²⁹ *Ibid.*, p. 11.

³⁰ *Ibid.*, p. 55.

³¹ The Court has refused to rule on whether trafficking in human beings amounts to some of the practices prohibited under Article 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms – “slavery”, “servitude” or “forced labor”, but instead, simply concluded that human trafficking as defined in Article 3(a) of the Palermo Protocol falls within the scope of Article 4 of the Convention.

³² *Rantsev v. Cyprus and Russia*, par. 280-281.

³³ For a detailed discussion on the issue of jurisdiction in slavery conventions see Bassiouni (2001), pp. 22-25.

³⁴ *Ibid.*, p. 25.

goal – accountability of traffickers. In fact, the Anti-Trafficking Convention in a way nudges the state to refer to universal jurisdiction by its Article 31 (5), which specifically provides that “without prejudice to the general norms of international law, this Convention does not exclude any criminal jurisdiction exercised by a Party in accordance with internal law”.

Second, although the Court in *Rantsev* did not mention that the duty to establish universal jurisdiction arose under Article 4 of the Convention, its aforementioned conclusion that Article 4 of the Convention imposed on all States the general obligation to investigate the crime could be interpreted in favor of establishing universal jurisdiction in addition to other jurisdictional grounds. The Court's reference to the objective of the Palermo Protocol concerning the states' obligation to adopt a comprehensive international approach to trafficking in the countries of origin, transit and destination, additionally favors this solution.³⁵ The negative effects of universal jurisdiction could be mitigated by domestic rules that would allow adherence only to conditional universal jurisdiction in cases when an alleged perpetrator is on the territory of the enforcement state and no other state can exercise jurisdiction on the basis of the traditional jurisdictional grounds or has a direct interest in conducting investigation.

Another tool for achieving accountability of traffickers is intensifying cooperation among states in fight against trafficking in human beings for organ removal. Since recently, cross-border cooperation in suppressing human trafficking has become a duty of the European states – failure to obey it may amount to a violation of Article 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Namely, the European Court of Human Rights has concluded that member states are subject to a duty in cross-border trafficking cases to cooperate effectively with the relevant authorities of other States concerned in the investigation of trafficking events, which occurred outside their territories.³⁶ The Court noted that such a duty is in keeping with the objectives of the member States, as expressed in the preamble to the Palermo Protocol, to adopt a comprehensive international approach to trafficking in the countries of origin, transit and destination and that it is consistent with international agreements on mutual legal assistance.³⁷

The need for making states cooperation in fight against human trafficking mandatory arose from a simple fact that “currently, countries police within their own borders what has become a transnational market.”³⁸ Since trafficking in human beings for organ removal is a form of organized and transnational crime, only broad cooperative measures implemented globally, regionally and on the national level could produce effective results in combating trafficking and alleviating the roots of its cause – “poverty, underdevelopment and lack of equal opportunity” (Article 9 of the Palermo Protocol). Among many traditional tools of cooperation in criminal matters, it seems that strengthening international police cooperation aimed at better exchange of information between countries of origin and countries of destination could eliminate a high number of unreported cases. This can be achieved through already established networks such as INTERPOL, EUROPOL and SECI (Southeast European Cooperative Initiative Regional Center for Combating Trans-Border Crime).

Finally, in law and order area, complying with the findings of GRETA, which is the European monitoring system established in accordance with Article 38 of the Anti-Trafficking Convention, may make the states more efficient in suppressing human trafficking for organ removal. GRETA draws up country evaluation reports containing an analysis of the implementation of the Anti-Trafficking Convention by each Party and proposals for further action. On the basis of GRETA's

³⁵ *Rantsev v. Cyprus and Russia*, par. 148, 288.

³⁶ *Ibid.*, par. 288.

³⁷ *Ibid.*

³⁸ Amy Lieberman, *Organ and Human Trafficking Intersect*, March 30, 2010, at <http://www.policyinnovations.org/ideas/briefings/data/000165/> (last visited September 16, 2012).

reports, the political pillar of the monitoring mechanism, the Committee of the Parties, may adopt recommendations concerning the measures to be taken to implement GRETA's conclusions.³⁹

Trafficking in human beings, including trafficking for organ removal is not only the issue of law and order. Above all, it is a human rights issue because it denies its victims virtually all rights protected by international human rights law. Although both international community and the national governments have made a substantial progress in achieving better protection for victims, it seems that one particular policy measure – immunity from prosecution for victims of trafficking has not attracted enough attention. Namely, Article 26 of Anti-Trafficking Convention envisages that "Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so". There are two policy measures that could be undertaken to achieve this goal. First, all states members of the Anti-Trafficking Convention should provide for an explicit right to immunity from prosecution for victims of trafficking in human beings on the grounds indicated in Article 26 of the Convention. Second, since the omission of the non-punishment provision represents a substantial oversight in the Palermo Protocol, the countries members of the Protocol should initiate the amendment providing for an explicit legal protection against criminal prosecution of the victims of trafficking, as it has been already envisaged in Article 5 of the UN Protocol against the Smuggling of Migrants by Land, Sea and Air, which like the Trafficking Protocol, also supplements the UN Convention against Transitional Organized Crimes.⁴⁰

Legislative and Law Enforcement Strategies to Combat Organ Trade (Commercialism)

The Ovideo Convention states a categorical ban on the commercialization of organ donation in Article 21 by saying "The human body and its parts shall not, as such, give rise to financial gain." The convention is based on broad consensus in Europe as more than twenty countries have ratified it so far. It follows from the text that both commercialization and commodification are covered by this prohibition. The prohibition is restated in the Additional Protocol to the Convention on Human Rights and Biomedicine, concerning Transplantation of Organs and Tissues of Human Origin. The Protocol also prohibits the advertising of the need for, or availability of, organs or tissues, with a view to offering or seeking financial gain or comparable advantage.

In the Explanatory Note of the Convention it is clarified that under Article 21 of the Convention organs and tissues, including blood, should not be bought or sold or give rise to financial gain for the person from whom they have been removed or for a third party, whether an individual or a corporate entity such as, for example, a hospital. However, certain technical acts which are performed on the basis of these items may legitimately give rise to reasonable remuneration. For instance, this Article does not prohibit the sale of a medical device incorporating human tissue as long as the tissue is not sold as such. Further, this Article does not prevent a person from whom an organ or tissue has been taken from receiving compensation which, while not constituting remuneration, compensates that person equitably for expenses incurred or loss of income.

At the EU level, the European Commission has urged addressing ethical and legal issues concerning organ transplantation. One of the most important legal instruments was adopted in 2010, the Directive 2010/45/EU of the European Parliament and of the Council of 7 July 2010 on standards of quality and safety of human organs intended for transplantation.

³⁹ See GRETA homepage at http://www.coe.int/t/dghl/monitoring/trafficking/default_en.asp (last visited September 16, 2012).

⁴⁰ For more, see David Luban, Julie R O'Sullivan, and David P. Stewart, *International and Transnational Criminal Law* (Aspen Publishers, 2010), pp. 542–558.

Despite remarkable consensus that organ trade is unethical and illegal practice and is prohibited virtually in all countries except in Iran, the shortage in organs has opened the door for criminals to use this circumstance for making organ trade a global, highly profitable criminal activity. Thus, "transplant ethics has been on a slippery slope almost since transplants began".⁴¹

Organ trade or transplant commercialism is defined in the Declaration of Istanbul as "a policy or practice in which an organ is treated as a commodity, including by being bought or sold or used for material gain." Commodification has been further explained as to refer to the production of a good or service for a profit.⁴² Almost every single country endorses the non-commerciality principle in organ transplantation and has implemented it into their national laws. As it has been frequently underlined in this book, the principle of non-commercialization of the human organs has been re-affirmed by the Council of Europe and by the European Union, as well.

Like trafficking in human beings for organ removal, organ trade is also a type of an organized and transnational crime that includes both international and domestic dimensions. Transplant transactions require participation of different actors, starting from medical directors of transplant units, hospital and medical staff, technicians in blood and tissue laboratories, dual surgical teams working in tandem, nephrologists, postoperative nurses, to travel agents and tour operators to organize travel, passports and visas, medical insurance agents, kidney hunters to recruit donors locally or internationally from among vulnerable and marginalized populations, religious organizations and charitable trusts which sometimes call upon organ brokers, and patient advocacy organizations which sometimes call upon organ brokers.⁴³ This is why the commission of this crime can be distinguished in terms of the sectors from which the perpetrators derive.

When it comes to law enforcement, it is general view that surgeons, medical administrators, organ brokers, buyers or sellers are rarely subject to law enforcement measures. Basically, two reasons contribute to this fact. First, while the trafficking in human beings for the purposes of organ removal has been fully covered by definitions and policy measures in national legislation and international documents, "there is a legal vacuum for the traffic in organs".⁴⁴ While the Declaration of Istanbul defines and differentiates trafficking from commercialism, it does not offer enough guidance to the prohibition enforcement policy. Second, as it has been rightly noted, "a combination of shame, fear and guilt keep donors and recipients silent, and thus the crimes are hard to investigate and prosecute".⁴⁵

In the rest of this chapter, we will underline some necessary law enforcement policy measures to combat organ trade in law and order area. Besides lobbying for criminalization on both national and domestic level, having in mind that the governments are obliged to protect human rights of its citizens and all others within their jurisdiction, we will briefly explain why criminal immunity for impoverished and vulnerable sellers should become mandatory victim's protection measure with regard to organ commercialization.

It is in the common interest of all European states to support the work of the Committee of Experts on Trafficking in Human Organs, Tissues and Cells, set up under Article 17 of the Statute of the Council of Europe and in accordance with Resolution CM/Res(2011)24 on intergovernmental committees and subordinate bodies. For the purpose of this chapter, it is important to emphasize

⁴¹ Miran Epstein, *The Organ Crisis*. Available at www.project-syndicate.org/commentary/the-organ-crisis (last accessed on September 16, 2012).

⁴² See in Dennis Soron and Gordon Laxer, *Thematic Introduction: Decommodification, Democracy, and the Battle for the Commons*, in Dennis Soron and Gordon Laxer (eds.), *Not For Sale. Decommodifying Public Life*, (Broadview Press, 2006), p. 17.

⁴³ These actors are listed in *Human Trafficking for the Removal of Organs and Body Parts*, Background Paper of the Vienna Forum to Fight Human Trafficking, Feb. 13-15, 2008, U.N. Doc. GIFT B.P.: 011, Vienna, Austria, p. 8.

⁴⁴ Amelia Mathias citing Marja Ruotanen, COE Director of Cooperation, in *International Convention Needed to Combat Organ Trafficking*, at <http://jurist.org/paperchase/2009/10/international-convention-needed-to.php> (last accessed on September 16, 2012).

⁴⁵ Panjabi (2010), p. 6.

that among its various tasks, the Committee is to draft a criminal law convention against trafficking in human organs and, "if appropriate, to ensure that the draft convention and its possible draft additional protocol provide added value, in particular when addressing criminalization of trafficking in human organs, prevention of trafficking in human organs, assistance to victims and international co-operation."⁴⁶

So far, it is known that under Part II, the draft Convention against Trafficking in Human Organs "obliges the states to criminalize the illicit removal of human organs for transplantation or other purposes, use of illicitly removed organs for purposes of implantation or purposes other than for implantation, implantation of organs outside of the domestic transplantation system, illicit solicitation, recruitment, offering and requesting of undue advantages, as well as preparation, preservation, storage, transportation, transfer, receipt, import and export of illicitly removed human organs. In law and order area, the draft Convention envisages obligations of the states to ensure effective criminal investigation and prosecution of offences established in accordance with this Convention, allowing, if appropriate, the possibility of carrying out financial investigations, undercover operations, controlled delivery and other special investigative techniques."⁴⁷ Like other anti-trafficking instruments, this Convention is not going to be self-executed, but rather, it will require from the states to adopt measures in national legislation in accordance with its provisions.

Some countries have already adopted necessary measures to criminalize organ trade and associated practices of solicitation, recruitment, offering and requesting of undue advantages with regard to transplantation process. For example, the provisions in Sections 2, 7 and 32 (2) of the Dutch Law on Organ Donation reflect the non-commerciality principle in transplant medicine in the following ways:

Section 2 states: "Consent given for the removal of an organ, given in return for payment amounting to more than the costs (including loss of income) incurred by the donor as a direct result of the removal of the organ, shall be invalid".

Section 7 states: "Neither the donor nor any other person from whom consent is required pursuant to Part 2 of this Act shall receive any payment other than compensation for the costs referred to in Section 2."

Section 32 (2) states: (a) "a party who deliberately causes or encourages a third party to consent to the removal of an organ during his lifetime in return for payment in excess of the costs referred to in Section 2, or to contravene the provisions of Section 7; (b) a party who openly offers payment in excess of the costs referred to in Section 2 for the receipt of an organ, or who puts himself forward as a donor in return for such payment, or who offers services which involve activities which are punishable under this Section 32, this subsection 2, under a.; [...] shall be punishable by up to one year in prison or a fourth-category fine."

The Serbian Organ Transplantation Act of 2009, in addition to organ trade has also criminalized two offences concerning a violation of free consent requirement for organ donation: the first relates to organ removal from living donor by force, coercion or deception, and the second relates to implantation procedure and organ removal without or against the will of the recipient or the deceased person. Particularly comprehensive is the provision of Article 79 that incriminates organ trade:

(1) Whoever, for any kind of compensation, gives their organ or organ of another person for transplantation purposes or offers for compensation their organ or organ of another person for trans-

⁴⁶ Plachta (2012).

⁴⁷ Ibid.

plantation purposes, or recruits, transports, transfers, delivers, sells, purchases, mediates in the purchase or mediates in any other manner in organ transplantation or participates in transplantation process which is subject of commercial trade, shall be punished by imprisonment for two to ten years.

- (2) If the criminal offense referred to in paragraph 1 of this Article is committed against a juvenile, the perpetrator shall be punished by imprisonment for not less than three years.
- (3) If the perpetration of criminal offense referred to in paragraph 1 and 2 of this Article, resulted in a serious bodily injury of the donor, the perpetrator shall be punished by imprisonment for three to fifteen years.
- (4) If the perpetration of criminal offense referred to in paragraph 1 and 2 of this Article, resulted in death of the donor, the perpetrator shall be punished by imprisonment for not less than ten years.
- (5) Whoever engages in committing criminal offences referred to in paragraph 1 to 2 of this Article or if the offence is committed by an organized group, the perpetrator shall be punished by imprisonment for not less than five years.

Besides criminalization of organ trade, it is essential for all states also to criminalize the instigation of, aiding, abetting or attempt to commit the offence.

Finally, among measures aimed at criminalizing, investigating and prosecuting for the offence of organ trade, measures related to the responsibility of the health care professionals are particularly important having in mind their essential role in this illicit practice. Thus, the provision of Article 27 (2) of the Serbian Organ Transplantation Act expressly refers to ethical obligation of a health care professional to refuse to participate in transplantation procedure if he/she has any suspicion that an organ to be used for transplantation has been obtained through a commercial transaction:

A health care professional, involved in carrying out transplantation procedure, who suspects that an organ to be used for transplantation is a subject of commercial trade, must reject the participation in transplantation procedure and without undue delay, in oral or written form, inform the competent state authorities and the Bio-medicine Bureau.

This significant novelty follows the 2006 World Medical Association Statement on Human Organ Donation and Transplantation. According to above cited Article 79 (1) of the Organ Transplantation Act, the ramifications of its violation could be serious and could lead to criminal responsibility of a health care professional for participation in transplantation process of an organ obtained through commercial trade.

We come now to criminal immunity for impoverished and vulnerable sellers. Basically, it is poverty that drives people to sell a body organ in case of no other options: "It is a manifestation of dire economic necessity, sometimes a means for an entire family briefly to eat and survive or pay off a debt to an assertive moneylender."⁴⁸ For vulnerably and impoverished donors the situation becomes even worse after illegal transplants. In its Recommendation 1611 (2003) the Council of Europe Parliamentary Assembly stressed that

"It is a matter of grave concern that following illegal transplants the donor's state of health generally worsens in the medium term, due to the absence of any kind of medical follow-up, hard physical work and an unhealthy lifestyle connected to inad-

⁴⁸ Panjabi (2010), p. 3.

*equate nutrition and a high consumption of alcohol. Most illegal donors will thus be forced in time to live on dialysis treatment or await, in turn, a kidney transplant.*⁴⁹

Apart from long-term measures aimed at eliminating poverty, this situation urges immediate measures to be undertaken to secure access to health care and legal services for impoverished and vulnerable sellers, including legislative measures which will secure their criminal immunity unless they are not themselves engaged in organ trade as organ brokers. It is our view that criminal immunity for impoverished and vulnerable sellers does not undermine the principle of non-commercialization of the human organs nor the prohibition of financial gain with regard to organ transplantation, but only partially remedies their appalling situation caused by poverty and lack of equal opportunity.

Terminology and Conceptual Problems

In a time of economic crisis it is not easy to clarify what constitutes organ commodification, organ trade and organ trafficking. Furthermore, it is difficult to find the appropriate regulative policy, and proper safeguards for enforcing the already established legal standards. The Declaration of Istanbul on Organ Trafficking and Transplant Tourism (hereafter Declaration) is the first document, drawn up by the international transplant community that defines and condemns transplant commercialism, organ trafficking and transplant tourism. Its primary aim is to inform, inspire and promote ethical practices in organ donation and transplantation around the world.⁵⁰ Building on the Universal Declaration of Human Rights and World Health Assembly Resolution 57.18, it aspires to achieve this aim by endorsing prohibition of transplant commercialism, tourism and trafficking of organs and penalization of those that aid or encourage it. The Declaration's Custodian Group and four task forces have been established to implement and monitor its effects.

The Declaration, non-binding by nature, nevertheless has proven to have significant influence. Over one hundred transplant organizations endorse its principles. Countries including China, Israel, the Philippines and Pakistan have passed new legislation or strengthened existing laws that ban organ trafficking and organ sales.

This acclaimed success is for a large part due to the World Health Organization (WHO) and its Guiding Principles on Human Cell, Tissue and Organ Transplantation⁵¹ (hereafter Guiding Principles). Whereas the Declaration is intended to influence transplant professionals and societies, the WHO intends to influence governments. Both act in concert to address growing problems of transplant commercialism, transplant tourism and trafficking by strict prohibition and penalization.

The prohibitionist discourse in the Guiding Principles and Declaration has a predominant focus on prohibition (through legislation) of commercialism and trafficking, however the importance of *enforcement* of the crime is neglected.⁵² Furthermore, there is a discomforting lack of criminological and legal expertise about what exactly we are trying to prevent by prohibition. Commercialism and trafficking are presented as being equally problematic crimes. However, coercion and exploitation of donors (trafficking) differs from the sale and purchase of organs (commercialism). Both acts warrant a different policy approach. The Declaration's Custodian Group and WHO, in their

⁴⁹ See Council of Europe Parliamentary Assembly, Recommendation 1611 (2003), at assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta03/EREC1611.htm, (last accessed on September 16, 2012).

⁵⁰ Participants in the International Summit on Transplant Tourism and Organ Trafficking Convened by the Transplantation Society and International Society of Nephrology. The Declaration of Istanbul on Organ Trafficking and Transplant Tourism. *Transplantation*, vol. 88, no. 8 (2008): 1013–1018.

⁵¹ World Health Organization Guiding Principles on Human Cell, Tissue and Organ Transplantation (last revised on May 26, 2008) www.who.int.

⁵² Ambagtsheer, Frederike and Willem Weimar. A Criminological Perspective: Why Prohibition of Organ Trade Is Not Effective and How the Declaration of Istanbul Can Move Forward. *American Journal of Transplantation*, vol. 12, no. 3 (March 2012): 571–575.

discourse on prohibition, do not take account of this distinction. They can improve their strategy to prevent and deter commercialism and trafficking in a number of ways. In the following paragraphs we explain why and how.

The WHO first declared the prohibition of organ trade in 1987, affirming that such trade is inconsistent with the most basic human values and contravenes the Universal Declaration of Human Rights. The WHO Guiding Principles state the reason why organ sales are prohibited. The Commentary to Principle 5 states: "Payment for [...] organs is likely to take unfair advantage of the poorest and most vulnerable groups, undermines altruistic donation, and leads to profiteering and human trafficking. Such payment conveys the idea that some persons lack dignity, that they are mere objects to be used by others."⁵³

The organ trade prohibition must be seen in context of when it was formed: at a time when there was no shortage of organs and organ trade and trafficking offences barely occurred. Back then, the prohibition was successful in its aim to *prevent* trade and trafficking, simply because the root cause of the crime (organ shortage) was not as rampant as it is now. The prohibition worked, not only as a preventative mechanism, but also as a universal norm that organs were not to be used commercially. Almost every single country endorses the non-commerciality principle in organ transplantation and has implemented it into their national laws.

Since the nineties however, transplantation has become a victim of its own success, with demand for organs far outpacing their supply. Organs have become more valuable and profitable to sell. This leads to black markets that involve various actors who increasingly make use of organs' high profitability.

Together with drugs, humans, arms, diamonds, gold and oil, organs are becoming the subject of an illegal multibillion dollar industry. A recent report by Global Financial Integrity estimates that the illicit organ trade generates illegal profits between \$ 600 million and \$ 1.2 billion per year. It ranks the trade in human organs on number ten of the illegal activities studied in terms of illegal profits made.⁵⁴ The report further states that profits from these illicit markets are making their way to transnational crime syndicates through vast international trade networks. These networks take advantage of globalization and new communication and transportation technologies. Key to the growth and success of global criminal networks is their flexibility and versatility, which have expanded their activities to a wide diversity of legal and illegal fields.⁵⁵ Many of these networks are successfully integrated in legal structures and institutions.⁵⁶

Indeed, an increasing number of organ trafficking rings are globally active and involve actors who operate in different countries from where recipients and donors are recruited. Organ trafficking accounts come from all over the world, including Egypt, India, South Africa, the Philippines, Israel, Colombia, the Balkan Region, Turkey and Eastern Europe.⁵⁷ A growing number of countries,

⁵³ *Ibid.*

⁵⁴ Jeremy Haken, *Transnational Crime in the Developing World* (Washington: Global Financial Integrity, 2011).

⁵⁵ Manuel Castells, *The global criminal economy. End of Millennium* (Oxford: Blackwell, 1998).

⁵⁶ Naylor R. *Wages of Crime. Black Markets, Illegal Finance and the Underworld Economy*. Ithaca: Cornell University Press, 2002.

⁵⁷ Budiani-Saberi D, Mostafa A. Care for commercial living donors: the experience of an NGO's outreach in Egypt. *Transplant International*, vol. 24, no. 4 (2011): 317–323; Goyal M, Mehta RL, Schneiderman LJ, Sehgal A. Economic and health consequences of selling a kidney in India. *JAMA* 288 (2002): 1589–93; Allain J. Commentary Trafficking of Persons for the Removal of Organs and the Admission of Guilt of a South African Hospital. *Medical Law Review*, vol. 19 (2011): 117–122; Padilla BS. Regulated compensation for kidney donors in the Philippines. *Current Opinion in Organ Transplantation*; 14 (2009): 120–123; Shimazono Y. The state of the international organ trade: a provisional picture based on integration of available information. *Bulletin of the World Health Organization*, vol. 85 (2007): 955–962; Mendoza RL. Colombia's Organ Trade: Evidence from Bogotá and Medellín. *Journal of Public Health*, vol. 18 (2010): 375–384; Marty D. Inhuman treatment of people and illicit trafficking in human organs in Kosovo. Committee on Legal Affairs and Human Rights. Switzerland, Alliance of Liberals and Democrats for Europe. Parliamentary Assembly. Council of Europe 2010. www.coe.int.

including the US, the UK, Macedonia and Canada report on patients leaving to well-known organ exporting countries who allegedly buy organs on the black market.⁵⁸

Only in very few cases have crime control efforts led to accusations by victims and prosecutions of the accused. Indeed, organ trafficking may be one of the most difficult crimes to detect. Moreover, its enforcement is not a priority of local, national and international law enforcement institutions. The universal response to the crime is characterized by punitive condemnation through legislation but awareness and expertise on how to detect the crime and enforce the law is practically non-existent.

Prohibition of Demand-Driven Crimes May Herald Significant Risks

Prohibition of demand-driven crimes is not new to the field of criminology. For centuries countries have been struggling to control criminalized, demand-driven activities often with limited effect.⁵⁹ Disregarding evidence that crime does not readily respond to severe sentencing, legislatures have over the years repeatedly adopted a punitive 'law and order' stance. David Garland describes this ambivalent response as a form of *acting out*, which is to say that legislatures engage in a form of impulsive and unreflective action, avoiding realistic recognition of underlying problems.⁶⁰ The reasons behind these repressive policies are often political: they are motivated by politically urgent needs to 'do something' decisive about crime, restore public confidence, illustrate good intention and demonstrate state control. These policies are seldom evidence-based, are not aimed at removing the root cause of crimes and do not acknowledge the risks that may arise.⁶¹

A wealth of studies illustrates the resilience of demand-driven activities such as drug use, gambling, alcohol consumption and prostitution to prohibition.⁶² These studies also highlight how harms associated with these demand-driven crimes including violence, disorder and corruption are in fact caused by their prohibition.⁶³ These studies show how prohibition generates black markets, drives up prices, provides illegal incomes, displaces crime to other regions and drives trade underground leading to higher crime rates and victimization.⁶⁴ One illustration is the "war on drugs". A recent report by the International Centre for Science in Drug Policy argues that enforced drug control in

⁵⁸ Canales MT, Kasiske BL, Rosenberg ME. Transplant Tourism: Outcomes of United States Residents Who Undergo Kidney Transplantation Overseas. *Transplantation*, vol.82, no.12 (2006): 1658–1661; Cronin AJ, Johnson RJ, Birch R, Robert IL, Randhawa G. Solving the Kidney Transplant Crisis for Minority Ethnic Groups in the UK: Is Being Transplanted Overseas the Answer? In: Willem W, Bos MA, Busschbach J, editors. *Organ Transplantation: Ethical, Legal and Psychosocial Aspects. Expanding the European Platform. Vol. II.* (Lengerich: Pabst, 2011), pp. 62–72; Ivanovski N, Masin J, Rambabova-Busljetic I, Ivanovski O, Pusevski V, Dohcevic S, et al. The Organ Shortage in the Balkans! Pakistan – The New Hope on the Horizon. In: Weimar W, Bos MA, Busschbach J, editors. *Organ Transplantation: Ethical, Legal and Psychosocial Aspects. Expanding the European Platform. Vol. II.* (Lengerich: Pabst, 2011), pp. 58–61; Jagbir S, Gill, Olivier Diec, David N. Landsberg, Caren Rose, Olwyn Johnston, Paul A. Keown and John S. Gill, Opportunities to deter transplant tourism exist before referral for transplantation and during the workup and management of transplant candidates. *Kidney International*, vol. 79, no.9 (2011): 1026–1031.

⁵⁹ MacCoun, Robert J. and Peter Reuter, *Drug War Heresies* (Cambridge: Cambridge University Press, 2001).

⁶⁰ Garland D. *The Culture of Control. Crime and Social Order in Contemporary Society.* Chicago: The University of Chicago Press; 2001.

⁶¹ Ibid.

⁶² Ibid.

⁶³ MacCoun and Reuter, op. cit.; Bouchard M. On the Resilience of Illegal Drug Markets, *Global Crime*, vol. 8, no. 4 (2007): 325–344; Best D, Strang J, Beswick T, Gossop M. Assessment of a Concentrated, High Profile Police Operation. No Discernible Impact on Drug Availability, Price or Purity. *British Journal of Criminology*, vol. 41, no. 4 (2001): 738–745.

⁶⁴ Best D, Strang J, Beswick T, Gossop M. Assessment of a Concentrated, High Profile Police Operation. No Discernible Impact on Drug Availability, Price or Purity. *British Journal of Criminology*, vol. 41, no. 4 (2001): 738–745.

the US led to unintended, harmful consequences.⁶⁵ Efforts in the US to suppress the sale and use of cannabis have substantially increased in the last years. The costs for stronger enforcement rose from \$ 1.5 billion in 1981 to more than \$ 18 billion in 2002. The report's authors claim that despite increased repression rates of violence, organized crime, the availability of illegal cannabis and the number of users substantially increased.⁶⁶ These conclusions on the failures of the system are in line with reviews of evidence from a global perspective. The authors advise alternatives to prohibition, such as decriminalisation and regulation. Indeed, evaluation of more liberal drug and prostitution policies involving a harm-reduction approach in countries such as the Netherlands have shown that the social harms within regulated markets are lower than in prohibited markets.⁶⁷

Despite substantial differences in nature between demand-driven crimes including the organ trade, drug trade and prostitution, the ways in which most states attempt to control them are similar. Unintended implications that may arise from prohibition of crimes such as the drug trade may be equally relevant and applicable to organ trade. First, prohibition of organ trade and drug trade has the similar effect of making them more worth and thus more profitable.⁶⁸ Second, arguments often made in favour of regulating the drug- and organ trade share the view that legalization is likely to reduce social harms inflicted upon vulnerable groups.⁶⁹

We believe that the risks known to arise despite or as a result of prohibition of demand-driven crimes should be taken seriously.

The Declaration of Istanbul in our view takes little account of the possible implications that prohibition of organ trade may herald. Their response to organ trade and trafficking has little to no recognition for the limits of crime control and limited acceptance of exploring alternative policies that possibly herald less harmful effects. Rather, their belief seems to be that prohibition will take away the problem and decrease illegal activity. The passing of legislation against organ trade and trafficking is proudly announced and expected to be followed by successful tackling of the problem.⁷⁰ One example of ineffective prohibition occurs in Pakistan that as a result of the Declaration lobby passed an ordinance in 2008 prohibiting foreign patients from purchasing transplants there. Despite the initial hope that the ordinance would prevail, a recent Pakistani newspaper article admits how despite the new law, Pakistan is being "sucked back into the vortex of kidney trade and transplant tourism".⁷¹

We think that the international co-operation should be strengthened to make sure that the current prohibitionist strategy of organ trade is not becoming ineffective and symbolic.

The relevance and limits of the Declaration of Istanbul

To assess what works, we need to get our definitions straight. Organ trade takes on a wide variety of forms: only after we agree on the definition of commercialism and trafficking, and on what we find condemnable, can we agree on their prohibition. Putting a price on organs (commercialism) is different from coercing someone into selling one (trafficking).

The Declaration correctly defines and differentiates trafficking from commercialism, yet it does not mention how both acts should be approached by policy. However, policies aimed to suppress

⁶⁵ Wood E, Werb D, Fischer B, Hart C, Wodak A, Bastos FL, et al. Tools for debate: US federal government data on cannabis prohibition. Vancouver BC: International Centre for Science in Drug Policy 2010.

⁶⁶ Francis L. Delmonico, The Implications of Istanbul Declaration on Organ Trafficking and Transplant Tourism. *Current Opinion in Organ Transplantation*, vol.14, no.2 (2009): 116–119.

⁶⁷ MacCoun and Reuter, op. cit.

⁶⁸ Haken J. *Transnational Crime in the Developing World.* Washington: Global Financial Integrity 2011.

⁶⁹ MacCoun and Reuter, op. cit.

⁷⁰ Delmonico, op. cit.

⁷¹ Moazzam F. Kidney trade: a social issue. Dawn.Com and AST eNews 2011 July 21.

or reshape an illegal trade or market work differently from policies addressing coercion and other harms associated with trafficking. Evaluative studies have shown that criminalization of commercialism is likely to *reinforce* trafficking.⁷² Indeed, it has been argued that “there is much more scope for exploitation and abuse when a supply of desperately wanted goods is made illegal.”⁷³ We therefore claim that the Declaration should clearly differentiate between policies needed to address commercialism and those needed to address trafficking.

First of all, to tackle and prevent organ trade, the root cause of the problem (organ scarcity) should be addressed. This ultimately means boosting organ supply. One such strategy that the Declaration already strongly supports is to help governments implement deceased donation programmes to increase deceased donation rates and achieve self-sufficiency. Such initiatives are being conducted in the Balkans⁷⁴ and Black Sea region⁷⁵ with the support of the Custodian Group, the WHO and European Union. Yet promotion of deceased donation alone is not enough to fill the gap between demand and supply of organs.

Although priority should be given to the better use of the organs from cadavers, still WHO and other relevant organizations should also encourage the increase of living donation. They should do so by *explicitly* stating the need to promote living donation in the text of the Declaration and Guiding Principles. International organizations and NGOs’ should furthermore encourage governments to remove unjustified restrictions regarding living unrelated or anonymous donation to make alternative living donation programmes possible.⁷⁶ Such programs should be implemented in consistency with international standards to ensure quality and safety of donors and recipients. Current restrictions to unrelated donation are based on the belief that living unrelated donation induces trade. However, there is no evidence of illegal trade in countries with well-organized systems allowing for high numbers of living unrelated donation such as in the US, the Netherlands, Norway and the UK. As it follows legislators should examine alternative safeguards to ensure that organ donation will not be commercialized while extending the possibilities for donation not only among genetically related family members.

A third example is to support regulated trials of incentives for donation.⁷⁷ This asks for a more liberal approach by both the WHO and the Declaration towards incentives. Incentives for donation may perhaps be promising examples of a harm-reduction approach. The Declaration should provide scope for governments to explore ways to increase donation through incentives. As it was suggested by Sándor⁷⁸ priority should be given to ethical incentives (such as acknowledgment of the efforts of the living organ donors) and incentives that may grant future health services in case of need but not in the *quid pro quo* manner. So for instance in case the organ donor may need future expensive health service (such as transplantation e.g.) may be given priority based on his/her previous generosity but the need for that health care service should be not yet certain at the moment of

⁷² MacCoun and Reuter, op. cit.

⁷³ Radcliffe-Richards J, Daar AS, Guttman RD, Hoffenberg R, Kennedy I, Lock M, et al. The case for allowing kidney sales. *The Lancet*, vol. 351, no. 9120 (1998): 1950–1952; Charles A. Erin and John Harris, *A Monopsonistic Market: Or How to Buy and Sell Human Organs, Tissues, and Cells Ethically*. In Ian Robinson, ed., *Life and Death under High Technology Medicine* (Manchester: Manchester University Press and New York: St. Martin’s Press, 1994), pp. 134–156.

⁷⁴ The Transplantation Society. Balkan Initiative in Deceased Donation Meeting, Skopje, Macedonia Tribune 2011 April.

⁷⁵ European Directorate for the Quality of Medicines and Health Care. Launch of a 3 year programme for the development of donation and transplantation activities in the Black Sea area. Strasbourg, France. Council of Europe 2011 www.edqm.eu.

⁷⁶ Roodnat JI, Kal-van Gestel JA, Zuidema W, van Noord MA, van de Wetering J, IJzemans JN, Weimar, W. Successful Expansion of the Living Donor Pool by Alternative Living Donation Programs. *American Journal of Transplantation*, vol.9, no.9 (September 2009): 2150–2156; Levey AS, Danovitch G, Hou S. Living Donor Kidney Transplantation in the United States - Looking Back, Looking Forward. *American Journal of Kidney Diseases*, 2011 (in press).

⁷⁷ Erin and Harris, op.cit.

⁷⁸ Judit Sándor (2010) Panel on Incentives (April 19, 2010, Rotterdam)

donation. In this way the person is not given kidney for material benefits (as at the moment of the donation he/she is not sure whether she will need it) but fairness would dictate to take into account such a generosity in using health services in the future.

In addition to some health care benefits to the altruistic donors it is also important to mention the need for legal policy that cultivates and promotes altruism. Love and care is probably the best and most powerful incentive for organ donation. If someone suffers from the prospect of losing a close relative, organ donation seems to be a sacrifice worth doing. Therefore, if substantial additional benefits are given to the organ donor in the form of health services, then it should be done in a manner that avoids foreclosing altruism. It should be considered unfair for organ donors if they are unable to receive the necessary health care service when they need it later in their lives and possibly die in the lack of financial support. Nevertheless, their future health care needs should be uncertain at the moment of donation, and should not be taken as a condition for the act of donation.

Finally, we think that international strategy to combat organ trafficking should be improved by prioritizing enforcement. There is no doubt that organ trafficking is and should remain prohibited universally. The text of the Declaration already emphasizes the prohibition and penalization of acts including brokering and other (medical) practices that aid or encourage trafficking. Indeed, organ trafficking cannot occur without the involvement of a medical staff. A recent organ trafficking network uncovered in South Africa illustrates the criminal involvement of medical staff, including nephrologists, surgeons and administrative staff who were found guilty of performing over one hundred illegal kidney transplants and receiving payments for them.⁷⁹ This case also demonstrates the immense investment that is needed to eventually bring perpetrators to justice. It took investigators seven years to succeed in gathering enough evidence to bring the case to court. However, dedicated investigations and efforts to identify collusion in hospitals and other criminal activities, in short, the *enforcement* and police intelligence necessary to bring such cases to court, does not exist in other countries. Organ trafficking case law is practically non-existent. Prohibition of organ trafficking largely remains a paper exercise. Strict, legislative prohibitionist efforts, no matter how sophisticated, are fruitless if they are not accompanied by *enforcement* by local, national and international policing agencies.

In order to achieve a consistent and effective prohibition of organ trafficking, legislation and law enforcement must go hand in hand. As a result of our research, we have summarized our findings in eleven recommendations.

Recommendation 1: Awareness Raising about the Crimes of Organ Trafficking Should Be Enhanced with the Involvement of Enforcement Institutions

Greater awareness about organ trafficking can be reached by sharing information about organ trafficking cases with INTERPOL, EUROPOL, UNODC, and local institutions such as national police service agencies. Organ trafficking researchers and other experts could send their reports and research findings to these target groups. Dissemination of information can occur through the competent authorities and Member States of EU and UN bodies.

Enhanced collaboration between these partnerships can be encouraged by EU-funding mechanisms for research projects and cooperation actions, such as by the European Commission *Home Affairs* Program. Fortunately, this programme started funding a three year research project called “combating trafficking in persons for the purpose of organ removal” (the HOTT project) in 2012. Other platforms for enhanced collaboration lie with the Council of Europe, the WHO and the

⁷⁹ Jean Allain, Commentary: Trafficking of Persons for the Removal of Organs and the Admission of Guilt of a South African Hospital. *Medical Law Review*, vol. 19, no.1 (2011): 117–122.

OCSE. These organizations are known to have written organ trafficking reports, yet little collaboration exists between these organizations and law enforcement institutions. Toolkits for Member States and Competent Authorities should be developed that provide indicators for police personnel to identify organ trafficking activities.

Training of police investigators should be encouraged regarding evidence gathering of organ trafficking cases and know-how about the *modus operandi* of the actors involved, training of prosecutors and judges. The establishment of bilateral and/or multilateral cooperation in cross-border criminal procedures shall be encouraged.

Ideally, such considerations are best followed when close collaboration between the medical field and (international) criminal justice agencies is achieved.

Perhaps the greatest achievement for the WHO and Declaration of Istanbul will thus lie in bridging the gap between the medical field and the criminal justice realm. Indeed, the Declaration does not have a binding force but both bodies may be the most influential forces to stimulate governments into addressing enforcement strategies.

Starting from the fact that the crime of trafficking in human beings leads to direct infringement of a number of the victim's human rights, including the right to life, the right to human dignity, freedom of movement, the prohibition of torture and other cruel, inhuman and degrading treatment, the right to health and the prohibition of discrimination, and recalling that exploitation is viewed as fundamental to the trafficking experience, and having in mind Article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings which envisages that "Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so",

Recommendation 2: Provide Non-Punishment for the Victims of Trafficking

One of the major obstacles in enforcing the prohibition of organ sale and trafficking lies in the inaccessibility of victims. Therefore we think, that all states should provide for explicit right to immunity from prosecution for victims of trafficking in human beings on the grounds indicated in Article 26 of European Convention on Action against Trafficking in Human Beings.

Since the omission of the non-punishment provision represents a substantial oversight in the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, the countries members of the UN Trafficking Protocol should initiate the amendment providing for an explicit legal protection against criminal prosecution of the victims of trafficking, as it has been already envisaged in Article 5 of the UN Protocol against the Smuggling of Migrants by Land, Sea and Air, which like the Trafficking Protocol, also supplements the UN Convention against Transitional Organized Crimes.

Affirming that the principle according to which the human body and its parts shall not, as such, give rise to financial gain, and stressing that the prohibition of financial gain with regard to organ transplantation is part of the legal *acquis* of the Council of Europe, but underlying the statement in the Council of Europe Parliamentary Assembly Recommendation 1611 (2003) that "it is a matter of grave concern that following illegal transplants the donor's state of health generally worsens in the medium term, due to the absence of any kind of medical follow-up, hard physical work and an unhealthy lifestyle connected to inadequate nutrition and a high consumption of alcohol...", and having in mind that the governments are obliged to protect human rights of its citizens and all others within their jurisdiction, which includes securing them access to health care and legal services, while at the same time addressing and eliminating causes of poverty.

Recommendation 3: Provide Criminal Immunity for Impoverished and Vulnerable Sellers

All states should implement legislative measures which will secure criminal immunity for impoverished and vulnerable sellers and potential sellers of organs unless they are not themselves engaged in organ trade as organ brokers.

Having in mind that trafficking in human beings for organ removal is a form of an organized and transnational crime we stress that only broad cooperative measures implemented globally, regionally and on the national level could produce effective results in combating trafficking and alleviating the roots of its cause – "poverty, underdevelopment and lack of equal opportunity" (Article 9 of UN Trafficking Protocol). Therefore, to reduce human trafficking for organ removal the improvement of national law enforcement policies should embrace:

Recommendation 4: Develop Law Enforcement Polices to Suppress Trafficking in Human Beings for Organ Removal

Adopting the measures to fight against trafficking in human beings including the trafficking for organ removal in accordance with the European Convention on Action against Trafficking in Human Beings and recommendations issued by GRETA, which is a body responsible for monitoring the implementation of the Convention by Contracting States.

Strict adherence to the principle *aut dedere aut judicare*: a state should make every effort either to prosecute the trafficker or extradite him/her to the state having jurisdiction. Adopting the legislative measures which would establish (a) extraterritorial jurisdiction for instituting the criminal proceedings against the perpetrator and (b) a conditional universal jurisdiction which would provide for prosecution by any state even in the absence of any connection between the state, the perpetrator and the victim, provided that the perpetrator is in custody of the state concerned (*forum deprehensionis* jurisdiction).

It is of utmost importance of strengthening international police cooperation aimed at better exchange of information between countries of origin and countries of destination through the established networks such as INTERPOL, EUROPOL and SECI (Southeast European Cooperative Initiative Regional center for Combating Trans-Border Crime) with an aim to eliminate a high number of unreported cases.

Recommendation 5: Adopt measures for the explicit criminalization of organ trade

Having in mind that organ trade for the purpose of organ transplantation mainly exists due to shortage of organs, and that organ trade outside of national system is a widespread phenomenon, national and international policies to combat organ trade (commercialism) should conform the following:

All states should adopt legislative measures which would expressly prohibit making financial gain with human organs and advertising the need for or availability of organs with a view of offering or seeking financial gain. All states should support the UN and the Council of Europe efforts to adopt international convention that would define trafficking in organs for transplantation purposes and introduce criminal-law measures to fight against such practices.

Recommendation 6: Strengthen the responsibilities of health professionals towards the victims of organ trafficking, trade, or tourism (to organ providers)

International and national legislative frameworks emphasize the necessity of cooperation amongst various actors involved in the fight against organ trade and organ trafficking. While there are many issues that shall be handled with the help of other professionals and institutions (such as police, criminology, departments for fighting against organized crime, so on) the public health sector and the health care professionals have also their attributions in the fight against organ trafficking, organ trade and organ tourism. It is in the paramount interest of the health care professionals involved in transplantation that their day by day life saving efforts not to be shadowed by the phenomena of organ trafficking and organ trade. Therefore the international transplant community must deliver a concerted message that organ markets that exploit the poor and vulnerable are not acceptable.⁸⁰

One of the first international instruments on this field, the Council of Europe Recommendation no. 1611 of 2003 on Trafficking in Organs in Europe proposed the introduction of sanctions for the medical staff involved in transplanting organs obtained through illegal trafficking; the denial of national medical insurance reimbursements for illegal transplants abroad; the denial of national insurance payments for follow-up care of illicit transplants, except where such a refusal would endanger the life or health of patients unable to cover the cost of vital treatment themselves.⁸¹ The WMA and WHO Guidelines on human organ and tissue transplantation also address the issue of the professional obligation of physicians.⁸²

Based on the findings of our research we consider that in case of living donation the health care professionals should assure the maximum safety for the donor. This includes, in line with international good practice, the need for follow-up in case of each living donor – results of the follow-up shall be communicated transparently by each transplant center and this should be monitored by the relevant authorities.

Adequate information should be provided to all living organ donors (and if applicable to their families) about the medical, health and legal impact of organ donation. Accurate medical records have a crucial role. Furthermore, the assessment of the nature of relationship between the donor and recipient should be made according to the relevant laws, but in case of doubt legal and psychological consultation should be conducted. In case of clandestine organ removal, victims shall be eligible for emergency and post-operative medical treatment. Furthermore, information should be provided to the victims on the accessibility of health care and legal aid independently to the legal (criminal sanctions) imposed on the intermediaries and health professionals institutional ethics committees (in the lack of ethics committees) the head of the institution should be notified about the case to make necessary prevented steps.

The medical staff should be trained and be committed to comply with the relevant international ethical and legal standards. As it is almost impossible to prove whether instances of patients traveling abroad for organ transplants constitute 'real' cases of transplant tourism. The cross-border and complex nature of this act possibly makes it one of the most difficult crimes to prove and prosecute. This complexity raises challenges for doctors and other health care providers confronted with patients who opt for transplants abroad.

⁸⁰ D. A. Budiani-Saberi and F. L. Delmonico (2008) Organ Trafficking and Transplant Tourism: A Commentary on the Global Realities. *American Journal of Transplantation*, vol.8 (2008): 925–929, at p. 929.

⁸¹ Council of Europe Parliamentary Assembly Recommendation 1611 (2003) Trafficking in organs in Europe

⁸² WMA Statement on Human Organ Donation and Transplantation, Adopted by the 52nd WMA General Assembly, Edinburgh, Scotland, October 2000 and revised by the 57th WMA General Assembly, Piñanesberg, South Africa, October 2006; WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation, as endorsed by the sixty-third World Health Assembly in May 2010, in Resolution WHA63.22.

Recommendation 7: The need to strengthen the responsibilities of health care professionals in case of organ tourism (organ receivers)

Physicians should inform patients about the risks of the pre- and postoperative journey. Moreover, it would be recommended to identify patients at risk for organ tourism, information on risk and dangers, moral aspects, cooperation in preparing organ tourists. However, in case a patient returned already after organ tourism, physicians should provide postoperative care of returning organ tourists. Rules for re-admittance to the waiting list should cover such scenarios (if necessary). Transplant tourism shifts the traditional role of doctors as health care providers to "agents", encouraged to deter and prevent transplant tourism.⁸³ Below, we present recommendations for health care professionals confronted with patients who – presumably – bought organs for transplants abroad.^{84, 85}

Recommendation 8: Health care providers should dissuade patients from seeking organs abroad

Considering the medical complications that accompany transplants abroad, health care providers should dissuade the patient from going abroad by warning him/her against the medical risks. Contrary to what Gill et al. claim, doctors should refrain from informing or "educating" all patients about going abroad: this may bring the unintended consequence of putting ideas into the heads of patients who otherwise might not have considered the possibility at all. Such warnings should only be directed towards the individual patient who has expressed an interest or desire to undergo a transplant abroad.

While the international law is clear in its intention to prohibit all forms of organ trade, health care professionals often meet ambiguous cases when (suspected) organ tourists come for pre or post-operative treatment. Therefore we think it is essential to provide professional guidelines also for practitioners that help to translate international norms in context of the everyday life.

Recommendation 9: States and professional associations should develop professional guidelines for professionals who may be in contact with organ tourists

Patients in general have a right to access their medical records and to receive a copy of it. Whereas the patient's right to receive medical care remains untouched, it could be claimed that the doctor may consider disclosing patient information to the police. This consideration may arise in the situation where the patient outright declares to his doctor that he is going to buy an organ for transplant

⁸³ Gill, J. S., A. Goldberg, Prasad, G.V. et al. Policy Statement of Canadian Society of Transplantation and Canadian Society of Nephrology on Organ Trafficking and Transplant Tourism, *Transplantation*, vol. 90, no. 8 (2010): 817–820.

⁸⁴ Ambagtsheer, F., Zaitch, D., Van Swaaningen, R., Duijst, W., Zuidema, W., and Weimar, W. "Cross-border quest: The reality and legality of transplant tourism" *Journal of Transplantation* (2012): 1-7.

⁸⁵ Gill, J.S., Gjertson, D., Lipshutz, G. et al. Transplant Tourism in the United States: A Single-Center Experience, *Clin J Am Soc Nephrol* 2008; 3: 1820–1828 ; Canales, M. T., B. L. Kasiske, Rosenberg, M.E. Transplant Tourism: Outcomes of United States Residents Who Undergo Kidney Transplantation Overseas, *Transplantation*, vol.82, no.12 (2006): 1658–1661; Sajjad, I., Baines, L.S., Patel, P. Commercialization of Kidney Transplants: A Systematic Review of Outcomes in Recipients and Donors, *American Journal of Nephrology*, vol.28, no.5 (2008): 744-754.

abroad from a trafficked or paid donor.⁸⁶ Medical doctors should receive clear guidance (in the framework of their training) that they should not assist patients in buying organs, even if they would go abroad to do that. The collision of professional duties; respect the patients' privacy on one hand and the duty not to commit and to assist crime, on the other hand should be eliminated by informing patients' about the law and the health risks. Beyond these activities health care professionals should not promote or assist in any way the activity of buying organs by their patients.

Recommendation 10: Developing instruments for the prevention of organ trade and organ trafficking

According to the international instruments on trafficking of human beings for the purpose of organ removal or organ trafficking *prevention* shall have a very important role in the fight against these negative phenomena.⁸⁷ As it is stated in the reports on this phenomenon organ trade, trafficking and tourism are demand driven. One way of combating it is to increase the availability of legally procured organs and to keep the donation process in the framework of the legality. There are various ways to achieve this goal. Transferring best practices across countries is difficult because health policies are deeply embedded in country specific contexts and different actors in health care systems might have different ideas of what is "best".⁸⁸ Being aware of this fact, we propose that in a first step the volume of deceased donation shall be maximized.⁸⁹ One measure towards this major goal can be the education of the healthcare professionals (and of the media), which is regarded as the most cost effective means of increasing the public's willingness to donate.⁹⁰ For increasing the rate of deceased donations special attention shall be provided for improving the knowledge of health professionals not directly involved in transplantation about transplantation issues. The Spanish Model of Organ Donation can be regarded as a possible model in this respect. One of the main elements of this model was the great effort in training programs targeted to all the professionals directly or indirectly involved in the process of donation. These training programs covered each step in the process of donation from donor detection and maintenance to legal aspects including brain death diagnosis, family approach, and organizational issues. In addition, trainings in areas such as management of resources or relation to the mass media have been also developed.⁹¹ While in some other European countries similar steps have been done already, there are still countries which should make more efforts in this direction.

⁸⁶ Ambagtsheer, F., Zaitch, D., Van Swaaningen, R., Duijst, W., Zuidema, W., and Weimar, W. "Cross-border quest: The reality and legality of transplant tourism" *Journal of Transplantation* (2012): 1-7.

⁸⁷ Council of Europe Convention on Action against Trafficking in Human Beings, Chapter II, Article 5; Article 6; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention on Organized Crime (2000), Art. 9.

⁸⁸ Robert H. Blank and Viola Burau (eds.) *Comparative Health Policy*. 2nd Edition Revised and Updated (New York: Palgrave Macmillan, 2007), p. 228.

⁸⁹ Observatori de Bioethica I Dret. Document on the Protection of Living Donors for Transplants, Barcelona, November, 2011, p. 53.

⁹⁰ Council of Europe. Organ shortage: current status and strategies for improvement of organ donation – A European consensus document, 2003, p.8.

⁹¹ R. Matesanz, B. Dominguez-Gil / Strategies to optimize deceased organ donation. *Transplantation Reviews*, vol.21 (2007): 177-188, p.183.

Recommendation 11: Empower Ethics Committees involved in Living Organ Donation decision-making

In the context of living organ donations the educational process could aim to improve the functioning of the committees involved in living organ decision-making in order to be more efficient in preventing the attempts of illegal activities that might occur in the transplantation process. Finally it would also involve raising awareness on the existence of the negative phenomenon of organ trafficking, trade and tourism, for making health care professionals alert to the detection of possible frauds.

By strengthening the role of Committees involved in living organ donation decision making process violations of the transplantation law could be minimized, the suspicions can be eliminated, and this can result in a better context in which living organ donation is carried out. At present the decision-making practice of such Committees is far from being unitary in translating the law into practice through purely objective criteria.⁹² While there are some shared principles that shall guide these Committees' in decision-making, such as objectivity, impartiality, professionalism, transparency there exists a diversity in application and evaluation of principles in practice. The actual functioning of the committees are correlated with such contextual factors as: the institutional environment; the role of ethics in clinical decision making in that country/the transplantation unit; the experience and professional background of the committee members; the larger socio-economic and cultural context. The context therefore matters, however some organizational steps could be recommended cross-nationally for an enhanced transparency in living organ donation decision-making process.

It is desirable to provide the possibility of two alternate Committees in one hospital unit: the potential donor and recipient to be assessed by separate health care teams, if possible. When this is not possible a member of the Committee shall act as the "donors defender" whose responsibilities include but are not limited to the following: to promote the best interests of the potential living donor, advocate for the rights of the potential donor, assist the potential donor in obtaining and understanding information before the consent process, evaluation process, surgical procedure, and need for follow-up.

In order to ensure the diversity of Committee members' backgrounds and affiliation it is recommended to bring non-transplantation unit members within, or rotating the membership of commissions among transplantation centers. The presence of a professional with specialization in medical ethics/bio-ethics is desirable.

The material/financial and structural/institutional conditions for the work of the Committees shall be provided. The decision-making process of the Committees should be transparent and accountable. Procedures to follow when donation does not proceed for various reasons (medical, donor's change of mind) shall be established. External supervisory body overseeing the Committee's work is necessary. More research should be done on the activity of the Committees for identifying barriers and strategies in implementing these structures.

Education, training and professional guidelines should be available for the members of the Committees. As the technology is changing it is necessary to conduct periodical reviews of the informed consent guidelines to verify that they contain up to date information about the conditions of the donation and its effects (including the latest results of research on the long term effects of donation, for example).

⁹² See for example Martine Gabolde, Christian Hervé, Anne-Marie Moulin (2001) Evaluation, selection, and follow-up of live kidney donors: a review of current practice in French renal transplant centers; George Florea and Enikő Demény: Applied Case Studies in Ethics and Medicine in Eastern Europe – the Role of Bio-Ethics in Living Organ Donations' Decision-Making. Results of fieldwork carried out in EULOD project and presented at the 25th Annual Conference of European Association of Medical Ethics (EACME), 15-17 September, 2011, in Istanbul.

Conclusion

European human rights and health law is unanimous in prohibiting all forms of organ trade and trafficking. Even beyond Europe, various supranational and transnational organizations have made efforts to reduce the occurrence of organ trade and trafficking by adopting international norms that call member states or states parties for prohibiting the commodification or commercialization of organ donation. Our research across a wide range of European countries have confirmed that while legal provisions repeatedly emphasize and reinforce the principles of non-commercialization, law is not an omnipotent tool. In the lack of appropriate control and follow-up mechanisms within the organ transplantation system and without the support of the professional bodies of medical practitioners, the growing economic tension between the poor and the rich may lead to finding legal loopholes and organizational gaps within the enforcement mechanism. There is also the added risk of developing illegal networks that clearly distinguish between organ supply and organ demand countries as well as institutionalize the exploitation that comes with this distinction. However, we have also identified good practices and promising efforts in regional co-operation that have contributed to the enhancement of the existing organ transplantation systems. Our chapter was a minor contribution to these positive developments with a special focus on the improvement of legislative and law enforcement mechanisms.

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Biographies

Frederike Ambagtsheer is PhD candidate at the Kidney Transplant Unit of the Erasmus MC University Medical Center Rotterdam on organ trafficking and transplant tourism. She holds a MA in criminology and public international law. She is the coordinator of the European Platform on Ethical, Legal and Psychosocial Aspects of Organ Transplantation (ELPAT). She coordinated the EULOD project and is now coordinator of the EU-funded project, 'Combating Trafficking in Persons for the Purpose of Organ Removal' (the HOTT project).

Violeta Beširević is a Professor of Law at Union University Law School Belgrade. She holds an LL.M. and an S.J.D. in Comparative Constitutional Law from the Central European University. Professor Beširević serves as a member of the Board of Directors of the European Public Law Organization, and a Research Associate at the CEU Center for Ethics and Law in Biomedicine. In 2012, she was awarded Fulbright stipend and spent the fall semester at the NYU School of Law as a Global Research Fellow. Professor Beširević works in the field of medical law, human rights law, comparative constitutional law and international criminal law. She authored the book *Euthanasia: Legal Principles and Policy Choices* (European Press Academic Publishing, 2006) and the paper *End-of-Life Care in XXI Century: Advance Directives in Universal Rights Discourse*, (2010), 24 *Bioethics* 3 (Oxford: Blackwell Publishing Ltd.), pp. 105-112, which is among the top five most read articles on Bioethics website since 2010.

Natalia Codreanu is a clinical psychologist and Administrative Director of the Renal Foundation. She has long-standing experience and expertise on organising and running projects aimed at prevention of kidney diseases and psychological protection of organ trafficking victims. Natalia Codreanu has an extensive network with numerous international organisations and governmental institutions that are active in the organ transplantation and anti-organ trafficking field. In EULOD project she is involved as a researcher in WP 2 and especially in WP 3 conducting field work in order to collect relevant information on organ trafficking cases in East-European countries (in Moldova, Ukraine and Russia).

Enikő Demény is Junior Researcher at the Central European University, Center for Ethics and Law in Biomedicine (CELAB) since September 2005. She has a Ph.D. in Philosophy (2006). Previously she studied sociology, anthropology and gender studies (MA in Gender Studies/Central European University; MA in Cultural Anthropology and BA in Sociology, Babes-Bolyai University, Cluj). Between 1998-2009 she was a Visiting Lecturer at the Babes-Bolyai University, where she offered MA courses at the Faculty of European Studies and Faculty of Political Science and Public Administration. In EULOD project she is involved in WP3 part II, her task includes the analysis of the effectiveness of the regulatory framework of organ trade, trafficking and tourism, as well as the analysis of stakeholder interviews and case studies.

Fabienne Dobbels, PhD, is a psychologist and professor at the Center for Health Services and Nursing Research of the University of Leuven, Belgium. Being a member of the Leuven-Basel Compliance Research Group for more than 15 years, her key research topics include patient self-management, psychosocial issues and symptom experience in transplantation and other chronic diseases, which resulted in more than 100 peer-reviewed publications and book chapters, and several presentations at national and international conferences. She is the co-chair of the Psychosocial