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Pascale Mayer

Bankbook Bodies: The Billion Dollar
Business with Organ Trade -
The Development of International Legal
Measures and their Effectiveness in
Curtailling the Black Market



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Preface

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Preface & Acknowledgements

The careful consideration of what to include and what to leave out of this paper has proven to be quite challenging. A topic such as the trade with human organs is much too complex to do it justice on all aspects in the very limited space of 40 some pages of text. I have therefore decided to put the primary focus on organs from living unrelated donations rather than cadaveric donations, an issue which comes with its very own set of problems, challenges, and questions, deserving of more than just a fleeting mention.

The most problematic part of research has been to come by reliable quantitative data. Due to the clandestine nature of the organ trade, it is nearly impossible to establish the true extent of this phenomenon. Worldwide numbers are at best an estimate.

I would like to thank Christine Kornhaas (*Deutsche Stiftung Organtransplantation*), Marion Schlauderer (*Deutsche Transplantationsgesellschaft*) and Juliette Van der Laan (*Eurotransplant*) for their help in supplying me with the most current statistics available.

Unfortunately, the *World Health Organization* – despite multiple attempts at procuring information via e-mail and telephone over a period of four months – has not returned any of my requests for assistance.

Many thanks to Dr. Julia Tainijoki-Seyer and Mr. Lamine Smaali (*World Medical Association*), Amanda Müller-Hahn (*Historical Archives of the European Parliament*), Valérie DeVuyst and Euridice Marquez (*United Nations Office on Drugs and Crime*), Hubert Körper (*Internationale Gesellschaft für Menschenrechte*), and Prof. Dr. Huige Li (*Johannes Gutenberg University Mainz*), for providing me with documents, sources, contacts, statements. Whatever I asked for, I was graciously given.

Prof. Dr. Urban Sester (*Saarland University Medical Center*) and “John Doe”: Thank you for insightful, inspiring conversations that opened up new perspectives to me and provoked my thoughts.

Lastly, I would like to point out that the terms “trade” and “traffic” are used interchangeably in this paper. While it has been argued that the former term readily suggests a legitimate market and the latter term rather refers to a crime, I draw no such distinction.

Pascale Mayer

Saarbrücken, 12 September 2016

Acronyms & Abbreviations

CAHBI	Comité Ad Hoc d'Experts pour la Bioéthique
CDBI	Comité Directeur pour la Bioéthique
CD-P-TO	Comité Directeur sur la Transplantation d'Organes
CETS	Council of Europe Treaty Series
COE	Council of Europe
DAFOH	Doctors Against Forced Organ Harvesting
DICG	Declaration of Istanbul Custodian Group
EP	European Parliament
EU	European Union
EULEX	European Union Rule of Law Mission in Kosovo
OJEC	Official Journal of the European Communities
OSCE	Organization for Security and Cooperation in Europe
RCIDT	Red/Consejo Iberoamericano de Donación y Trasplantes
SITF	Special Investigative Task Force
SP-CTO	Comité d'Experts sur les Aspects Organisationnels de la Coopération dans le Domaine de la Transplantation d'Organes
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNMIK	United Nations Interim Administration Mission in Kosovo
UNODC	United Nations Office on Drugs and Crime
UNTOC	United Nations Convention Against Transnational Organized Crime
WHA	World Health Assembly
WHO	World Health Organization
WMA	World Medical Association

A. INTRODUCTION

"It is hard to put exact figures on it, but we know that organ trading is big money."

Thorbjørn Jagland

I. Fact or Fiction: Urban Legends

Imagine this: Central America. U.S. body snatchers in trucks round up kids like cattle, abduct them, remove their organs, then toss them like trash. Could this gruesome story be true? In the end, it turned out to be nothing but a rampant rumor. But in 1987, when the story first surfaced, printed by the *Pravda*, it not only put a severe dent into relations between the United States and the Soviet Union.¹ The European Parliament, "deeply shocked" at the "appalling revelations," condemned U.S. involvement in such unscrupulous activities.² The UN Special Rapporteur on the Sale of Children, Child Prostitution, and Child Pornography asserted that "mounting evidence of a market for children's organs" existed.³ When a slew of violent attacks, provoked by fear and outrage, ensued on U.S. tourists in Central America⁴, the U.S. State Department launched a campaign to show the impossibility and baselessness of organ trafficking and to dismantle "irresponsible and totally unsubstantiated" stories that threatened "the extremely fragile system of voluntary organ donation, upon which many lives depend."⁵

The last sentence shows that it is paramount to distinguish fact from fiction. Fact remains that not all stories turn out to be myths: today, organ trafficking is a universally acknowledged tragic reality of our times⁶ – a billion dollar business.⁷

¹ *Morelli*, Organ Trafficking: Legislative Proposals to Protect Minors, *American University International Law Review*, Vol. 10, 1995, p. 927 ff.

² European Parliament, Resolution on the Trafficking in Children in Central America, Doc. B2-7474/88, OJEC No. C262, p. 121 ff. Available through the Historical Archives of the European Parliament (see Annex).

³ Sale of Children, Child Prostitution and Child Pornography, Report submitted by Mr. Vitit Muntarbhorn, Special Rapporteur, in accordance with Commission on Human Rights Resolution 1993/82, 14 January 1994, E/CN.4/1994/84, p. 23. Available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G94/102/37/PDF/G9410237.pdf?OpenElement>

⁴ *Interlandi*, Organ Trafficking Is No Myth, *Newsweek*, 10 January 2009. Available at <http://europe.newsweek.com/organ-trafficking-no-myth-78079?rm=eu>

⁵ *Leventhal*, United States Information Agency, The Child Organ Trafficking Rumor: A Modern "Urban Legend", Report Submitted to the United Nations Special Rapporteur on the Sale of Children, Child Prostitution, and Child Pornography, December 1994. Available at <http://pascalfroissart.online.fr/3-cache/1994-leventhal.pdf>

⁶ *Lawless*, Dispelling the Myth: The Realities of Organ Trafficking, Professor Nancy Scheper-Hughes in Interview, *TMO Magazine*, Three Monkeys Online. Available at <http://www.threemonkeysonline.com/dispelling-the-myth-the-realities-of-organtrafficking-professor-nancy-scheper-hughes-in-interview/>

II. Facts and Figures: Putting Numbers On It

Thorbjørn Jagland, Secretary General of the Council of Europe, has called organ trafficking “one of the world’s top ten illegal money-making activities”, generating a likely US\$1,2 billion in illegal profits globally – every year.⁸ This can only be an estimate as trafficking takes place in the underworld, involving multiple actors, operating in multiple countries, and the cases that are uncovered only give an idea of the magnitude of the problem.

In 2013, 117.733 organs were reported to be transplanted in 112 countries – a 2,6% increase over the previous year, satisfying less than 10% of global needs. Of these organs, 78.952 were kidneys, a likely 10% of which were obtained on the black market.^{9,10} The retail value of the global illicit kidney market alone would exceed US\$1 billion a year, assuming that US\$50.000 broker’s fees plus medical and transport expenses brought the price of a kidney transplant to about US\$150.000.¹¹ If we take a look at Europe, more specifically the Eurotransplant region¹², we find that 10.267 people were registered on a waiting list for transplant surgery in 2015. Of those, 6.092 were waiting for a kidney. Of those, 599 died because of the lack of an available organ. That makes almost 10%.¹³

Like drugs, arms, diamonds or oil, organs have become a highly profitable commodity to sell. But how did we get there? In the 1960s and 70s, when transplantation was still a new science, and rarely performed, demand and supply of organs were in balance. Introducing a legal ban on organ trade was both sensible and useful at the time. Today, though, as demand far outstrips supply, prohibition has led to a thriving black market¹⁴ – and begs the question: can it still work?

⁷ *Haken*, Transnational Crime in the Developing World, Global Financial Integrity, February 2011, p. 22.

⁸ *Jagland*, “On The Council of Europe Convention Against Trafficking in Human Organs,” Speech, International Conference on Organ Trafficking, Santiago de Compostela, 25 March 2015. Available at: <http://www.coe.int/en/web/secretary-general/speeches-2015>

⁹ Global Observatory on Organ Donation and Transplantation, Data Reports, 2013. Available at <http://www.transplant-observatory.org/>

¹⁰ *Bos*, Directorate-General for External Policies, Policy Department, Study: Trafficking in Human Organs, European Union, 2015, p. 16.

¹¹ *Haken*, *supra* note 7, p. 21.

¹² The Eurotransplant region comprises Austria, Belgium, Croatia, Germany, Hungary, Luxembourg, the Netherlands, and Slovenia – a total population of 134,6 million.

¹³ <http://statistics.eurotransplant.org/>

¹⁴ *Ambagtsheer/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, 2012, p. 572.

B. BACKGROUND

“Extremis malis extrema remedia.”

Latin Proverb

I. The Art of Transplantation: A Marvel of Modern Medicine

The most momentous milestones in the history of transplantation include: the first live donor kidney transplant performed between identical twin brothers in 1954; the first successful kidney transplant from a deceased donor in 1962; Dr. Christiaan Barnard’s rise to world fame with the first human-to-human heart transplant in 1967; that same year, the creation of Eurotransplant¹⁵, a non-for profit organization responsible for the patient-oriented allocation of organs; and in 1983, the revolutionary introduction of the powerful immunosuppressive anti-rejection medication Cyclosporine.¹⁶

Though just a few decades ago, organ transplants were still suspiciously seen as daring experiments, they have rapidly surpassed major practical limitations (by creating new methods, controlling the immune response, developing preservation solutions, improving pre- and postoperative care, etc.) to become common practice in many countries around the world today.¹⁷ As a result, global demand on organs has grown exponentially.¹⁸

In the previous chapter, we have already established that the kidney is the most frequently transplanted organ. Now consider the following: one of the leading causes of kidney failure is diabetes¹⁹ and the number of people in the world who suffer from diabetes has quadrupled since 1980 to 422 million adults.²⁰ End stage renal disease is increasing by 5% a year in the U.S. alone.²¹ So, even though medical and technical advances over the years have brought about a dramatic increase in success rates and also in potential donor organs, their *relative* shortage still remains at the crux of a crisis of universal scope.

¹⁵ Eurotransplant coordinates the allocation of donor organs within the eight member countries of its collaborative framework. Comparable institutions are Scandiatransplant (Iceland, Denmark, Sweden, Norway, and Finland,) and Balttransplant (Estonia, Latvia, and Lithuania), just to name two.

¹⁶ https://www.eurotransplant.org/cms/index.php?page=about_timeline

¹⁷ *Watson/Dark*, Organ Transplantation: Historical Perspective and Current Practice, *British Journal of Anaesthesia*, Vol. 108, 2012, p. i29 ff.

¹⁸ *Scutti*, Organ Trafficking Is On The Rise As Transplant Surgeries Increase Around The Globe, *Medical Daily*, 26 September 2014. Available at <http://www.medicaldaily.com/organ-trafficking-rise-transplant-surgeries-increase-around-globe-305230>

¹⁹ World Health Organization, *Global Report on Diabetes*, 2016, p.13.

²⁰ *Ibid*, p. 6.

²¹ University of California, San Francisco, The Kidney Project. See <https://pharm.ucsf.edu/kidney/need/statistics>

II. The Rise of Organ Trafficking: An Evil of Modern Times

We could say that transplantation has become a victim of its own success. When waiting lists fail them, desperate dialysis patients may feel driven to having their needs met outside the established system. In the early 1980s, a global trade in kidneys from poverty stricken living persons began in the Middle East, Latin America and Asia.²² The first scientifically documented source on the phenomenon of “transplant tourism” was a 1990 report on 130 renal patients from the United Arab Emirates and Oman. They were transplanted by their private doctors, not in their own countries, but in India, with kidneys from the slums of Mumbai, where sellers parted with their organs for US\$2,600 to \$3,300. The report focused on the many complications, including HIV and Hepatitis C infections, the transplantees suffered post-operatively – and the 25 deaths. It was less concerned with the commercial nature of the transplantations.²³

In 1994, India passed the Transplantation of Human Organs Act, prohibiting the buying and selling of human organs. While this prompted organ brokers to tap into new sources and open other markets, e.g. in Bolivia, Brazil, Columbia, Iraq, Israel, Moldova, Pakistan, Peru, the Philippines or Turkey,²⁴ kidney commerce in India, despite the new law, did not stop.^{25, 26} Instead it continued to be a “flourishing market” with an average of 2000 illegal transactions taking place annually, according to the Voluntary Health Association of India.²⁷

When German patients died in 1996 at the University Hospital in Essen after having received new kidneys in India, German doctors were outraged, calling for “suitable laws to prohibit

²² *Scheper-Hughes*, Human Traffic: Exposing the Brutal Organ Trade, New Internationalist, 14 May 2015. Available at: <https://newint.org/features/2014/05/01/organ-trafficking-keynote/>

²³ *Salahudeen/Woods/Pingle/et al.*, High Mortality Among Recipients of Bought Living-Unrelated Donor Kidneys, The Lancet, Vol. 336, No. 8717, 22 September 1990, p. 725 ff. Many sources incorrectly quote the *Salahudeen et al.* report, mistakenly citing the number of patients as having been 131. In fact, 130 is correct. But one patient had to be operated twice. Hence the number 131 refers to the number of transplants performed.

²⁴ *Shimazono*, The State of the International Organ Trade: A Provisional Picture Based on Integration of Available Information, Bulletin of the WHO, Vol. 85, No. 12, December 2007, p. 955 ff. Available at <http://www.who.int/bulletin/volumes/85/12/06-039370/en/>

²⁵ *Shroff*, Legal and Ethical Aspects of Organ Donation and Transplantation, Indian Journal of Urology, Vol. 25, Issue 3, 2009, p. 348 ff.

²⁶ The same holds true for other key donor countries, such as Egypt, Pakistan or the Philippines, where organ trade has not ceased despite the implementation of domestic laws prohibiting organ sales. See *Budiani-Saberi/Columb*, A Human Rights Approach to Human Trafficking for Organ Removal, Med Health Care Philos, November 2013, Vol. 16, Issue 4, p. 909, fn. 13.

²⁷ *Hogg*, Why Not Allow Organ Trading? BBC News, 30 August 2002. Available at <http://news.bbc.co.uk/2/hi/health/2224554.stm>

organ tourism [...] and to protect the impoverished populations of developing countries from being misused as organ banks for the rich countries of the world."²⁸

Today, almost every country in the world has implemented the principle of non-commerciality in organ transplantation into their national legislation. However, only in very few cases have prosecutorial efforts been successful.²⁹

C. DECRYPTING THE ORGAN TRADE

"The pound of flesh which I demand of him is dearly bought; 'tis mine and I will have it."

Shylock in William Shakespeare's *The Merchant of Venice*

I. Travel for Transplantation vs. Transplant Tourism

If related recipients and donors live in different countries, naturally, for an operation to take place, travel will have to be involved. While this kind of travel where recipients, donors, surgeons or organs move across jurisdictional borders for transplantation purposes is perfectly legal and appropriate, so-called transplant tourism has the potential to violate human rights. It involves the purchase of an organ abroad while "bypassing laws, rules, or processes of any or all countries involved"³⁰ and having the potential to "undermine the country's ability to provide transplant services for its own population."³¹

The term "tourism" makes the practice sound rather innocent. In that sense, Jim Cohan might be considered a travel agent. On his website, he professes to have experience and contacts to "provide immediate transplants in countries recognized for successful transplant procedures." The cost for a kidney package is US\$140.000. The deal includes air fare, hospital fees, the organ, the surgery, medications, plus travel and lodging for a friend, relative, or nurse, who accompanies the recipient.³² But whom is the recipient buying the organ from? Nancy Scheper-Hughes, founding director of the human rights project *Organs Watch*, describes the sellers as "the displaced, the disgraced, the dispossessed." During her

²⁸ Karcher, German Doctors Protest Against Organ Tourism, BMJ, Vol. 313, 23 November 1996, p. 1282.

²⁹ Ambagtsheer/Weimar, *supra* note 14, p. 572.

³⁰ Budiani-Saberi/Delmonico, Organ Trafficking and Transplant Tourism: A Commentary on the Global Realities, American Journal of Transplantation, Vol. 8, 2008, p. 926.

³¹ The Declaration of Istanbul on Organ Trafficking and Transplant Tourism, 2008, p. 2.

³² J. Cohan and Associates, International Transplant Coordinators. See <http://www.transplantcoordinator.com>

extensive field research among “the poor at the service of the rich,” she encountered Eastern European peasants, Turkish junk dealers, Palestinian refugees, runaway soldiers from Iraq and Afghanistan, and Afro-Brazilians from the favelas who had sold parts of their bodies in transactions where “the boundaries between gift, commodity and theft were decidedly blurred.”³³

II. Trafficking in Human Beings vs. Trafficking in Human Organs

Considerable confusion over the scope of what organ trafficking involves has probably posed the biggest difficulty in devising a coherent global solution for it. Trafficking in human beings and trafficking in human organs overlap but refer to different legal and institutional frameworks.³⁴ Trafficking in human beings for the purpose of organ removal is a criminal offense committed by transnationally operating organized crime syndicates, involving the coercive transport of individuals and the subsequent removal of their organs.³⁵ International legal instruments that deal with this problem include the *United Nations Convention against Transnational Organized Crime* and the *Council of Europe Convention on Action against Trafficking in Human Beings*.³⁶ Trafficking in human organs is covered to the extent that there is a person “attached” to the organ, in which case the offense amounts to trafficking in human beings. But what if the person is not trafficked? A more far reaching legal instrument, the *Council of Europe Convention against Trafficking in Human Organs* was conceived with the aim to criminalize every act pertaining to the organ trade, extending to every member in the chain of operations,³⁷ from recruiters and brokers through various intermediaries to public officials and health professionals.

A distinction should be made between commercialism and trafficking. They should not be treated as crimes of equivalent standing. Buying an organ from a donor can hardly be seen as equally problematic as compelling, constraining, coercing him.³⁸ To effectively address both problems, experts have asked for binding legal instruments to uniformly criminalize trafficking and commercialism while at the same time pushing national governments to raise awareness of the crimes, to raise awareness of organ shortage and promote ways to

³³ *Scheper-Hughes, supra* note 22.

³⁴ *Bos, supra* note 10, p. 16.

³⁵ *Kelly, International Organ Trafficking Crisis: Solutions Addressing the Heart of the Matter*, Boston College Law Review, Vol. 54, Issue 3, 2013, p. 1318.

³⁶ Both conventions as well as the Council of Europe Convention against Trafficking in Human Organs are looked at in more detail in the chapter on “International Standards, Guidelines and Legal Instruments”.

³⁷ *Pietrobon, Challenges in Implementing the European Convention against Trafficking in Human Organs*, Leiden Journal of International Law, Vol. 29, 2016, p. 485.

³⁸ *Ambagtsheer/Weimar, supra* note 14, p. 571.

overcome it. As already mentioned, these instruments exist. The next chapter will retrace their development and try to explain why prosecutorial successes have been few and far between.

D. INTERNATIONAL STANDARDS, GUIDELINES AND LEGAL INSTRUMENTS

“Justice will not be served until those who are not affected are as outraged as those who are”
Benjamin Franklin

I. Prologue

In 2009, the Council of Europe and the United Nations found in an exhaustive joint study that quite a remarkable range of legal instruments already existed on the topic of organ transplantation and that these instruments did not contradict each other but that they rather “complement[ed] one another in an internationally recognized body of law.”³⁹ In 2015, an equally comprehensive study on trafficking in human organs, requested by the European Parliament’s Subcommittee on Human Rights, arrived at the same conclusion, namely that a broad legal framework, comprising guidelines and binding legal instruments, had been established over the past decades to allow for the implementation of very clear general principles, first and foremost the prohibition to commercialize the human body and the prevention of trafficking in human beings for the removal of organs. These principles are endorsed by all international organizations concerned: the United Nations, the European Union, the Council of Europe, the Organization for Security and Cooperation in Europe, the World Health Organization, the World Medical Association, the International Society of Nephrology, to name just the most important ones, have all contributed to try and help curtail the global phenomenon of organ trafficking.⁴⁰

II. Chronology

In their own overviews, the two studies cited above introduce the relevant legal instruments by grouping them together according to organizations, institutions, groups and other bodies, in an effort to document the progress that has been made within those entities. The

³⁹ *Caplan/Domínguez-Gil/Matesanz/Prior*, Trafficking in Organs, Tissues and Cells and Trafficking in Human Beings for the Purpose of the Removal of Organs, Joint Council of Europe/United Nations Study, Council of Europe/United Nations, 2009, p. 52.

⁴⁰ *Bos*, *supra* note 10, p. 28.

chronology of this paper, in contrast, strictly follows a timeline (from 1978 through today) to demonstrate which developments occurred. In the author's opinion, this approach lends itself better to understanding the causal chain, in other words to understanding what had an effect on what and who was inspired or guided by whom. Listing every single step that has been taken along the road would go far beyond the scope of this paper, which is why content on the next pages is constrained to the most essential breakthroughs, attempting to present the reader with a chronological progression of events leading to the legal framework that exists today on tackling the problem of trafficking in human organs.

1978 / Council of Europe (CoE)

As the continent's leading human rights organization, the Council of Europe issues one of the first international instruments to ever deal with the transplantation of human organs, the *Resolution on Harmonization of Legislation of Member States Relating to Removal, Grafting and Transplantation of Human Substances*.⁴¹ It sets out the core principles, such as the prohibition to offer any human substance for profit⁴² and informed consent as a prerequisite for donation,⁴³ to be implemented in the member states' domestic legislations. However, *Resolution (78) 29* is not legally binding and does not articulate any provisions on sanctions.

1986 / World Health Organization (WHO)

The World Health Assembly (WHA) is the decision-making body of the World Health Organization and, as such, the highest health policy setting body in the world.⁴⁴ During the 39th WHA, various countries, concerned about the trade for profit in human organs, submit a draft resolution on organ transplantation which also touches upon the ethical dimensions of the topic. It is decided that the Executive Board should deliberate over the matter before the 40th WHA. The WHO Director General presents his *Report on Human Organ Transplantation* to the Executive Board at its 79th Session, sparking indeed a debate over the issue.⁴⁵

⁴¹ Resolution (78) 29 is adopted by the Committee of Ministers on 11 May 1978.

⁴² *Ibid*, art. 9 and art. 14.

⁴³ *Ibid*, art. 2 and art. 10.

⁴⁴ Held annually, the WHA is attended by health ministers from all 194 WHO member states, as well as representatives from the health industry, international organizations, NGOs, the media, and many others.

⁴⁵ World Health Organization, *Human Organ Transplantation: A Report on Developments under the Auspices of WHO (1987 – 1991)*, World Health Organization, Geneva, 1991, p. 6, fn.1. Available at <http://apps.who.int/iris/bitstream/10665/37097/1/9241693045.pdf>

1987 / World Health Organization (WHO)

The 40th WHA adopts *Resolution WHA40.13*, reiterating its concern about the phenomenon of organ trafficking and requesting the Director General “to study, in collaboration with other organizations concerned, the possibility of developing appropriate guiding principles for human organ transplants.”⁴⁶ Typically, a WHA resolution advocates that certain steps be taken by the WHO member states to solve a particular health problem. While resolutions are imperative international policy documents that encourage public health actions to be carried out by governments and civil society, they are not legally binding.⁴⁷

1987 / World Medical Association (WMA)

The World Medical Association⁴⁸ is a forum for the discussion of medical topics relating to ethics, education, science and socio-medical affairs, the aim being to offer recommendations that may prove beneficial to health care providers and policy developers uncertain about the right course of action. While these statements have no legal power, they do carry considerable weight in international debates.⁴⁹ In its *Declaration on Human Organ Transplantation*, the WMA condemns the purchase and sale of human organs for transplantation.⁵⁰

1987 / Council of Europe (CoE)

As a “logical follow-up to several initiatives taken by the CoE to favor a European approach” to problems arising in the area of organ transplantation, the European Health Ministers decide to further expand on Resolution (78) 29 (see p. 8), laying the footwork for the future Convention on Human Rights and Biomedicine.⁵¹ Main concerns are the need for protection of individual rights and freedoms, the prohibition of any commercialization of organs and transplantation, the development of public information policies, the optimization of

⁴⁶ Resolution WHA40.13 on the Development of Guiding Principles for Human Organ Transplants is adopted by the 40th World Health Assembly on 13 May 1987.

⁴⁷ *Dias/Marques/Ruseva/et al.*, WHO Regional Office for Europe, Public Health Policy and Legislation Instruments and Tools: An Updated Review and Proposal for Further Research, WHO, 2012, p. 2.

⁴⁸ Set up in 1945, the World Medical Association is an apolitical, non-profit organization, composed of and funded by voluntary national medical associations representing over eight million doctors around the globe.

⁴⁹ WMA, Handbook of Declarations, available at: <http://www.wma.net/en/30publications/10policies/10about/>

⁵⁰ The Declaration on Human Organ Transplantation is adopted by the 39th World Medical Assembly in Madrid, Spain, October 1987.

⁵¹ Council of Europe, 3rd Conference of European Health Ministers, Report of the Secretary General, 21 December 1987, CM(87)236.

organizational aspects to thwart organ shortage, and the encouragement of European cooperation.⁵² Although their political message is loud and clear, the Ministers' conclusions have no legal binding power.⁵³ Following the 3rd Conference of European Health Ministers, the *Committee of Experts on the Organizational Aspects of Cooperation in Organ Transplantation (SP-CTO)* is established to follow the latest developments in organ transplantation, identify the causes of organ shortage, find out how to increase the availability of organs, recommend quality standards, draft appropriate legal instruments, improve contacts between exchange organizations, and encourage training courses in organ transplantation.⁵⁴

1989 / World Health Organization (WHO)

As a response to the request voiced in Resolution WHA40.13 on the Development of Guiding Principles for Human Organ Transplants from 1987 (see p. 9), the 42nd WHA adopts *Resolution WHA42.5 on Preventing the Purchase and Sale of Human Organs*.⁵⁵

1990 / Council of Europe (CoE)

Echoing the European Ministers of Health's concern that the development of biomedical sciences could threaten the rights of the individual, the European Ministers of Justice adopt *Resolution No. 3*,⁵⁶ recommending that the Ad Hoc Committee of Experts on Bioethics (CAHBI)⁵⁷ prepare a legally binding text of broad scope with general standards intended to protect the individual from potential harm in the context of scientific biomedical advances. In *Recommendation 1160*,⁵⁸ the Parliamentary Assembly supports the idea of such a legally binding text. The Committee of Ministers instructs the CAHBI to prepare a framework

⁵² Council of Europe, 3rd Conference of European Health Ministers, Final Text, 16 December 1987, CM(87)231.

⁵³ Bos, *supra* note 10, p. 31.

⁵⁴ López-Fraga/Domínguez-Gil/Fehily/*et al.*, *Concerted Efforts to Promote Donation and Transplantation in Europe: The Leading Role of the Council of Europe and the C-P-TO, Organs, Tissues & Cells*, Number 17, 2014, p. 40.

⁵⁵ Resolution WHA42.5 is adopted by the 42nd World Health Assembly on 15 May 1989.

⁵⁶ Resolution No. 3 on Bioethics can be found in the *Texts of the Council of Europe on Bioethical Matters, Vol. II* (p. 102).

⁵⁷ The CAHBI is set up in 1985 in order to address problems and challenges with regard to medical and biological advancements. It is renamed the Steering Committee on Bioethics (CDBI) in 1992.

⁵⁸ Council of Europe, Parliamentary Assembly, Recommendation 1160 (1991), *Preparation of a Convention on Bioethics*, 28 June 1991.

Convention, open to non-member states, “and Protocols to this Convention, relating to, in a preliminary phase: organ transplants [...]”.⁵⁹

1991 / World Health Organization (WHO)

As a response to Resolution WHA40.13 and Resolution WHA42.5, the 44th WHA adopts *Resolution WHA44.25*, endorsing the guiding principles formulated during a process of consultations between the Director General and a broad range of international organizations and individual experts.⁶⁰ The commentary on Principle 5 states that payment for organs “is likely to take unfair advantage of the poorest and most vulnerable groups, undermines altruistic donation [...], leads to profiteering and human trafficking, [...] and conveys the idea that some persons lack dignity, that they are mere objects to be used by others.” At the same time, it asserts that the reimbursement of “reasonable and verifiable expenses incurred by the donor” is not precluded. Besides emphasizing aspects of non-commercialization,⁶¹ it stresses the preference for deceased over living donors,⁶² voluntary donation⁶³ and the genetic relation between donor and recipient.⁶⁴ The nine Guiding Principles will have a considerable influence on the further development of legislation, policies and professional codes.

1993 / Europol

The European Union’s law enforcement agency, Europol, is established to support cooperation between police forces in the EU member states and assist them in combatting serious and international crime. Trafficking in human beings becomes one of the agency’s mandated crime areas, and while trafficking in organs is outside its jurisdiction,⁶⁵ the issue will push itself onto Europol’s radar screen more prominently over the years.⁶⁶

⁵⁹ Council of Europe, Explanatory Report to the Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine, ETS 164, Oviedo, 04 April 1997.

⁶⁰ Resolution WHA44.25 on Human Organ Transplantation is adopted by the 44th World Health Assembly on 13 May 1991.

⁶¹ Guiding principles 5, 6, 7, 8 and 9.

⁶² Guiding principle 3.

⁶³ Guiding principles 1 and 3.

⁶⁴ Guiding principle 3.

⁶⁵ Today, Europol’s mandate is “based on the definition in the UN 2000 Protocol on trafficking in persons, therefore also trafficking in persons where the scope of exploitation is removal of organs. Europol does not have the mandate to coordinate operations on trafficking in organs.” (EUROPOL G14 Public Relations & Events, personal e-mail communication, 04 May 2016).

⁶⁶ In 2009, Europol starts issuing reports and knowledge products on the subject of human trafficking (see, e.g., *Europol Knowledge Product: Trafficking in Human Beings in the European Union*, 2011).

1997 / Council of Europe (CoE)

After years of planning and negotiation, the *Convention on Human Rights and Biomedicine*⁶⁷ is adopted by the Committee of Ministers. A breakthrough piece of international legislation, it is the first comprehensive multilateral legally binding instrument focusing on biomedical human rights issues.⁶⁸ Key amongst these are the preservation of human dignity,⁶⁹ individuals' rights and freedoms⁷⁰ and the prohibition of misuse of biological and medical advances.⁷¹ While the Convention does devote a chapter to organ transplantation,⁷² the Additional Protocol concerning the Transplantation of Organs and Tissues of Human Origin follows only five years later, in 2002 (see p. 15).

1997 / Bellagio Task Force

The Bellagio Task Force is an interdisciplinary working group composed of transplant surgeons, organ procurement specialists, human rights activists and social scientists, set up by the Columbia University College of Physicians and Surgeons. In order to promote public trust in the international practice of organ donation, the *Bellagio Task Force Report* takes a differentiated look at key concerns like the procurement of organs from prisoners and commercialization. While opposing the sale of organs from live donors, the task force favors incentive programs for families of deceased donors. It also proposes the establishment of an international human donor surveillance committee.⁷³

From 2012 to 2015, Europol participates in the HOTT project, an international research project funded by the EU to combat trafficking in persons specifically for the purpose of organ removal. See <http://hottproject.com/>

⁶⁷ The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (ETS No. 164) is opened for signature on 04 April 1997 in Oviedo, Spain.

⁶⁸ Andorno, The Oviedo Convention: A European Legal Framework at the Intersection of Human Rights and Health Law, *Journal of International Biotechnology Law*, Vol. 2, Issue 4, 2005, p. 133.

⁶⁹ Art. 2 – The interests and welfare of the human being shall prevail over the sole interest of society or science.

⁷⁰ Chapter II deals with consent, while chapter III focuses on private life and the right to information.

⁷¹ Art. 21 – The human body and its parts shall not, as such, give rise to financial gain.

⁷² Chapter VI - Organ and tissue removal from living donors for transplantation purposes.

⁷³ Rothman/Rose/Awaya/*et al.*, The Bellagio Task Force Report on Transplantation, Bodily Integrity, and the International Traffic in Organs, first published in *Transplantation Proceedings* (1997; 29:2739-45), reproduced with the kind authorization of the publisher on the website of the International Committee of the Red Cross: <https://www.icrc.org/eng/resources/documents/misc/57jnyk.htm>

1998 / Council of Europe (CoE)

The European Committee on Organ Transplantation (CD-P-TO)⁷⁴ initiates the *European Day for Organ Donation & Transplantation (EODD)*. The idea behind it is to help member states promote organ donation by providing information and encouraging debate so that people can make educated decisions on the subject matter.⁷⁵

2000 / European Union (EU)

The *EU Charter of Fundamental Rights* enshrines key political, social and economic rights in EU law.⁷⁶ Outside of the International Covenant on Civil and Political Rights,⁷⁷ the specific principles relating to the fields of medicine and bioethics are rather a novelty in a general human rights instrument.⁷⁸ Of particular significance for the topic of this paper are the limitations on medicine and biology⁷⁹ found in Art. 3 of the Charter, which deals, e.g., with the principle of free and informed consent and the prohibition of turning the human body into a source of financial gain.⁸⁰

2000 / United Nations (UN)

The sale of children is prohibited in the 1990 *UN Convention on the Rights of the Child*.⁸¹ In its *Optional Protocol*,⁸² organ removal is added to the definition of what constitutes the sale of children (Art. 3), making it “the first binding international legal instrument to explicitly prohibit

⁷⁴ The CD-P-TO is in charge of organ transplantation activities at the European Directorate for the Quality of Medicines & HealthCare (EDQM). See more at <https://www.edqm.eu/en/EDQM-mission-values-604.html>

⁷⁵ <http://www.coe.int/en/web/portal/12-october-european-day-for-organ-donation>

⁷⁶ The Charter of Fundamental Rights is initially drafted and solemnly proclaimed by the European Parliament, the Council of Ministers and the European Commission at the Nice European Council on 7 December 2000, but it becomes legally binding only nine years later, with the entry into force of the Treaty of Lisbon.

⁷⁷ Adopted by the UN General Assembly in 1966, the ICCPR enters into force in 1976. Art. 7 prescribes that “no one shall be subjected without his free consent to medical or scientific experimentation.”

⁷⁸ Bojarski/Schindlauer/Wladasch, *The Charter of Fundamental Rights as a Living Instrument*, Manual, 2014, p. 17. Available at http://www.equineteurope.org/IMG/pdf/cfreu_-_the_charter_of_fundamental_rights_as_a_living_instrument.pdf.

⁷⁹ These limitations are in line with the Preamble of the Charter, in which one aim is defined as to protect the individual's fundamental rights in view of social changes, scientific progress and technological developments.

⁸⁰ EU Network of Independent Experts on Fundamental Rights, *Commentary of the Charter of Fundamental Rights of the European Union*, June 2006, p. 36 ff.

⁸¹ The Convention is adopted by General Assembly Resolution 44/25 on 20 November 1989 and enters into force on 2 September 1990. Art. 35 prohibits the sale of children.

⁸² The Optional Protocol to the Convention on the Rights of the Child on the Sale of children, Child Prostitution and Child Pornography is adopted by General Assembly Resolution A/RES/54/263 of 25 May 2000 and enters into force on 18 January 2002.

human trafficking for organ removal.”⁸³ In the same year, the *UN Convention against Transnational Organized Crime (UNTOC)* is adopted, as is its *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*.⁸⁴ The Protocol includes in the definition of human trafficking the removal of organs as a form of exploitation:

*“Trafficking in persons” shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include [...] the removal of organs.*⁸⁵

Because of the broad scope of the definition, many international organizations embrace this Protocol as the “cornerstone for law enforcement measures against human traffickers.”⁸⁶ It also stresses that a victim’s consent must be considered irrelevant if it was given under pressure.⁸⁷

2000 / World Medical Association (WMA)

In its *Statement on Human Organ Donation and Transplantation*,⁸⁸ the WMA is against the procurement of organs from prisoners⁸⁹ and strictly opposes financial incentives for providing or obtaining organs, as it has done in 1987 (see p. 9), though now with the exception of a “reasonable reimbursement” of expenses.⁹⁰ The statement also stresses the need for ethical standards of professional medical conduct.⁹¹

⁸³ Kelly, *supra* note 35, p. 1336.

⁸⁴ The so-called Palermo Convention and its three Protocols (the Palermo Protocols) are adopted by Resolution A/RES/55/25 on 15 November 2000 at the 55th Session of the UN General Assembly. The Convention enters into force on 29 September 2003. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children enters into force on 25 December 2003.

⁸⁵ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, art. 3 (a).

⁸⁶ Bos, *supra* note 10, p. 33.

⁸⁷ Palermo Protocol, *supra* note 85, art. 3 (b).

⁸⁸ The statement is adopted by the 52nd WMA General Assembly in Edinburgh, Scotland, in October 2000, revised by the 57th WMA General Assembly in Pilanesberg, South Africa, in October 2006, and rescinded at the 65th WMA General Assembly in Durban, South Africa, in October 2014.

⁸⁹ See para. F (4) in the statement.

⁹⁰ *Ibid*, para. H (4).

⁹¹ *Ibid*, para. B.

2002 / Council of Europe (CoE)

The *Additional Protocol to the Convention on Human Rights and Biomedicine*⁹² seeks to ensure the protection of individuals specifically in the area of transplantations. It expressly prohibits organ trafficking⁹³ and requires that infringement of its provisions be sanctioned. It does not, however, specify by which means.⁹⁴ As an addition to the 1997 Convention (see p. 12), the Protocol is of equal binding power.

2002 / European Union (EU)

The *Council Framework Decision 2002/629/JHA on Combating Trafficking in Human Beings*⁹⁵ essentially echoes the UNTOC (see p. 13), however, surprisingly it does not include exploitation for the purpose of organ removal in its definition of trafficking in human beings.

2002 / Eurojust

The European Union's Judicial Cooperation Unit is created to improve the handling of serious cross-border and organized crime by strengthening investigative and prosecutorial coordination between the agencies of the EU Member States. As is the case for Europol, organ trafficking seems a rather new and neglected offense for Eurojust before moving within its scope of attention.⁹⁶ When trafficking in human beings becomes one of the priorities in the fight against serious and organized crime,⁹⁷ Eurojust creates an action plan with concrete proposals for increasing the number of investigations and prosecutions.⁹⁸

⁹² The Additional Protocol concerning Transplantation of Organs and Tissues of Human Origin (ETS No. 186) is adopted on 24 January 2002 and enters into force on 01 May 2006.

⁹³ Art. 22 refers to the prohibition of organ trafficking for making financial gain from the human body, violating human rights, exploiting vulnerable persons and eradicating public trust in the official transplant system.

⁹⁴ ETS No. 186, *supra* note 92, art. 24 and art. 26.

⁹⁵ OJ L 203 of 1/8/2002, p. 1-4.

⁹⁶ Eurojust, THB Project, available at: <http://www.eurojust.europa.eu/practitioners/operational/thb/pages/thb-project.aspx>

⁹⁷ Council of the European Union, Council Conclusions on Setting the EU's Priorities for the Fight against Serious and Organised Crime between 2014 and 2017, Justice and Home Affairs Council Meeting, Luxembourg, 6 and 7 June 2013.

⁹⁸ Eurojust. Strategic Project on Eurojust's Action against Trafficking in Human Beings. Final Report and Action Plan, October 2012.

2003 / Council of Europe (CoE)

In the report *Trafficking in Organs in Europe*,⁹⁹ member states are urged to recognize their shared responsibility in curtailing the crime of organ trafficking. It is pointed out that although many member states legally prohibit organ trafficking, their legislation still has loopholes. Criminal responsibility, e.g., is not clearly described in many national criminal codes.¹⁰⁰ Western European “trends towards less restrictive laws allowing greater scope for unrelated living donation” are disapproved of.¹⁰¹ This report forms the basis for *Recommendation 1611 (2003)*,¹⁰² in which member states are called upon to reinforce cooperation, implement the recommendations of the 52nd WMA (see p. 14), and to sign and ratify all relevant conventions.¹⁰³ Distinguishing between donor and demand countries, the report stresses that for the fight against trafficking to be successful, it cannot be the sole responsibility of one, but it must be the concerted effort of all involved. Measures should include implementation of national anti-corruption programs, sanctioning of medical professionals involved in performing operations with trafficked organs,¹⁰⁴ and insurance companies’ refusal to reimburse illicit transplants performed abroad and follow-up care.¹⁰⁵

2003 / Initiative of the Hellenic Republic

The *Initiative with a view to adopting a Council Framework Decision concerning the prevention and control of trafficking in human organs and tissues* points out that legislation regarding the definition of the penalties differs in the member states, but for the fight against organ trafficking to succeed it must be led not by individual action but by a comprehensive approach.¹⁰⁶ The initiative fills gaps left by the lack of reference to organ removal as a purpose for human trafficking in Council Framework Decision 2002/629/JHA (see p. 15).¹⁰⁷

⁹⁹ Council of Europe, Parliamentary Assembly, Report of the Social, Health and Family Affairs Committee, Rapporteur: Mrs. Vermot-Mangold, Doc. 9822, 03 June 2003.

¹⁰⁰ *Ibid*, para. I. 12.

¹⁰¹ *Ibid*, para. II. 36.

¹⁰² Recommendation 1611 (2003) on Trafficking in Organs in Europe is adopted by the Parliamentary Assembly on 25 June 2003.

¹⁰³ *Ibid*, para. 14.

¹⁰⁴ *Ibid*, para. 14.3.e. and 14.3.i.

¹⁰⁵ *Ibid*, para. 14.1.b. and 14.1.c.

¹⁰⁶ OJ C 100 of 26/04/2003, p. 27.

¹⁰⁷ Caplan/Domínguez-Gil/Matesanz/Prior, *supra* note 39, p. 71.

2003 / Organization for Security and Cooperation in Europe (OSCE)

In its *Action Plan to Combat Trafficking in Human Beings*, the OSCE adopts the definition of human trafficking given by the UNTOC (see p. 13), including the removal of organs as a purpose for trafficking. Its main resolve is the criminalization of human trafficking.¹⁰⁸

2004 / European Union (EU)

Although *Directive 2004/23/EC on Setting Standards of Quality and Safety for the Donation, Procurement, Testing, Processing, Preservation, Storage and Distribution of Human Tissues and Cells*¹⁰⁹ does not explicitly include human organs, it does underline the need for awareness campaigns regarding donations in general (“we are all potential donors”¹¹⁰) in order to help people make informed decisions, and it stresses the need for member states to prohibit advertising “with a view to offering or seeking financial gain.”¹¹¹

2004 / World Health Organization (WHO)

As professional practice and public perception of organ transplantation have changed over time, the WHA adopts *Resolution WHA57.18 on Human Organ and Tissue Transplantation*¹¹² requesting an update of the Guiding Principles from 1991 (see p. 11) and urging member states to “take measures to protect the poor and vulnerable from transplant tourism and to address the wider problem of international trafficking of human organs and tissues.”¹¹³

2004 / Council of Europe (CoE)

In *Recommendation Rec (2004)7*, the Committee of Ministers focuses on the prevention of organ trafficking, which should be attained by improving availability and assuring traceability of organs, prohibiting financial gain, refining legal instruments, informing the public, and cooperating internationally.¹¹⁴

¹⁰⁸ OSCE, Permanent Council, Decision No. 557, OSCE Action Plan to Combat Trafficking in Human Beings, 24 July 2003. The Action Plan is revised in 2005: OSCE PC.DEC/557/Rev.1 (Vienna, 2005).

¹⁰⁹ OJ L 102 of 7/4/2004, p. 48-58.

¹¹⁰ *Ibid*, p. 48.

¹¹¹ *Ibid*, p. 54.

¹¹² Resolution WHA57.18 is adopted by the 57th World Health Assembly on 22 May 2004.

¹¹³ *Ibid*, para. I 1 (5).

¹¹⁴ Recommendation Rec (2004)7 on Organ Trafficking is adopted by the Committee of Ministers on 19 May 2004.

2004 / United Nations (UN)

In its *Resolution 59/156 on Preventing, Combating and Punishing Trafficking in Human Organs*, the General Assembly is alarmed at the potential growth of organ trafficking and urges member states to “adopt the necessary measures to prevent, combat and punish the illicit removal of and trafficking in human organs.” It further encourages the international exchange of experience and information.¹¹⁵

2005 / Council of Europe (CoE)

Above and beyond the adoption of the UNTOC’s definition of human trafficking (see p. 13), the *Convention on Action against Trafficking in Human Beings*^{116, 117} has some relevant additions to the Palermo Convention and Protocol.¹¹⁸ Key added value is the human rights perspective: with a victim-centered approach, the emphasis lies on the obligation to protect victims and safeguard their rights.¹¹⁹ The Convention also calls for the creation of an independent mechanism to monitor progress and implementation into national legislations.¹²⁰

2005 / The Iberoamerican Network/Council of Donation and Transplantation¹²¹

The Iberoamerican Network/Council of Donation and Transplantation (RCIDT) aims at improving collaboration in organizational, legislative, educational, ethical and sociological matters of organ donation and transplantation.¹²² The RCIDT issues a *Declaration against Transplant Tourism in Latin America*,¹²³ based on the WHO Guiding Principles (see p. 11), recommending that member states take legal measures to control and sanction the endorsement of transplant tourism because it promotes “inequity, exclusion and social

¹¹⁵ United Nations, General Assembly, A/RES/59/156, 20 December 2004.

¹¹⁶ The Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197) is adopted in Warsaw, Poland, on 16 May 2005 and enters into force on 01 February 2008.

¹¹⁷ Conventions that were opened for signature between 1949 and 2003 were published under the name of *European Treaty Series* (ETS No. 001 to 193). Since 2004, this series is continued by the name of *Council of Europe Treaty Series* (CETS No. 194 and onward).

¹¹⁸ Bos, *supra* note 10, p. 34.

¹¹⁹ Art. 10-16, 19, 28.

¹²⁰ Art. 36.

¹²¹ Comprised of 21 Spanish and Portuguese speaking countries, the RCIDT, is formed at the 7th Iberoamerican Conference of Health Ministers in Granada, Spain, September 2005.

¹²² Matesanz/Soratti/Pérez-Rosales, Regional Perspective: The Iberoamerican Network/Council on Donation and Transplantation, Transplantation, September 2015, p. 1739.

¹²³ http://www.grupopuntacana.org/materiales_consejo/declaraturismotraspla.pdf

injustice, [...] violate[s] human rights of national recipients [...] and distorts the general activity in donation and transplantation of the entire region".¹²⁴

2005 / United Nations Educational, Scientific and Cultural Organization (UNESCO)

*The Universal Declaration on Bioethics and Human Rights*¹²⁵ aims at assembling a comprehensive set of global standards to guide states in their efforts to responsibly carry out biomedical research and clinical practice and ensure their conformity with international human rights law. Though most of these standards have already been written down before, the Declaration's great merit is that, for the first time, bioethics and human rights are linked and, the international community commits to applying these fundamental principles laid out within a single text.¹²⁶ One of the principles urges states to make a concerted effort in the fight against bioterrorism and illegal organ trafficking.¹²⁷

2006 / United Nations (UN)

Pursuant to Resolution 59/156 (see p. 17), the Secretary General submits a *Report to the General Assembly on Preventing, Combating and Punishing Trafficking in Human Organs*.¹²⁸ It concludes that human organs are traded as a commodity worldwide and that, due to a lack of attention brought to the issue and due to the absence of internationally conform definitions and legal standards, the extent of the problem cannot be rendered precise.¹²⁹

2007 / European Union (EU)

The Commission adopts a *Communication on Organ Donation and Transplantation*¹³⁰ in which it calls for an EU directive on quality and safety of human organs. Acknowledging that organ trafficking is "an issue of serious political and ethical concern," it proposes the implementation of an action plan to improve member states' coordination.¹³¹

¹²⁴ *Ibid*, p. 2.

¹²⁵ The Declaration is adopted by acclamation on 19 October 2005 by the 33rd Session of the General Conference of UNESCO.

¹²⁶ *Andorno*, Global Bioethics at UNESCO: In Defense of the Universal Declaration on Bioethics and Human Rights, *Journal of Medical Ethics*, Vol. 33, Issue 3, 2007, p. 154.

¹²⁷ UNESCO Declaration, *supra* note 125, Art. 21.5.

¹²⁸ E/CN.15/2006/10.

¹²⁹ *Caplan/Domínguez-Gil/Matesanz/Prior*, *supra* note 39, p. 65.

¹³⁰ COM (2007) 275 final.

¹³¹ *Ibid*, p. 4.

2008 / European Union (EU)

Pursuant to the Commission Communication, the European Parliament (EP) adopts the *Resolution on Organ Donation and Transplantation*.¹³² The EP recognizes that organ trafficking is a rapidly developing phenomenon, on which more data is needed and which is directly linked to the problem of organ shortage.¹³³ Organ and donor shortage being a major challenge, it stresses the importance of the Commission's action plan to "increase organ availability, enhance the efficiency and accessibility of transplantation systems, increase public awareness, and guarantee quality and safety."¹³⁴ With respect to opt-in vs. opt-out donation models, it considers it unnecessary to harmonize legal systems¹³⁵ but calls on member states to optimize their organizational systems.¹³⁶ It also calls for the introduction of an EU donor card to complement existing national systems.¹³⁷ With regards to organ trafficking, the EP appeals to member states to prevent transplant tourism¹³⁸ and, if necessary, amend their criminal codes to guarantee the adequate prosecution of traffickers and persons involved with the transplantation of trafficked organs. Pondering the criminal liability of EU citizens who purchase organs inside or outside the EU, the EP takes a remarkably strong stand against organ recipients, that is: the patients. Also, health insurance providers are to be kept from facilitating activities which, intentionally or not, promote organ trafficking.¹³⁹ The bold call for all cases of transplant tourism and organ trafficking to be reported to the police is a rather novel request, void of support in existing European legislation, and disconcerting to health professionals, as it can be considered a breach of medical confidentiality.¹⁴⁰ Lastly, regretting that Europol has not produced a survey on organ trafficking, due to an absence of documented cases, the EP asks for an improvement in the monitoring of organ trafficking cases.¹⁴¹ Although the 60 action points in this resolution are meant to "set the agenda for future policy actions", they are not legally binding.¹⁴²

¹³² European Parliament Resolution on Organ Donation and Transplantation: Policy Actions at EU Level (2007/2210 (INI)), 22 April 2008.

¹³³ *Ibid*, para. B.

¹³⁴ *Ibid*, para. 9.

¹³⁵ *Ibid*, para. 11.

¹³⁶ *Ibid*, para. 12.

¹³⁷ *Ibid*, para. 34.

¹³⁸ *Ibid*, para. 52.

¹³⁹ *Ibid*, para. 53.

¹⁴⁰ *Bos*, *supra* note 10, p. 49.

¹⁴¹ European Parliament, Press Release, How to Fight Organ Shortages and Transplant Tourism, Europol to Act on Organ Trafficking, Public Health, Plenary Sessions, 22 April 2008. Available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM-PRESS+20080418IPR27078+0+DOC+XML+V0//EN>.

¹⁴² *Bos*, *supra* note 10, p. 48.

2008 / Asian Task Force on Organ Trafficking¹⁴³

Asian countries in particular have gained a notorious international reputation as a hub for transplant tourism with a flourishing black market catering to patients from wealthier countries.¹⁴⁴ Composed of a multidisciplinary team of 14 international experts from the fields of medicine, ethics, law, philosophy and social sciences, the Task Force's *raison d'être* is to identify the root causes and problems of organ trafficking and transplant tourism, specifically in Asia, and formulate a set of suggestions to guide Asian governments, institutions and health professionals in coping with the issue collectively. In the comprehensive 20-point *Taipei Recommendations*,¹⁴⁵ relevant governments and organizations are urged to increase public awareness of the social, ethical and legal ramifications of organ trafficking in Asia (recommendation 1), address the needs of the populations who suffer from economic disadvantages (6), and support Asian countries in their commitments to prohibit and prevent organ trafficking and undertake full implementation of the Palermo Convention (4). All countries are called on to pass national legislation clearly distinguishing between prohibited and allowable practices pertaining to organ transplantation (3), and an international treaty is strongly recommended, as it is needed to effectively implement international norms relating to organ trafficking (2). The Recommendations also include technical matters, such as the need for studies and information exchange (11), transparency and accountability (13), abolition of insurance policies that support illicit transplantation practices (15), and cost reimbursement for altruistic living donors (17).

2008 / The Transplantation Society and the International Society of Nephrology

Heeding the call to action of Resolution WHA57.18 (see p. 17), over 150 representatives of science and medicine from 78 countries finalize a formal statement against unethical practices which violate the principles of equity, justice and respect for human dignity and threaten to defile the legacy of transplant medicine.¹⁴⁶ Although not legally binding, the

¹⁴³ The Asian Task Force on Organ Trafficking is established jointly by the Center for Ethics, Law, and Society in Biomedicine & Technology (CELS) and the Asian Center of WTO & International Health Law and Policy (ACWH), National Taiwan University.

¹⁴⁴ Shimazono, *supra* note 24, p. 955 ff.

¹⁴⁵ The Recommendations on the Prohibition, Prevention and Elimination of Organ Trafficking in Asia are adopted on 27 January 2008 in Taipei, Taiwan. Full text available at <http://www.jcb.utoronto.ca/publications/documents/Asian%20Task%20Force%20on%20%20organ%20trafficking%20.pdf>.

¹⁴⁶ The Declaration of Istanbul on Organ Trafficking and Transplant Tourism is adopted at the International Summit on Transplant Tourism and Organ Trafficking convened by The Transplantation Society and International Society of Nephrology in Istanbul, Turkey, 30 April - 2 May 2008. See <http://www.declarationofistanbul.org/>.

Declaration of Istanbul draws weight from the fact that governments and the medical profession, by their own choice, observe the values it promotes.¹⁴⁷ It clearly defines organ trafficking, transplant tourism and commercialism, provides principles of practice, and proposes alternatives to dealing with global organ shortage. It distinguishes between transplant tourism and travel for transplantation. It stresses the need for national and regional self-sufficiency in meeting organ demand and the importance of transparent regulatory oversight systems. It allows reimbursement of legitimate expenses incurred by the donor and it refrains from explicitly prohibiting regulated rewards or incentives for donation.¹⁴⁸ It insists that protection, safety and care of living donors be ensured and that their “heroic” act be honored as such by governments and civil society organizations.¹⁴⁹ To observe the implementation of the Declaration, the *Declaration of Istanbul Custodian Group (DICG)*¹⁵⁰ is formed.¹⁵¹

2008 / European Union (EU)

The Commission adopts the *Action Plan on Organ Donation and Transplantation*. It puts forth ten primary measures to be taken by the member states in a concerted effort to meet three major challenges, namely to increase organ availability, make transplant systems more efficient and improve quality and safety of the transplantation process. The ten priority actions include the establishment of donor coordinators and quality improvement programs in hospitals, the enhancement of organizational models, the facilitation of organ interchange between national authorities, and the evaluation of post-transplant results. The Action Plan not being binding, the Commission proposes that it be complemented by a legal instrument.¹⁵²

2009 / Council of Europe (CoE)

After the Convention on Action Against Trafficking in Human Beings (see p. 17) enters into force in 2008, the Parliamentary Assembly issues a *Recommendation Towards a Council of*

¹⁴⁷ Bos, *supra* note 10, p. 30.

¹⁴⁸ Jafar, Organ Trafficking: Global Solutions for a Global Problem, *American Journal of Kidney Diseases*, Vol. 54, No. 6 (December), 2009, p. 1153.

¹⁴⁹ Caplan/Domínguez-Gil/Matesanz/Prior, *supra* note 39, p. 74.

¹⁵⁰ To uncover and prevent cases of transplant tourism and organ trafficking, DICG emissaries are put in place in over 40 countries to inform national health authorities and appropriate professional organizations in the hope that proper steps be taken against those involved.

¹⁵¹ Danovitch/Al-Mousawi, The Declaration of Istanbul – Early Impact and Future Potential, *Nature Reviews Nephrology*, June 2012, Vol. 8, p. 358 ff.

¹⁵² Action Plan on Organ Donation and Transplantation (2009-2015): Strengthened Cooperation between Member States, COM(2008) 819/3. Full text available at http://ec.europa.eu/health/ph_threats/human_substance/oc_organ/docs/organs_action_en.pdf

Europe Convention to Combat Trafficking in Organs, Tissues and Cells of Human Origin,¹⁵³ representing “the culmination of several years of efforts by the Council of Europe in the field of organ trafficking,”¹⁵⁴ with the goal of being the first legally binding international instrument devoted solely to fight organ trafficking in the broadest sense.¹⁵⁵

2010 / European Union (EU)

The *Directive 2010/53/EU on Standards of Quality and Safety of Human Organs Intended for Transplantation*¹⁵⁶ complements the Action Plan on organ donation and transplantation and, legally binding, it propels the execution of the priority actions set out therein.¹⁵⁷ Although its priority is organ safety and quality, the Directive also aids to combat organ trafficking “through the establishment of competent authorities, the authorization of transplantation centers, the establishment of conditions of procurement and systems of traceability.”¹⁵⁸

2011 / European Union (EU)

*Directive 2011/36/EU on Preventing and Combating Trafficking in Human Beings and Protecting its Victims*¹⁵⁹ replaces Council Framework Decision 2002/629/JHA (see p. 15), now including the purpose of organ removal in the context of trafficking in human beings.¹⁶⁰ Expected to have considerable impact, it focuses on crime prevention, law enforcement and victim protection. A novelty is the punishment of offenders by a minimum 5 years prison sentence.¹⁶¹ Having been compelled to participate in criminal activities, victims of trafficking will not be prosecuted for their involvement;¹⁶² instead the Directive emphasizes the need for victim support.¹⁶³ Lastly, it prescribes that member states take appropriate measures to prevent and combat trafficking offences by assigning rapporteurs to assess trends, measure results of anti-trafficking actions, gather statistics, and cooperate with relevant civil society

¹⁵³ Recommendation 2009 (2013) Towards a Council of Europe Convention to Combat Trafficking in Organs, Tissues and Cells of Human Origin is adopted by the Parliamentary Assembly on 23 January 2013.

¹⁵⁴ *Ibid*, para. 1.

¹⁵⁵ *Ibid*, para. 3.

¹⁵⁶ OJ L 207, 06 August 2010, p. 14-29.

¹⁵⁷ Report of the Madrid Consultation Part 1: European and Universal Challenges in Organ Donation and Transplantation, Searching for Global Solutions, Transplantation, Vol. 91, No. 11S, June 15, 2011, p. S46.

¹⁵⁸ OJ L 207, *supra* note 156, p. 14.

¹⁵⁹ OJ L 101, 15.04.2011, p. 1-11.

¹⁶⁰ *Ibid*, para. 11, para. 20 and art. 2 (3).

¹⁶¹ *Ibid*, art. 4 (1).

¹⁶² *Ibid*, art. 8.

¹⁶³ *Ibid*, art. 11-17.

organizations¹⁶⁴ and by facilitating the tasks of an anti-trafficking coordinator who will trace progress and report to the Commission every two years.¹⁶⁵ The “minimum rules”¹⁶⁶ established in this comprehensive, legally binding instrument are a clear indication of the EU’s continued commitment to and intensified efforts in the fight against human trafficking over the past decade. In a joint *UN Commentary* on selected articles of Directive 2011/36/EU,¹⁶⁷ Office of the UN High Commissioner for Human Rights, the UN Refugee Agency, the UN Office of Drugs and Crime, UN Women, UNICEF, and the International Labor Organization support member states’ efforts to transpose the Directive into national legislation and offer practical guidance on how to do so while making sure that human rights are rendered mainstream.¹⁶⁸

2011 / Council of Europe (CoE)

Following a report about Kosovar Prime Minister Hashim Thaçi’s alleged involvement in illegal organ trafficking during his time as a Kosovo Liberation Army leader,¹⁶⁹ *Resolution 1782 (2011) on the Investigation of Allegations of Inhuman Treatment of People and Illicit Trafficking in Human Organs in Kosovo* is adopted. The Resolution also refers to investigations of illicit activities at the Medicus Clinic in Priština by the European Union Rule of Law Mission in Kosovo (EULEX).¹⁷⁰ “Aware that trafficking in organs is now an extremely serious problem worldwide,” the Parliamentary Assembly stresses the urgent need for an international legal instrument that clearly defines organ trafficking and specifies what actions should be taken to prevent it, protect its victims and prosecute the perpetrators.¹⁷¹

¹⁶⁴ *Ibid*, art. 19.

¹⁶⁵ *Ibid*, art. 20.

¹⁶⁶ *Ibid*, art. 1.

¹⁶⁷ Available at https://www.unodc.org/documents/human-trafficking/2011/UN_Commentary_EU_Trafficking_Directive_2011.pdf.

¹⁶⁸ <https://www.unodc.org/unodc/en/human-trafficking/2012/joint-un-commentary-on-eu-directive-on-preventing-and-combating-trafficking-in-human-beings-is-launched-at-the-european-parliament.html>

¹⁶⁹ The so-called Marty Report accuses Thaçi of being a “key player” in a “mafia-like” organized crime network that ordered the systematic killing of captives for their kidneys to be sold on the international black market. See: Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Rapporteur: Mr. Dick Marty, AS/Jur (2010) 46, 12 December 2010. Available at http://assembly.coe.int/CommitteeDocs/2010/20101218_ajdoc462010provamended.pdf

¹⁷⁰ The Medicus Case will be looked at in more detail in section V (“Law Enforcement”) of this chapter.

¹⁷¹ Resolution 1782 (2011) on the Investigation of Allegations of Inhuman Treatment of People and Illicit Trafficking in Human Organs in Kosovo is adopted by the Parliamentary Assembly on 25 January 2011.

2012 / World Medical Association (WMA)

The WMA develops the *Statement on Human Organ and Tissue Donation*,¹⁷² based on the core principles of altruism, autonomy, beneficence, equity and justice, to assist medical associations, health care providers and policy makers in achieving the goal of maximizing the number of donor organs and ensuring maintenance of the highest ethical standards.¹⁷³

2012 / European Union (EU)

The Commission adopts a set of practical measures to be carried out until 2016, complementing the implementation of Directive 2011/36/EU (see p. 23). The *EU Strategy towards the Eradication of Trafficking in Human Beings*¹⁷⁴ is based on the key priorities of identifying, protecting and assisting victims, increasing prevention of trafficking and prosecution of offenders, enhancing coordination and cooperation among key actors, achieving policy coherence, increasing knowledge and effective responses to all forms of human trafficking.¹⁷⁵ Of particular relevance to the field of organ trafficking is the proposed development of tools for victim identification, such as an EU Transnational Referral Mechanism which links national referral mechanisms to better identify, refer, protect and assist victims.¹⁷⁶ In 2016, a report will analyze how effective the strategic measures have been in curbing the demand for trafficking, which might result in new legislation.¹⁷⁷

2013 / Organization for Security and Cooperation in Europe (OSCE)

The OSCE adopts an *Addendum to the 2003 Action Plan*,¹⁷⁸ offering an updated toolkit for the fight against all forms of trafficking in human beings. The Addendum focuses on the three Ps (prosecution, prevention, and protection) in national law enforcement and transnational

¹⁷² The WMA Statement on Human Organ and Tissue Donation is adopted by the 63rd WMA General Assembly in Bangkok, Thailand, October 2012.

¹⁷³ The WMA Council decides in 2014 that the Statement on Human Organ Donation and Transplantation (see p. 14) is to be rescinded and archived since it is covered by the Statement on Organ and Tissue Donation. (Dr. Julia Tainijoki-Seyer, WMA, personal e-mail communication, 13 April 2016).

¹⁷⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. The EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016. (COM (2012) 286 final), 19 June 2012. Full text available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012DC0286&from=EN>

¹⁷⁵ *Ibid*, p. 5.

¹⁷⁶ *Ibid*, p. 6.

¹⁷⁷ *Bos, supra* note 10, p. 51.

¹⁷⁸ OSCE Permanent Council, Decision No. 1107/corr.1 (6 December 2013). Addendum to the OSCE Action Plan to Combat Trafficking in Human Beings – one decade later.

partnerships, bearing testament to the practical approach the OSCE is taking with regard to combating trafficking crimes. In a remarkable *report*,¹⁷⁹ assessing its own efficiency in this field, the OSCE, for the first time, exclusively focuses on human trafficking for the purpose of organ removal and demonstrates what progress has been achieved over the last decade:¹⁸⁰ While it is commendable that a few cases have been prosecuted and a few trafficking offenders have been convicted,¹⁸¹ international cooperation is indispensable and there is much room for improvement – especially considering that some states still do not attach great importance to illegal acts if not perpetrated on national territory.¹⁸²

2014 / European Union (EU)

The Commission issues a *Working Document on the Mid-Term Review of the Action Plan on Organ Donation and Transplantation (2009-2015)*,¹⁸³ summarizing steps taken and progress made with regard to the challenges of increasing organ availability, enhancing efficiency and accessibility of transplant systems, and improving quality and safety. Unfortunately, though, the document does not address developments in the field of combating and preventing organ trafficking.¹⁸⁴

2015 / Council of Europe (CoE)

The Draft Convention against Trafficking in Organs is supported by the European Committee on Crime Problems (in 2012), the Parliamentary Assembly, the Committee on Social Affairs, Health and Sustainable Development, and the Committee on Legal Affairs and Human Rights (all in 2013) – although not without some prior disapproval:¹⁸⁵ The lack of sufficiently developed questions in the areas of prevention, protection and cooperation outside the criminal law sphere, e.g., is criticized as a “missed opportunity” that is “most regrettable.”¹⁸⁶ With the punishment of organ suppliers and recipients left to the discretion of the signatories,

¹⁷⁹ OSCE, Office of the Special Representative and Coordinator for Combating Trafficking in Human Beings. Report: Trafficking in Human Beings for the Purpose of Organ Removal in the OSCE Region: Analysis and Findings, 2013.

¹⁸⁰ Bos, *supra*, note 10, p. 54.

¹⁸¹ See the “Law Enforcement” section of this chapter (p. 33, especially footnote 227).

¹⁸² OSCE Report, *supra*, note 178, p. 60.

¹⁸³ European Commission, Commission Staff Working Document SWD(2014) 147 final of 25 April 2014, on the mid-term review of the Action Plan on Organ Donation and Transplantation (2009-2015): Strengthened Cooperation between member states. Full text available at http://ec.europa.eu/health/blood_tissues_organ/docs/midtermreview_actionplan_organ_en.pdf.

¹⁸⁴ Bos, *supra* note 10, p. 52.

¹⁸⁵ Bos, *supra* note 10, p. 55.

¹⁸⁶ Report, Doc. 13338, Rapporteur: Ms. Liliane Maury Pasquier, 22 October 2013, at para. B.2.7. Full text available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20229&lang=en>.

it is recommended that the suppliers' vulnerability should be taken into account before sanctioning them.¹⁸⁷ Furthermore the lack of a provision to remove the double criminality rule¹⁸⁸ is condemned for promoting transplant tourism.¹⁸⁹ Critics also recommend deleting opt-out clauses, as too many of them would water down the scope of the Convention.¹⁹⁰ Having taken critical comments and amendments into account, the CoE, together with the Spanish government, on 25 and 26 March 2015, hosts the High-Level International Conference on the Fight against Trafficking in Human Organs, which opens with the signing ceremony¹⁹¹ for the *Council of Europe Convention against Trafficking in Human Organs* (CETS No. 216).¹⁹² Illegal organ trade being a global phenomenon, the Convention is open also to non-European signatories upon invitation by the CoE and will be legally binding to the contracting states once it enters into force. Thorbjørn Jagland lauds the Convention as "genuinely ground-breaking," being "the world's first ever international treaty to empower states to deal specifically with [the] crime [of organ trafficking]." ¹⁹³

III. Review

The preceding chronology documents first that the ethical and legal framework around the concept of organ commercialism has been firmly established on the European and international level, providing legal instruments to prohibit commercial transplants. In a next step, as far as tackling trafficking in human beings for the purpose of organ removal is concerned, important contributions have been made by various stakeholders. But although a general agenda for legal and judicial response to trafficking offences has been laid out, the instruments available are not customized to other forms of trafficking in organs, such as transplant tourism.¹⁹⁴ Their inherent weakness is that commercial transplant practices do not always fulfill the three criteria to constitute trafficking: the *act* (like the recruitment of a donor), the *means* used to achieve that act (some form of coercion, like the use of force or the abuse of a position of vulnerability) and the *purpose* (exploitation, like the removal of an organ) –

¹⁸⁷ *Ibid* at para. B.3.1.1.

¹⁸⁸ As per the rule, an act has to be considered a criminal offense in both jurisdictions (in extradition, that of the demanding and the delivering state). This means that a country does not have to prosecute a citizen involved in an act related to organ trafficking if it was committed in a jurisdiction where the act was not considered a criminal offense.

¹⁸⁹ Pasquier Report, *supra*, note 186, para. B.3.1.2.14.

¹⁹⁰ *Ibid*, para. B.4.26.

¹⁹¹ Conference program available at <http://www.coe.int/t/dghl/standardsetting/cdpc/conference/PREMS018515%20GBR%20Spain%20Programme%20A4.pdf>.

¹⁹² The Council of Europe Convention against Trafficking in Human Organs (CETS No. 216) is opened for signature on 25 March 2015 in Santiago de Compostela and signed by a total of 14 states on that day.

¹⁹³ Jagland Speech, *supra* note 8.

¹⁹⁴ *Bos*, *supra* note 10, p. 52.

and are therefore difficult to prove and nearly impossible to prosecute.¹⁹⁵ Although there are 117 signatories and 169 parties to the Palermo Protocol,¹⁹⁶ e.g., the number of trafficking convictions has remained low, considering the following figures: 2,5 million people are presumably trafficked at any given time, and in 2007 experts already agreed that this estimate was just the tip of an enormous iceberg.¹⁹⁷ That year, only 5.682 prosecutions were achieved worldwide, with 3.427 convictions. In 2014, prosecutions nearly doubled to 10.051 while convictions increased by about 23% to 4.443.¹⁹⁸ Still, relatively speaking, those numbers are very low. The Case Law Database of the UN Office of Drugs and Crime's Human Trafficking Knowledge Portal currently only lists 12 officially documented instances of trafficking in persons for the purpose of organ removal between the years 2007 and 2010.¹⁹⁹ The list does not yet include such high-profile cases as the Gurgaon Case in India or the Rosenbaum Case in the USA. A brief summary of the prominent Medicus Case follows in the section on "Law Enforcement". But first, a closer look will be taken at CETS No. 216.

IV. CETS No. 216: A Closer Look

1. Précis

CETS No. 216 has not entered into force yet. Before it becomes binding upon the contracting states, it has to be accepted formally by the individual governments, declaring their readiness to adapt national legislations. Ratification by five states is needed, of which at least three must be members of the Council of Europe. 16 states have signed the Convention to date and of those, Albania is the first to have ratified it,²⁰⁰ so the signs bode well. Two of the EU's founding nations, however, have not signed the Convention: Germany and France.

¹⁹⁵ López-Fraga/Domínguez-Gil/Capron/et al., A Needed Convention Against Trafficking in Human Organs, *The Lancet*, Vol. 383, No. 9936, 28 June 2014, p. 2187 ff.

¹⁹⁶ Status as of 06 June 2016. United Nations Treaty Collection, online database available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&clang=_en.

¹⁹⁷ UN Office of Drugs and Crime (see <https://www.unodc.org/unodc/en/press/releases/2007-03-26.html>).

¹⁹⁸ U.S. Department of State, *Trafficking in Persons Report 2015*, p. 48. Available at <https://www.state.gov/documents/organization/245365.pdf>.

¹⁹⁹ Status as of 07 June 2016. The Human Trafficking Knowledge Portal was created to help with the distribution of information regarding the implementation of the Palermo Convention and its Protocol I. See United Nations Office on Drugs and Crime <https://www.unodc.org/cld/v3/htms/>. The Case Law Database "is a living tool that [the UNODC is] constantly improving" (Euridice Marquez, Crime Prevention and Criminal Justice Officer, Human Trafficking and Migrant Smuggling Section, Organized Crime and Illicit Trafficking Branch, UNODC, Vienna, personal e-mail communication, 09 June 2016).

²⁰⁰ Status as of 09 June 2016. For a full list of signatures and ratifications, see http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/216/signatures?p_auth=mKridTXo.

In Germany, the Transplantation Act of 1997²⁰¹ provides the legal provisions governing organ donation, graft procurement and transplantation. Trafficking in human organs is sanctioned with up to 5 years imprisonment.²⁰² Although Germany supports the target course of the Convention (prevent and combat organ trafficking, protect victims' rights, facilitate national and international cooperation) and has actively participated in negotiations from the beginning, it does not envisage at this point an accession because it feels one of the principles that are paramount to Germany, namely the organ donor's prior free, informed and specific consent, is not secured strongly enough in the Convention.²⁰³ It is noteworthy that the negotiators of the Convention decided the concept of consent should be identical to the one defined in the Convention on Human Rights and Biomedicine (see p. 12) and its Additional Protocol concerning the Transplantation of Organs and Tissues of Human Origin (see p. 15)²⁰⁴ – which was not signed by Germany either. While Germany is certainly to be commended for insisting on high standards for fear of a risk of abuse of potential donors – a concern that is quite understandable considering the unethical medical practices under the Nazi regime – the argument is not really convincing: The Explanatory Report to CETS No. 216 states that signatories are at liberty to go beyond the minimum requirements provided for in the Convention.²⁰⁵ This allows for the conclusion that Germany could simply accede to the Convention without having to lower the level of protection in its own national standards. The provisions in the Convention – albeit less strict than the ones applied in Germany – are still a gain on an international level. Should Germany not acknowledge and support this gain by its accession to the Convention? And would such a step not increase the likelihood that, in the future, German standards might establish themselves as best practice?

CETS No. 216 aims to fill the loopholes left by prior international legal instruments as it shifts the central focus from human trafficking to the “illicit removal of organs,”²⁰⁶ which is not

²⁰¹ Gesetz über die Spende, Entnahme und Übertragung von Organen und Geweben (Transplantationsgesetz, TPG, BGBl I S. 2631), 05 November 1997. Available at <http://www.gesetze-im-internet.de/bundesrecht/tpg/gesamt.pdf>

²⁰² König, *Strafbarer Organhandel*, 1999, p. 25.

²⁰³ „Es bestehen ernste Bedenken gegen die in Artikel 4 Absatz 2 der Konvention eingeräumte Vorbehaltsregelung. Durch diese Vorbehaltsregelung ist das Recht auf eine freie und informierte Einwilligung in die Entnahme von Organen aus deutscher Sicht nicht hinreichend abgesichert.“ (Astrid Nießen, Bundesministerium für Gesundheit, personal e-mail communication, 13 May 2016).

²⁰⁴ Council of Europe, Explanatory Report to the Council of Europe Convention against Trafficking in Human Organs, 25 March 2015, para 32, p. 5.

²⁰⁵ “As always in criminal law conventions of the Council of Europe, this does not mean that Parties would not be allowed to go beyond this minimum requirement [...]” Explanatory Report, *supra* note 204, para 28, p. 5.

²⁰⁶ CETS No. 216, *supra* note 192, art. 4.

restricted to trafficked human beings. It criminalizes organ trafficking also in cases of donors travelling to the place of surgery without having been forced into doing so²⁰⁷ and in cases where organs are obtained legally but then redirected so-to-speak to being used illegally, e.g. in ineligible patients or facilities who serve transplant tourists.²⁰⁸ It defines as separate criminal offences a range of new wrongs in an intricately woven web of actions underlying organ trade, warranting that the entire network of persons participating in the trafficking of organs – irrespective of the role they play – (recruiters, brokers and their collaborators, even if human trafficking is not involved, corrupt officials who abuse their position, e.g. police and customs officers, healthcare professionals who knowingly use illegally acquired organs, but also drivers or interpreters) can be brought to justice.²⁰⁹ It criminalizes the use, preparation, preservation, storage, transportation, transfer, receipt, import and export of illicitly removed human organs, the implantation of organs outside of the domestic transplantation system or in breach of essential principles of national transplantation law, the illicit solicitation, recruitment, offering and requesting of undue advantages.²¹⁰

The Convention further calls for prevention measures at domestic and international levels²¹¹ and international investigative and prosecutorial cooperation, including the extradition of accused persons.²¹² This provision is significant because of the possibility of third states being signatories to the Convention: If a state does not have a treaty with a state requesting extradition, it can consider the Convention as the legal basis for bringing the extradition about.²¹³ If a state *can consider* or “shall endeavor to establish jurisdiction,”²¹⁴ however, it means that it is *not obligated* to prosecute a crime on the basis of the passive personality principle.²¹⁵

Additionally, CETS No. 216 puts unprecedented emphasis on the protection of and the support for victims.²¹⁶ The Convention does not give a definition of the term “victim”. Instead, the determination of who qualifies as a victim of trafficking in human organs is left up to states and national courts. They can decide not to prosecute a person who has purchased an organ, but they can also choose to prosecute a person who has sold one of their organs –

²⁰⁷ Jagland Speech, *supra* note 8.

²⁰⁸ Bos, *supra* note 10, p. 58.

²⁰⁹ Pietrobon, *supra* note 37, p. 499. See also Bos, *supra* note 10, p. 21.

²¹⁰ CETS No. 216, *supra* note 192, chapter II, in particular art. 5, 6, 7, 8 and 9.

²¹¹ *Ibid*, chapter V.

²¹² *Ibid*, art. 17.

²¹³ Explanatory Report, *supra* note 204, para. 106, p. 16.

²¹⁴ CETS No. 216, *supra* note 192, art. 10 (2).

²¹⁵ Pietrobon, *supra* note 37, p. 500.

²¹⁶ CETS No. 216, *supra* note 192, chapter IV.

a point which will be taken up more critically in the next paragraph. Victims, whether they be donors or recipients, are entitled to compensation consisting in a claim against the perpetrators of the trafficking.²¹⁷

2. Critical Commentary

In its determination to fight unlawful and unethical transplant activities that up until now have fallen through the cracks of the criminal justice system, CETS No. 216 has broadened the scope to complement existing instruments and provide a comprehensive legal framework for the prevention and prosecution of transplant practices that violate human rights. Nevertheless, the Convention has certain inadequacies.

A key point of criticism concerns the opt-out clauses.²¹⁸ According to article 30, states can reserve the right not to apply, amongst others, articles 4.1.a (free, informed and specific consent) and 10.1.e and d (jurisdiction rules) of the Convention.²¹⁹ Applied to articles for which negotiators could not reach unanimous agreement, reservations aim at “enabling the largest possible ratification of the Convention, whilst permitting parties to preserve some of their fundamental legal concepts.”²²⁰ While this is understandable, it is also likely to have a negative bearing on the degree to which a signatory feels bound by the Convention. It can even keep states from signing the Convention altogether – as we have seen is the case with Germany.²²¹ Following the same line of criticism, one could question altogether the compatibility of the reservations provided for in article 30 with the very object and purpose of CETS No. 216. Article 19 of the Vienna Convention on the Laws of Treaties specifies that a state may *not* formulate a reservation if it is incompatible with the object and purpose of a treaty. The purpose of CETS No. 216 is “to prevent and combat the trafficking in human organs by providing for the criminalization of certain acts, to protect the rights of victims of the offences established in accordance with this Convention, and to facilitate cooperation at national and international levels on action against the trafficking in human organs.”²²² Taking this into consideration, it seems quite indisputable that a state would act *against* the purpose of the treaty if it were to take advantage of reserving the right not to apply, e.g., certain

²¹⁷ Explanatory Report, *supra* note 204, para. 111, p. 17.

²¹⁸ Pasquier Report, *supra* note 189.

²¹⁹ CETS No. 216, *supra* note 192, art. 4.2., 10.3., 30.

²²⁰ Explanatory Report, *supra* note 204, para. 156, p. 23.

²²¹ *Nießen*, *supra* note 203.

²²² CETS No. 216, *supra* note 192, art. 1.

jurisdiction rules²²³ in order to not punish offences committed abroad by their nationals and residents.

In order to comply with their obligations laid out in the Convention, state parties are required to modify their domestic legislation. In countries that already have a tightly regulated transplantation system, the effect of the Convention would be rather insignificant. In fact, the most serious offences are purportedly being committed outside Europe,²²⁴ in countries, such as India or China, that are not very likely to sign the Convention. However, the Convention imposes obligations onto the signatory parties to enact criminal provisions with extraterritorial scope.²²⁵ This means, e.g., that European nationals who are aiding or abetting the commission of an offense abroad should be prosecuted.²²⁶ Although these articles are subject to reservations as noted in the paragraph above, their provisions are a step in the right direction. For the moment, International law does not allow for a further general extension of European criminal provisions to, say, China, if there is no connection to Europe. The principle of universal jurisdiction does not apply to trafficking in human organs – yet.

As seen with the term “victim”, the term “trafficking” is also not clearly defined. The word itself appears 31 times on the 13 pages of the Convention, but a differentiation is still lacking between the phenomena of trafficking human beings for the removal of organs and selling organs in the context of transplant tourism. As mentioned before, the decision about whom to criminalize is left to the states. The patient who purchased an organ? The person who sold their kidney? Putting the purchase or the sale of an organ on one level with the trafficking of human beings for the purpose of organ removal is rather questionable.²²⁷ Since the Convention is vague about what makes an organ seller a victim, it is to be feared that, unless a person can argue solidly that they are indeed a victim, they will be held criminally liable. This point was already unfavorably noted in 2013 by Ms. Maury Pasquier who urged that an organ seller’s vulnerable circumstances be taken into account, be they of physical, psychological or economic nature – any circumstances which lack tolerable alternatives.

The concept of consent is a complex one – and treated differently in different countries. The task of gauging the legitimacy of a donor’s free, informed, and specific consent to having an organ removed remains a riddle to be unraveled. Indeed, it poses a conflict of laws not taken

²²³ CETS No. 216, *supra* note 219.

²²⁴ *Pietrobon*, *supra* note 37, p. 487.

²²⁵ CETS No. 216, *supra* note 192, art. 10.

²²⁶ CETS No. 216, *supra* note 192, art. 9.

²²⁷ *Bos*, *supra* note 10, p. 58.

up by the Convention as it leaves the question about *which* domestic law to consider when assessing the validity of consent unanswered.²²⁸ The law of the country where the organ was removed? Or the law of the jurisdiction in which the legal action is brought? It has been suggested that this rather vague formulation could impede the Convention's effectiveness and have damaging effects on tackling organ shortage since the legitimacy of organ removals could too easily be disputed.²²⁹ Similarly, a conflict of laws might also arise over the divisive issue of reasonable reimbursement of the donor. While it is legitimate for donors to be reimbursed for loss of income and "other justifiable expenses" due to surgery, organ removal is deemed a crime when the donor receives "financial gain or comparable advantage."²³⁰ For some time, though, there have been persuasive voices favoring compensation for donors.²³¹ Should this perspective gain further momentum, the stage would be set for conflict: What if a donor received financial gain in a country where compensation was legal, but the organ was implanted in a country bound by the Convention?²³²

It is difficult to foresee if CETS No. 216 will be successful in curtailing the thriving black market in organ trade. The Council of Europe, in any case, has sent the clear signal that it will not sit back and watch idly as trafficking crimes flourish. However, in the end, the new Convention could turn out to be just that: a political signal without much weight in practice.

V. Law Enforcement

1. Example of a Prosecuted Case: The Medicus Scandal²³³

Corroded by corruption and organized crime, Kosovo has been haunted by allegations of organ trafficking since 1999, as pointed out earlier in this paper (see p. 23). In a 2014 statement, the Chief Prosecutor of the European Union Special Investigative Task Force (SITF), Ambassador Clint Williamson conceded compelling indications that indeed "a small number of individuals were killed for the purpose of extracting and trafficking their organs."

²²⁸ Explanatory Report, *supra* note 204, para. 37, p. 6.

²²⁹ *Pietrobon*, *supra* note 37, p. 492 ff.

²³⁰ CETS No. 216, *supra* note 192, art. 4.

²³¹ The subject has been discussed around the world, from the UK to the U.S. See, e.g., *Ahmed/Revill*, Organ Donors Could Be Paid, *The Observer*, 20 October 2002 (available at http://www.theguardian.com/observer/uk_news/story/0,6903,815484,00.html) or *Rosenberg*, It's Time To Pay Kidney Donors, *The New York Times*, 07 August 2015 (available at <http://opinionator.blogs.nytimes.com/2015/08/07/its-time-to-compensate-kidney-donors/>).

²³² *Pietrobon*, *supra* note 37, p. 499.

²³³ For a more extensive overview of cases that have been investigated and prosecuted, see e.g. the Annex of *OSCE Analysis and Findings 2013*, *supra* note 178, p. 63 ff. and the Annex of *Bos*, *supra* note 10, p. 72 ff.

He acknowledged that the findings mostly matched those in the Marty Report²³⁴ and that although not enough evidence had been obtained to charge the crimes, the SITF would continue to vigorously pursue the allegations.²³⁵

While investigations are still ongoing in this case, the high-profile Medicus Case has been prosecuted: In 2008, the Medicus Clinic in Priština was at the center of UNMIK²³⁶ police investigations for illegal kidney transplants. At least 24 organ suppliers were found to have been recruited in Belarus, Israel, Kazakhstan, Moldova, Russia, Turkey, and Ukraine. They were promised a fee of up to US\$30.000 and asked to sign a paper saying that they donated their kidney voluntarily, without compensation. Suppliers were deemed victims of exploitation. Six testified at the trial, some claiming not to have received any money. The recipients to whom the suppliers had been matched came to the clinic with the help of so-called fixers (brokers) they had found through word of mouth. When EULEX was deployed in Kosovo, it took over the prosecution of the case. Proceedings were complicated by several factors, including key political figures being suspected of involvement in the trafficking (the Ministry of Health, e.g., had granted operating licenses although Kosovar law prohibits organ transplants) and the local court administration's requests for international legal assistance proving difficult because the autonomous status of Kosovo was not recognized by countries that still considered it to be part of Serbia.^{237, 238}

In 2013, the owner of the Medicus Clinic, a urologist, was sentenced to eight years in prison and a €10.000 fine for charges of Trafficking in Persons and Organized Crime. His medical license was revoked for two years. His son, also a doctor, was found guilty and sentenced to imprisonment and a fine as well. Both were ordered to partially compensate each of the victims with €15.000 – victims may seek further compensation later, the court said. While the chief anesthetist was acquitted for the charge of Organized Crime, he was sentenced to

²³⁴ Marty Report, *supra* note 169.

²³⁵ Special Investigative Task Force, Statement by the Chief Prosecutor Clint Williamson, 29 July 2014 (available at <http://www.sitf.eu/index.php/en/news-other/42-statement-by-the-chief-prosecutor-clint-williamson>).

²³⁶ United Nations Interim Administration Mission in Kosovo.

²³⁷ *Bos*, *supra* note 10, p. 38 ff.

²³⁸ The fact that Kosovar sovereignty and independence is not recognized by 13 members of the CoE (*Council of Europe, Parliamentary Assembly, Resolution 2094 (2016), The Situation in Kosovo and the Role of the Council of Europe, 28 January 2016*) is a stumbling block for joining the CETS No. 216. Although it is not a member of the CoE, Kosovo became a member of the CoE's Development Bank in 2013 (see <http://www.mfa-ks.net/?page=2,4,1749>) and the Venice Commission in 2014 (see <http://www.venice.coe.int/webforms/events/?v=2014>). It has been suggested that the CoE invite UNMIK to ratify the Convention in lieu of Kosovo, however, this would require a special agreement and the unanimous consent of all CoE members, as art. 28 of the Convention does not provide for the participation of non-state parties. See *Pietrobon*, *supra* note 37, p. 502.

three years in prison on the count of Grievous Bodily Harm. His medical license was revoked for one year. The prison sentences of two assistant anesthetists were overturned by the Priština Appeals Court in 2016. A top ranking official of the Ministry of Health was acquitted, as was a seventh defendant.²³⁹

EU Special Prosecutor, Jonathan Ratel, considers *Medicus* a landmark case because doctors were convicted. Success seems dampened, though, by the fact that two pivotal actors remain at large and are subject to Interpol Red Notices.²⁴⁰ Turkish transplant surgeon Yusuf Sonmez and Israeli broker Moshe Harel, the suspected mastermind behind the organ snatching ring. In 2011, a Turkish public prosecutor had already requested a 171-year prison sentence for each.²⁴¹ Sonmez, nicknamed Dr. Frankenstein, Dr. Vulture, Dr. Mengele, or The Butcher, has admitted to having performed more than 2.400 transplants around the world, including in Kosovo. He was arrested six times in Turkey, but escaped conviction by producing consent forms from the organ donors.²⁴²

2. Examples of Suspected Cases and International Controversies

ISIS In a fatwa dating from 31 January 2015, ISIS says taking organs from a living captive to save a Muslim's life is permissible.²⁴³ The fatwa, if authentic, does not prove that ISIS actually engages in organ harvesting. It does, however, grant religious permission for it,

²³⁹ EULEX Press Release, Twenty Years Imprisonment for Five Defendants in *Medicus* Case, 29 April 2013 (see <http://www.eulex-kosovo.eu/en/pressreleases/0436.php>); Convictions In International Organ Trafficking Ring, USA Today, 29 April 2013 (see <http://www.usatoday.com/story/news/world/2013/04/29/organ-trafficking-ring-convictions-kosovo/2121595/>); and *Collaku*, Three Kosovo Organ Traffickers' Jail Sentences Upheld, Balkan Insight, 03 March 2016 (see <http://www.balkaninsight.com/en/article/appeal-court-acquitted-two-in-medicus-case-03-03-2016>).

²⁴⁰ <http://www.interpol.int/notice/search/wanted/2010-39869> and <http://www.interpol.int/notice/search/wanted/2010-39875>.

²⁴¹ EU Business, Kosovo Organ Harvesting Trial Starts, 04 October 2011 (see <http://www.eubusiness.com/news-eu/kosovo-turkey.con/>); *Bilefsky*, Five Are Convicted in Kosovo Organ Trafficking, The New York Times, 29 April 2013 (see <http://www.nytimes.com/2013/04/30/world/europe/in-kosovo-5-are-convicted-in-organ-trafficking.html>).

²⁴² *Aliu*, Sonmez Ready to Testify in The *Medicus* Case, Balkan Insight, 25 May 2012 (see <http://www.balkaninsight.com/en/article/sonmez-ready-to-testify-in-medicus-case-lawyer>); <https://turkeyetc.wordpress.com/2011/01/19/dr-frankenstein-speaks/>; *Bienstock*, Tales From The Organ Trade, HBO Documentary Films, 2013 (transcript available at https://www.journeyman.tv/film_documents/5908/transcript). The HBO documentary features interviews not only with Dr. Sonmez, but also with a donor-recipient pair. The Moldovan donor says that she felt very well attended to at the clinic and was paid US\$12.000 two days after surgery. She also says that Moldovan police pressured her into helping them build a case against "that so-called illegal operation." The recipient, an Israeli-Canadian who has testified to having paid US\$120.000 for the transplant package, deplores the "propaganda machine" that he feels seems to take a one-sided look at the problem.

²⁴³ The U.S. Government translation is available at <http://graphics.thomsonreuters.com/doc/document.pdf>.

giving rise to concerns that ISIS may indeed be trafficking in body parts.²⁴⁴ In February 2015, Iraq's ambassador to the UN urged the Security Council to investigate the deaths of 12 doctors in Mosul, claiming they were executed for refusing to remove organs. The UN spokesman, the UN Special Envoy for Iraq, and the U.S. State Department could not corroborate any alleged organ trafficking by ISIS, but said it would be investigated.²⁴⁵

SINAI Migrants from Sudan, Eritrea and Ethiopia are trying to reach Israel via the Sinai desert, an area firmly in the hands of Bedouin tribes, an area the Egyptian police rarely sets foot in. According to the Egyptian Human Rights Organization, a fact finding mission discovered migrants being held in a Bedouin camp under atrocious conditions, subjected to forced labor, rape and torture. The New Generation Foundation for Human Rights of North Sinai claims corrupt doctors are involved with Bedouins for organ harvesting. "It's like spare parts for cars," says an anonymous trafficker: "Doctors who need organs deal directly with the al-Sawarka tribe and pay from US\$1.000 to \$20.000. They come with some sort of mobile fridge where the organs can be stored for 6 to 8 hours and resold in Cairo or elsewhere." The commanding general of Egypt's police in North Sinai confirms that his forces are aware of the organ trafficking but they have not been able to identify those behind the scheme. As for the doctors involved, not a single arrest has been made to this day.²⁴⁶

CHINA In 1979, governmental sanctioning of organ harvesting from prisoners began with China's Ministry of Health issuing *Rules Concerning the Dissection of Corpses*, asserting the legality of the practice and laying the foundation for the 1984 *Provisions for Regulations on the Use of Dead Bodies or Organs from Condemned Criminals*.²⁴⁷ Key officials have admitted that this practice was "profit-driven, unethical and violating human

²⁴⁴ Al-Hassoun, Islamic State Reaps Profits From Organ Trafficking, Al-Monitor, 05.12.2014 (see <http://www.al-monitor.com/pulse/security/2014/12/islamic-state-financing-funding-human-trafficking-extortion.html#>).

²⁴⁵ Saul, Iraq's Ambassador Urges UN to Investigate Claims Isis Is Harvesting Organs, The Independent, 18 February 2016 (see <http://www.independent.co.uk/news/world/middle-east/iraq-s-ambassador-urges-un-to-investigate-claims-isis-is-harvesting-organs-we-have-bodies-it-is-10052758.html>); Shafaq News, United Nations Investigates Claim of ISIS Organ Theft, 21 February 2015 (see <http://english.shafaaq.com/security/13372-united-nations-investigates-claim-of-isis-organ-theft.html>).

²⁴⁶ Obert, Im Reich des Todes, Süddeutsche Zeitung, SZ-Magazin, Heft 29/2013 (see <http://sz-magazin.sueddeutsche.de/texte/anzeigen/40203>) and Pleitgen/Fahmy, Death in the Desert, CNN Documentary, 03 November 2011 (see <http://edition.cnn.com/videos/world/2015/05/18/spc-cfp-death-in-the-desert.cnn>).

²⁴⁷ See *Organs For Sale: China's Growing Trade and Ultimate Violation of Prisoners' Rights*, Hearing Before the Subcommittee on International Operations and Human Rights of the Committee on International Relations, House of Representatives, 27 June 2001.

rights.”²⁴⁸ In 2006, reports surfaced, alleging the state-sponsored systematic killing of Falun Gong²⁴⁹ practitioners for their organs.²⁵⁰ At that time, any hospital in China could perform organ transplantations without a license. As a result, more than 600 hospitals were competing for organ suppliers. In 2007, a new law was adopted, prohibiting the trade in human organs,²⁵¹ and the Ministry of Health granted official licenses to 164 transplant hospitals. In 2014, China announced that from 2015 on only voluntarily donated organs would be used. This has been erroneously interpreted as meaning that organ procurement from executed prisoners was made illegal by government mandate. In reality, it was a statement without any binding force – and a semantic ruse: prisoners’ organs were simply redefined as voluntary donations by regular citizens. Since then, there have been no new laws or regulations on organ donation in China. Consequently, experts say, organs from executed prisoners are still being used.²⁵² Prof. Dr. Huige Li, EU delegate for Doctors Against Forced Organ Harvesting (DAFOH), says the international community needs to continue to put pressure on China. He welcomes steps that have been taken to that effect by the EU and the U.S.²⁵³ “If you can’t change China,” says Huige Li, “you can at least do something in your own country, like not being an accomplice – and adapting your laws,” like, e.g., Israel,²⁵⁴ Spain,²⁵⁵ and Taiwan.^{256, 257}

²⁴⁸ Bodeen, Cultural Attitudes Impede Organ Donations in China, Associated Press, The Big Story, 17 May 2013. Available at <http://bigstory.ap.org/article/cultural-attitudes-impede-organ-donations-china>

²⁴⁹ Falun Gong (or Falun Dafa) is a spiritual practice that grew immensely popular in 1990s China. When practitioners requested legal recognition and freedom from state interference for their “religion,” the Communist Party leadership began to crack down on the spiritual movement, declaring it a menace to society. Since then, Falun Gong practitioners have been persecuted and subjected to massive human rights abuses. See, e.g., *Jacobs*, China Still Presses against Falun Gong, The New York Times, 27 April 2009.

²⁵⁰ See the investigative works of David Matas and David Kilgour, e.g., at <http://organharvestinvestigation.net/>

²⁵¹ Regulations on Human Organ Transplantation, adopted at the 171st Executive Meeting of the State Council on March 21, 2007, promulgated by Decree No. 491 of the State Council of the People’s Republic of China on March 31, 2007, and effective as of May 1, 2007 (see especially Chapter IV on Legal Liability). Full text available at http://en.nhfpc.gov.cn/2014-06/05/c_46320.htm

²⁵² Allison/Kaplan/Shapiro/ et al., Historical Development and Current Status of Organ Procurement from Death-Row Prisoners in China. BMC Medical Ethics, 03 December 2015, p. 2 ff.

²⁵³ European Parliament Resolution of 12 December 2013 on Organ Harvesting in China (2013/2981(RSP)), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0603+0+DOC+XML+V0//EN>; European Parliament Written Declaration on Stopping Organ Harvesting from Prisoners of Conscience in China, 0048/2016, 27 April 2016, available at <http://www.europarl.europa.eu/sides/getDoc.do?type=WDECL&reference=P8-DCL-2016-0048&format=PDF&language=EN>; H. RES. 343 H. Res. 343: Expressing concern regarding persistent and credible reports of systematic, state-sanctioned organ harvesting from non-consenting prisoners of conscience in the People’s Republic of China, available at <https://www.govtrack.us/congress/bills/114/hres343/text>

²⁵⁴ In 2008, Israel defined organ trade as a criminal offense and prohibited insurance companies’ reimbursement of certain transplantations abroad, thus decreasing dramatically transplant tourism from Israel. See *The Organ Transplantation Law 5768-2008. Israeli Book of Laws*. Summary in

Although some prosecutorial victories have been attained, it is evident that international legislation has reached rather small doses of success in curtailing the black market (in the case of China apparently even state-sponsored) organ trade. Because of their very nature, which is to criminalize actions, the existing instruments do not really get at the root of the problem, which is the shortage of organs. Before proposing possible complementary or alternative steps, one central issue must still be addressed, the issue of ethics.

E. “E” AS IN “ETHICS”

“Science brings society to the next level, ethics keep us there.”

Dr. Hal Simeroth

I. Self-Determination vs. Exploitation of the Poor – A Philosophical Approach

Two of the most prominent debaters on the issue of organ trade are Janet Radcliffe-Richards²⁵⁸ and Nancy Scheper-Hughes.²⁵⁹ Radcliffe-Richards argues that denying the poor the right to sell their organs is to prevent consenting adults from freely entering into contract. It is to deprive the vendor of what he considers to be his best option – from a narrow range of options, granted – to remedy his misery. A narrow range of options, though, should not be mistaken for incompetence to choose amongst them. If the poor do not fully understand the implications of their choice, if they are unaware of the risks and consequences of having an organ removed, they must be informed, educated, and counseled, so that ignorance cannot be claimed as an obstacle to genuine choice. But can a *coerced* choice be a *genuine*

English language available at <http://www.justice.gov.il/Units/InternationalAgreements/HumanRightsAndForeignRelations/Faq/09-2015.pdf>.

²⁵⁵ In 2010, Spain changed its Criminal Code, providing for prison sentences of up to 12 years for people who “promote, favor, facilitate or publicize the unlawful obtaining or trafficking in human organs or their transplantation,” including recipients who know their donor organ was illegally procured (art. 156 bis). English translation available at <http://www.parliament.am/library/Qreakan/ispania.pdf>

²⁵⁶ In 2015, Taiwan amended its Human Organ Transplantation Act, criminalizing the use of organs from executed prisoners, as well as the purchase, sale and brokering of organs. See <http://www.taipeitimes.com/News/front/archives/2015/06/13/2003620572>.

²⁵⁷ Prof. Dr. Huige Li, Department of Pharmacology, Johannes Gutenberg University Medical Center, Mainz, Germany, and DAFOH Advisory Board Member, personal e-mail communication, 06 August 2016.

²⁵⁸ Janet Radcliffe-Richards is Professor of Practical Philosophy and Distinguished Research Fellow and Consultant at the Oxford Uehiro Centre for Practical Ethics.

²⁵⁹ Nancy Scheper-Hughes is Professor of Medical Anthropology at the University of California, Berkeley, and Founding Director of “Organs Watch” (see also *Scheper-Hughes, supra* notes 22 and 33).

choice? Radcliffe-Richards infers that if poverty is coercion, so is the threat of a loved one's death. If coercion is the reason for prohibiting organ sales, it should also rule out donation. Prohibiting organ sales, she says, is "like ending the miseries of slum dwelling by bulldozing the slums." The evil of exploitation might be ended, but at the cost of leaving the exploited even worse off than before. The only way of ending exploitation and protecting the poor, according to Radcliffe-Richards, is to have a regulated system, allowing organ sales, with strict controls.²⁶⁰

Scheper-Hughes misses the notion of social justice in such reasoning. She deplores the emergence of a new "commodity fetishism" that has turned the kidney into the poor man's "ultimate collateral against hunger, debt, and penury." Coming from a medical human rights perspective, she opposes the libertarian standpoint which, in her view, adjusts bioethics to the needs and desires of a consumer-oriented society, reducing an intensely human and ethical dilemma to a simple matter of free-market medical management. In her 17 years of field research, Scheper-Hughes has learned that for most individuals she encountered, the choice of selling an organ – indeed a non-choice born out of poverty and marginalization – was the wrong choice: instead of alleviating their wretched situations, it almost always marginalized them more. "Euro-American notions of contract and individual choice," she says, "create the semblance of ethical choice in an intrinsically unethical context." The organ trade not only spurns the law and medical ethics, it also leads vendors to spurn their own human dignity.²⁶¹

II. Human Dignity vs. Commodification of the Body – A Legal Approach

Does a state have the right, or perhaps even the duty, to protect individuals from violating their own dignity? In some cases, courts have ruled that, yes, a state may intervene, even if an individual does not feel violated or submits voluntarily to a violation of their dignity – e.g. to earn money. In 1981, the German *Bundesverwaltungsgericht* ruled that peep-shows could be prohibited because placing naked women (who were competent and consenting) on display and degrading them to mere objects of desire was irreconcilable with the principle of human dignity.²⁶² Similarly, in 1995, the French *Conseil d'État* ruled that dwarf-tossing²⁶³ was

²⁶⁰ Radcliffe-Richards, Nephrological Goings On, *The Journal of Medicine and Philosophy*, No. 21, 1996, p. 375ff.

²⁶¹ Scheper-Hughes, Keeping an Eye on the Global Traffic in Human Organs, *The Lancet*, Vol. 361, 10 May 2003, p. 1645 ff.

²⁶² BVerwGE 64, 274 (1981).

²⁶³ Dwarf-tossing consists of people competing to see who can throw a dwarf the furthest. The person being thrown (a consenting adult, earning a living with this "sport") wears protective gear with handles on the back.

contrary to human dignity,²⁶⁴ a decision which was upheld in 2002 by the UN Human Rights Committee.²⁶⁵ In 2004, the European Court of Justice upheld the concept of human dignity as a general principle of law in need of protection.²⁶⁶

It needs to be mentioned that it has also been suggested that these cases were not truly concerned about human dignity. But that the claim of needing to protect human dignity was merely used to mask the restriction of the individual's right to self-determination in order to justify what was really a decision on purely moral grounds.²⁶⁷ Analogously, it has been put forward that moral outrage and feelings of repugnance may steer the debate on organ trade in a wrong direction, "distorting arguments to the detriment of the people most in need of protection."²⁶⁸

F. CONCLUSION

"Our major obligation is not to mistake slogans for solutions."

Edward R. Murrow

I. From Amoral Market to a Moral Market?

After both of his kidneys failed due to a genetic defect, John Doe bought a new and healthy organ from a donor in a third world country. Prohibition is no deterrent for the desperate and determined. "Due to perpetual demand," says John Doe, "the illegal market has become so flexible and globally cross-linked that any attempt to curb it by tightening the laws fizzles out into thin air." Following criminal complaints by organ donation and medical associations, medical practitioners, and others, preliminary proceedings were initiated, but charges against John Doe were dropped in accordance with §170 section 2 of the German Code of Criminal Procedure. The prohibition of organ trade under current transplantation law has not been

²⁶⁴ Conseil d'État, No. 136727, 27 Octobre 1995, Commune de Morsang-sur-Orge, Recueil Lebon, p. 372.

²⁶⁵ *Manuel Wackenheim v France*, Communication No. 854/1999, UN Doc. CCPR/C/75/D/854/1999 (2002). Mr. Wackenheim, without a job since the ban on dwarf-tossing, claimed that not his job, but the ban, having negatively affected his life, was an affront to his dignity.

²⁶⁶ Proceedings in the *Laserdrome Case* concerned the question whether the "playful killing" of human beings (using laser guns to fire at people and simulate murder) could be prohibited on the grounds of violation of human dignity. See ECJ, Case C-36/02, *Omega Spielhallen und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, 14 October 2004.

²⁶⁷ O'Mahoney, *There Is No Such Thing As a Right to Dignity*, International Journal of Constitutional Law, Vol. 10, No. 2, 2012, p. 570.

²⁶⁸ *Radcliffe-Richards*, *supra* note 254, p. 375.

tested against a patient/organ buyer in German practice so far. In an actual trial, John Doe's lawyers would have pleaded life-threatening illness, duress of circumstances, or necessity, in his defense. "I don't know if that would have worked," says John Doe, "and I think that authorities and the government have no real interest in knowing either: They may just be afraid that a trial could reveal how poor their arguments are."²⁶⁹ While the German Ministry of Justice was not available for comment, the Ministry of Health replied that no softening in whatever shape or form was being envisaged for transplantation law.²⁷⁰

John Doe would welcome a softening of the law. The idea of a legalized, regulated system with a comprehensive bill of rights, medical insurance and payment for donors is also being pondered by physicians, arguing that it would boost organ supply, curb the black market, and improve the standing of donors.²⁷¹ Indeed, if doctors, nurses, transplant coordinators – in short, everyone involved – receive payment, then why not the donors, too? Reasonable payment for a kidney might, e.g., be equivalent to the cost of one or two years of dialysis care.

In Iran, the sale of organs is legal. A nonprofit organization matches donors and recipients. The donor obtains financial compensation and one year of medical insurance from the government plus payment from the recipient, negotiated privately as there are no fixed prices. While some argue that Iran's example should be followed, critics claim that the situation for donors has not changed much.²⁷² Findings also contradict each other on a strong argument in favor of the model, the eradication of the waiting list.²⁷³ Iran's reputed success has even been

²⁶⁹ For fear of legal consequences, "John Doe" has asked to keep his real identity secret. Communication took place via e-mail between 20 June and 29 August 2016.

²⁷⁰ „Ich darf Ihnen mitteilen, dass es keine derartigen Überlegungen [zu einem regulierten legalen Markt] gibt. Nach § 17 Transplantationsgesetz ist jegliche Form des Handels mit menschlichen Organen, die einer Heilbehandlung zu dienen bestimmt sind, verboten. Eine wie auch immer geartete Aufweichung dieses Organhandelsverbots ist nicht beabsichtigt.“ Claudia Siepmann, Leiterin Referat 312 „Transplantationsrecht“, Bundesministerium für Gesundheit, personal e-mail communication, 11 July 2016.

²⁷¹ For the debate in the UK, e.g., see *Smith*, Sale of Human Organs Should Be Legalised Say Surgeons, The Independent, 05 January 2011. Available at <http://www.independent.co.uk/life-style/health-and-families/health-news/sale-of-human-organs-should-be-legalised-say-surgeons-2176110.html>.

²⁷² Kidney hunters seem to have been replaced by "social workers who go to unemployment offices, jail, and the margins of society" to recruit donors (see Nancy Scheper-Hughes in *Lawless*, *supra* note 6). "Forush-e" (for sale) ads can even be found on house walls as people now compete to sell their organs to escape economic hardship. An Iranian newspaper cited a young woman who had already sold her kidney and was advertising to sell an eye: "What do I need an eye for if I cannot feed my children?" (see *Schirasi*, Organhandel im Iran, blog article available at <http://alischirasi.blogspot.de/2015/08/10/organ-handel-im-iran/>).

²⁷³ While some sources say that Iran has "erased their waiting list" and "everyone who needs a kidney, gets one" (see, e.g., Nancy Scheper-Hughes in *Lawless*, *supra* note 6), others say that long waiting lists persist and that seven to ten of the 24.000 people in need of dialysis in Iran die every day because they cannot procure a matching organ (see *Pour*, Organhandel: Lukratives Geschäft im Iran,

called a “Goebbelsian lie, repeated over and over by the commercial program's spin doctors.”²⁷⁴

Transplant surgeon Prof. Dr. Urban Sester agrees that the statistics “are doctored” and that “the Iranian program is not going as well as people would have us believe.” He favors the strict laws in Germany and categorically opposes the prospect of a legalized system. Even if, at first, black marketeers might lose ground, “crooks would find a way to beat *any* system.” Besides, there will always be a shortage of organs because the more organs are made available, the more the threshold for transplantations will be lowered, Sester explains. In other words, more people would be “prescribed” a transplantation. He also fears that legality would undermine the already restrained readiness for voluntary donation. If the government no longer needs to develop more efficient structures or campaign for more public awareness, if people no longer see the necessity to think about their own mortality, general concern drops and with it the number of volunteer donors. Besides eroding the sense of community and lowering scientific standards, a commercial program could also further tarnish the already tattered reputation of transplant services and shatter the already frail faith in transplant surgeons²⁷⁵ – after all, corruption and bribery can persist in a seemingly fair legal system as well. In the end, says Sester, people should learn to accept their fate. “People die of freak accidents, terror attacks, and painful diseases. Sad as it is: that’s life. We need to realize: our lives are not limitless.”²⁷⁶

II. There Are No Quick Fixes, But There Are Alternatives

As we have seen, international legal measures first and foremost bank on criminalization and prohibition, an approach which usually serves to demonstrate state control and to inspire public confidence. But studies about so-called demand-driven activities, such as drug use, e.g., suggest that it is precisely prohibition which increases crime rates and victimization, boosts prices, and spawns black markets that spread trade to every corner of the planet.²⁷⁷

Iran Journal, 24 July 2014. Available at <http://iranjournal.org/gesellschaft/organhandel-lukrativ-geschaeft-im-iran>).

²⁷⁴ Griffin, Kidneys On Demand, BMJ, Vol. 334, 10 March 2007, p. 502.

²⁷⁵ When Germany was shaken by a mass donor organ fraud in 2012, involving falsified medical records and systematically manipulated waiting lists at four hospitals, donation rates dropped by 20% to 40%.

²⁷⁶ Prof. Dr. Urban Sester, transplant surgeon and transplantation commissary at the Saarland University Medical Center, Homburg, Germany, personal interview, 29 June 2016.

²⁷⁷ Ambagtsheer/Weimar, *supra* note 14, p. 573.

If a purely repressive law and order stance does not effectively curtail organ trade, and decriminalization seems not to be the answer either, the alternative must be a broad, multi-tiered approach, a combination of the political will to ensure the enforcement of laws that make sense and the political courage and flexibility to ensure the adjustment of laws that don't. If the key is to increase the number of voluntary donations, perhaps a look at Spain would prove helpful. It tops the world organ donation ranking²⁷⁸ by focusing on the continuous improvement of organization, professionalization, communication, adaptation, and innovation. Spain has a presumed consent system,²⁷⁹ and it allows alternative altruistic living donation models, such as non-directed donations, paired donations, or transplant chains.²⁸⁰ This is a perfect example of how the right kind of flexibility, while being ethically justifiable, can save lives and money.²⁸¹

A touch of Sci-Fi still surrounds laboratory-grown and 3D-printed organs. But they will be reality before long – and bring with them a whole set of new discussions and developments in both the legal and the ethical realm.

²⁷⁸ In 2015, the deceased organ donation rate was 39.7 per million inhabitants in Spain versus 10.8 in Germany. See http://www.irodat.org/img/database/pdf/NEWSLETTER2016_SecondEdition.pdf.

²⁷⁹ In Spain, you are presumed to consent unless you expressly specified that you do *not* want to donate your organs after death. For comparison: In Germany, where the so-called “decision solution” is employed, it's the other way around. You are presumed *not* to consent unless you explicitly expressed the wish to become a donor.

²⁸⁰ A paired donation works like this: When a donor/recipient pair is incompatible, it is possible for them to be matched with another donor/recipient pair in the same situation. The donors simply switch places so that each pair is a match. This means that the donors donate to recipients they don't know. It also means that each recipient receives a living donor transplant that they would not have received otherwise. For the account of a German woman who had a kidney transplanted in Barcelona as part of a kidney exchange chain (impossible in Germany because living organ donation is restricted to close relatives and persons in an obviously close personal relation with the recipient), see *Geisler*, „Sie Stirbt Sonst“, *Stern*, 30 June 2016, p. 79 ff. Available at <http://www.stern.de/gesundheit/organspende-niere-ringtausch-tausch-simone-reitmaier-6939720.html>.

²⁸¹ In the U.S., e.g., it costs US\$90.000 per year to do dialysis. A transplantation costs US\$100.000 and anti-rejection drugs US\$20.00 per year. A transplantation would hence save US\$250.000 in the first five years, according to Alvin Roth. The U.S. economist won a Nobel Prize in 2012 for his work on matching markets. He has devised an algorithm for kidney exchange chains. See *Shute*, *How An Economist Helped Patients Find The Right Kidney Donor*, NPR, 11 June 2015 (available at <http://www.npr.org/sections/health-shots/2015/06/11/412224854/how-an-economist-helped-patients-find-the-right-kidney-donor>).

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Annex

10. 10. 88

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11. Calls on the governments of the Member States, the Council and the Commission to ensure that no money supplied as part of development cooperation is directly or indirectly used for combating the rebels and requests written information on the projects agreed on between the Member States or the Commission and the Salvadorean Government and the implementation thereof;

12. Calls on the Member States of the Community to bring decisive pressure to bear to ensure that human rights violations and terror in El Salvador feature on the agenda of the next meeting of the UN General Assembly and to take steps to ensure that a permanent UN representative is once more sent to El Salvador;

13. Instructs its President to forward this resolution to the Council, the Commission, the Foreign Ministers meeting in European political cooperation, the governments of the Member States, the Governments of El Salvador, Honduras and the United States, the UNHCR, the Salvadorean refugees organizations and the Central American Secretariat in Zürich.

(h) Doc. B2-747/88

RESOLUTION

on the trafficking in children in Central America

The European Parliament,

- A. deeply shocked at the discovery on Saturday, 23 January 1988, at Santa Catarina Pinula in Guatemala of a 'casa de engorde', a 'fattening-up house' in which there were eleven babies aged between 11 days to four months bought for \$ 20 each,
- B. whereas, at their arrest, Jose Luis and Michel Rotman who ran this house stated that the children never stayed at the centre for longer than a fortnight and that they were sold for \$ 75 000 to Americans or Israeli families with children needing organ transplants,
- C. whereas this network was discovered in January 1987 at the same time as the 'casa de engorde' of San Pedro Sula in Honduras in the vicinity of which a number of corpses of children, including new born babies were found with one or more organs missing,
- D. whereas in March 1987 a 'casa de engorde' was dismantled in Ciudad Guatemala and its records showed that between 1 October 1985 and 31 March 1986 170 children had been sold abroad, the majority to the United States for organ transplants,
- E. whereas the Honduras Social Affairs Ministry which had acknowledged these facts during a press conference suddenly retracted its statement,
- F. having regard to the report by the International Association of Democratic Jurists of 5 April 1988 submitted to the UN Committee on Human Rights which notes the discovery of several networks of traffickers of children,

1. Condemns in the strongest terms practices of this kind and expresses its shock at these appalling revelations;

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2. Requests the authorities of the countries concerned to shed light on the full extent of the trafficking and to identify those responsible;
3. Calls on the governments concerned to adopt forthwith administrative and legislative measures to prevent any kind of trafficking and violence against children;
4. Calls on the Commission, the Council and the governments of the 12 Member States at the same time to hold an inquiry in the Community to discover whether this trafficking has spread to Europe and welcomes the steps taken to this end by Italy for example;
5. Instructs its President to forward this resolution to the Commission, the Council, the Foreign Ministers meeting in European political cooperation, the governments of the Twelve, of Honduras and Guatemala, the President of the Latin American Parliament and the UN Secretary General.

(i) Joint resolution replacing Docs. B2-679 and 745/88

RESOLUTION

on Nelson Mandela

The European Parliament,

- A. believing that the release of Mr Nelson Mandela has become still more urgent for both political and humanitarian reasons,
 - B. deeply concerned at his serious state of health,
 - C. noting his transfer, after 26 years, from prison to hospital, but insisting that until the recognized leader of one of the main bodies of opinion is free, negotiations to bring peace and freedom to all South Africans cannot begin to establish a pluralist and non-racial democracy based on respect for individual rights and the rule of law,
 - D. having regard to the international protest movement calling for his release,
 - E. having regard to its numerous statements of position on earlier occasions,
1. Again calls on the South African Government to release Mr Mandela and all other political prisoners unconditionally;
 2. Calls on all the signatory states to the Lomé Convention, the Council and the Commission to step up their pressure until Nelson Mandela is freed;
 3. Insists on the need for the South African Government to prove by its acts that it really intends to abolish apartheid and see established basic human rights for all South Africans;
 4. Calls on the ANC to make clear, when Mr Mandela has been released, how it envisages the constitution of South Africa as a non-racial and pluralist democracy and by what means the freedom of all South Africans can best be promoted and secured;
 5. Condemns the way in which violence and repression continues to increase tension and calls on the responsible leadership of all sections of opinions to abandon these methods;
 6. Instructs its President to forward this resolution to the Council and Commission, the Government of South Africa, the ANC and the Co-Presidents of the ACP/EEC Joint Assembly.