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ORGAN TRAFFICKING

FROM A EUROPEAN AND
INTERNATIONAL PERSPECTIVE

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RESUMEN

El tráfico de órganos es uno de los problemas más preocupantes i escalofrantes de nuestra actualidad, llegando a ser un acto de carácter tanto europeo como internacional. Esta inquietud ha llegado hasta los distintos organismos internacionales y/o europeos, los cuales se han encargado de elaborar un marco legal, junto con una agrupación de instrumentos internacionales, que se encargan de criminalizar y luchar contra estos actos. Además, se comparará el tráfico de seres humanos con el objetivo de extraer órganos con el tráfico de órganos, haciendo especial mención al “turismo de trasplantes”. Al tratarse de un crimen de carácter transnacional mayoritariamente ejecutado por redes criminales internacionales, existe una gran cantidad de personas implicadas; las cuales tendrán responsabilidades legales, que también serán analizadas en el presente trabajo. Finalmente, se examinarán dos casos reales en dónde se ve involucrado el tráfico de órganos, aunque de una manera bastante peculiar.

Palabras clave: *tráfico de órganos, tráfico de seres humanos con fines de extracción de órganos, turismo de trasplantes, trasplantes.*

ABSTRACT

Organ trafficking is one of the most worrisome and chilling problems of our time, becoming an act of both European and international character. This concern has reached various international and European organizations, which have been in charge of developing international instruments, together with a legal framework to criminalize and fight these acts. In addition, a comparison between human trafficking with the objective of removing organs and organ trafficking will be made, and also, a special mention to "transplant tourism". As it is a transnational crime, mostly carried out by international criminal networks, a huge number of people are involved; hence, there are a lot of legal responsibilities, that will also be analyzed in this work. Finally, two real cases in which organ trafficking is peculiarly involved would be examined.

Key words: *organ trafficking, trafficking in human beings with the purpose of organ removal, transplant tourism, transplants.*

ACRONYMS

CoE	Council of Europe
DICG	Declaration of Istanbul Custodian Group
DOI	Declaration of Istanbul
Europol	Europol European Union law enforcement agency
Interpol	International Criminal Police Organization
ISN	International Society of Nephrology
OTC	Organs, Tissues and Cells
THB	Trafficking in Human Beings
THBOR	Trafficking in Human Beings for the purpose of Organ Removal
UNDOC	United Nations Office on Drugs and Crime
UNTOC	United Nations Convention against Transnational Organized Crime
WHO	World Health Assembly
WHA	World Health Organization
WMA	World Medical Association
HOTT	European Commission funded project on Human Organ Trafficking for Transplantation

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INTRODUCTION

In recent years, a great improvement has been made in the subject of organ transplants, becoming one of the best milestones of the current medicine, increasing the possibilities of finding the cure for the multiple pathologies and dolences that patients could be suffering. Over the years, despite the fact that surgical techniques and immunosuppression have favored medical progress, one of the greatest fears regarding this topic has become evident: the lack of organs.

With the aim of solving this problem, and guaranteeing respect for ethical principles related to the matter, different developed countries decided to create different legal initiatives to regulate the disposition of organs from living and deceased donors.

The organ trafficking problem is driven by demand, which means, the more demand there is, the more the waiting lists for transplants increase. Consequently, patients on the waiting list, and due to the situations of distress to which they are subjected, seek alternative and illegal solutions to end this nightmare and obtain the organs they need.

The appearance of organ trafficking as a transnational phenomenon occurred in the late 1980s, and according to the WHO; it currently represents 10 percent of all transplants performed. Furthermore, this illegal trafficking is directly related to economic inequality, in other words, the countries with the highest poverty rates will be more likely to present a high number of people willing to sell their organs as their only form of subsistence or; they will be victims of the removal of organs in a non-consensual way.

The traffic networks that carry out organ trafficking are extremely well organized and mobile networks; where any type of professional can be involved such as: doctors, insurance companies, hotels, brokers, laboratory technicians, interpreters, etc. Furthermore, these transnational networks seek markets that allow them to minimize police controls while maximizing their profits.

The main objective of this work is to establish an overview of the current situation with trafficking in human organs, either through the commercialization of these or through trafficking in human beings for the purpose of removing their organs, both at European as well as international level.

In the first part of the work we will compare the different legal instruments on organ trafficking and human trafficking for the purpose of organ removal; while at the same time an approximation of the terms is going to be made.

Continuing through the second part, we will analyze the possible criminal liability of health professionals, victims and recipients; the modus operandi of the people and organizations involved, together with a special mention to “transplant tourism”.

In the third and last part of the work, we will analyze in detail two of the most relevant cases of organ trafficking in the international area, such as the NETCARE case in South Africa and the MEDICUS case in Kosovo.

PART 1: APPROXIMATION AND LEGAL REGIME OF ILLEGAL TRAFFICKING

1. TRANSNATIONAL ORGANIZED CRIME WITH SPECIAL DISTINCTION BETWEEN ORGAN TRADE AND HUMAN TRADE

The concept “transnational organized crime” appeared for the first time in mid-1970s in the Fifth United Nations Congress on Crime Prevention¹, constituted by a small list of five activities. Before that, the term was first used during the nineteenth century in Chicago by anticorruption reformers and then converted to a term closely attached to gangster’s associations. During that time mafia groups as Yakuza (Japanese Mafia) and Cosa Nostra (Italian mafia) used to employ it to describe the archetype or the most significant and endured form of organized crime.

The Ninth United Nations Congress (1995) defined transnational organized crime as an “offence whose inception, prevention and/or direct or indirect effects involve more than one country”.²

Twenty years after, the list continued growing till today; where we can find criminal activities such as human trafficking, drug trafficking, illegal mining, illegal organ trade, etc.

After a long process of debates and deliberations, the General Assembly of the United Nations created the United Nations Convention against Transnational Organized Crime which came into force on 2003³, being the first and most important convention against the fight of transnational crime, apart from representing the recognition by Member States about the “seriousness of the

¹ Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1975) (p.11-12). Geneva. Retrieved from <https://www.ncjrs.gov/pdffiles1/Digitization/65619NCJRS.pdf> [Accessed February 14, 2020]

² United Nations. (1995). Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (p. pag. 4). Cairo, Egypt: Secretariat. Retrieved from <https://www.unodc.org/congress/en/previous/previous-09.html> [Accessed February 14, 2020]

³ United Nations Office on Drugs and Crime. (2003). United Nations Convention against Transnational Organized Crime and the Protocols Thereto. Vienna: United Nations Retrieved from <https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html> [Accessed February 14, 2020]

problems posed by it, along with the need to improve and promote international cooperation in dealing them.

Transnational crime is a business, and money is one of the most important motivations or even the most important one, for these illegal activities. During 2017 transnational crime generated between US\$ 1,6 trillion and \$2,2 trillion⁴, while financing corruption, violence and other abuses. Human trafficking and Illegal Organ trade are two of the most important transnational crimes along with one of the most serious human rights violations. According to the Global Financial Activity (2017) report by Transnational Crime and the Developing World, these two activities generated \$ 150.2 billion⁵ and \$ 840 million to \$ 1.7 billion⁶ annually, respectively.

1.1. HUMAN TRAFICKING FOR THE PURPOSE OF ORGAN REMOVAL

Human Trafficking is defined in article 3 of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children, also known as Palermo Protocol where the term “human trafficking” is defined as:

[...] 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, at a minimum, the exploitation

⁴ May, C. (2017). Transnational Crime and the Developing World (p. 1). Global Financial Activity. Retrieved from https://secureservercdn.net/45.40.149.159/34n.8bd.myftpupload.com/wp-content/uploads/2017/03/Transnational_Crime-final.pdf [Accessed February 14, 2020]

⁵ May, C. (2017). Transnational Crime and the Developing World (p. 21). Global Financial Activity. Retrieved from https://secureservercdn.net/45.40.149.159/34n.8bd.myftpupload.com/wp-content/uploads/2017/03/Transnational_Crime-final.pdf [Accessed February 15, 2020]

⁶ May, C. (2017). Transnational Crime and the Developing World (p. 29). Global Financial Activity. Retrieved from https://secureservercdn.net/45.40.149.159/34n.8bd.myftpupload.com/wp-content/uploads/2017/03/Transnational_Crime-final.pdf [Accessed February 14, 2020]

of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs”.⁷

According to international law, for this to be a human trafficking case and therefore carry criminal responsibility, the act must contain the following three elements:

- **What is done?** In this question it is referring to the *act* itself, hence, recruitment, transfer, transportation or receipt of persons.
- **How it is done?** In other words, it basically focusses on the *means* or mechanisms. In this case is with the use of force, fraud, deception, coercion, abuse of power, abuse of vulnerability by the victim, etc.
- **Why it is done?** The *purpose* of human trafficking is the purpose of exploitation, whether sexual exploitation, slavery, removal of organ or sexual exploitation.

There is an exception regarding compliance with the three previous elements, and this occurs when the victim is a child. If the victim is a minor, the “means” element is not necessary to be demonstrated, as it is stipulated in the Article 3 (c) of the Trafficking in Persons Protocol.⁸

⁷ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) (2000) UN Doc A/53/383, Art 3 (Palermo Protocol). Retrieved from <https://www.ohchr.org/en/professionalinterest/pages/protocoltraffickinginpersons.aspx> [Accessed February 15, 2020]

⁸ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) (2000) UN Doc A/53/383, Art 3 (c) (Palermo Protocol). Retrieved from <https://www.ohchr.org/en/professionalinterest/pages/protocoltraffickinginpersons.aspx> [Accessed February 15, 2020]

Within the definition of human trafficking, we find human trafficking for the purpose of organ removal. The Palermo Protocol establishes that networks operate internationally committing the illegal act through deception and coercion. As a direct consequence, people subjected to extreme poverty, through this deception and coercion, agree to sell an organ and therefore, become suppliers.

From a legal point of view, THBOR consists, together with other forms of human trafficking, a violation of fundamental human rights (especially articles 3 and 5 of the Universal Declaration of Human Rights, 1948)⁹ and the dignity of the individual; usually committed by transactional organized crime networks.

The Palermo Protocol also establishes in the article 3 (b)¹⁰, that in the event of trafficking, any agreement or consent provided by the victim is invalid and irrelevant, since it is considered to have been obtained under pressure.

The THBOR, apart from being recognized in article 3 of the Palermo Protocol, is also defined and prohibited in article 4 of the Council of Europe Convention on Action against trafficking in human beings¹¹, together with the article 2 of the Directive 2011/36 / EU of the European Parliament and of the Council¹².

⁹ United Nations. The Universal Declaration of Human Rights, 1948-1998. New York: United Nations Dept. of Public Information (1948). Retrieved from <https://www.un.org/en/universal-declaration-human-rights/> [Accessed 26 February 2020]

¹⁰ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime UN Doc A/53/383 (2003). Art 3 (c) (Palermo Protocol). Retrieved from <https://www.ohchr.org/en/professionalinterest/pages/protocoltraffickinginpersons.aspx> [accessed 21 February 2020]

¹¹ Council of Europe Convention on Action against Trafficking in Human Beings, CETS No.197 (2005). Article 4. Retrieved from <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008371d> [accessed 26 February 2020]

¹² Directive 2011/36/EU of The European Parliament And Of The Council Council of Europe, of 5 April 2011, on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L. 101/1 (2011). Article 2. Retrieved from <https://www.refworld.org/docid/50ec1e172.html> [accessed 26 February 2020]

1.2. ORGAN TRAFFICKING

1.2.1. ORGAN TRAFFICKING BACKGROUND

Medicine has undergone a great development in recent years, reaching the realization of organ transplants around the world nowadays. The clearest example of this evolution is the more than 139,024 transplants performed in 82 countries during 2017, according to the Global Observatory on Donation and Transplantation¹³. A figure like this implies that 380 transplants occur per day, which is equivalent to 16 transplants per hour. These data encompass all types of transplants, including commercial transplants for which donors are paid. However, it is very difficult to determine the exact number of transplants where organ trafficking is used, since there are no reliable data because of the clandestine nature of it.

In the 1980s, first reports talking about trade in human organs appeared, describing the illegal sale of kidneys by Indian citizens to patients from foreign countries, specifically from the Middle East. These cases occurred before the approval of the Indian Transplantation of Human Organ Transplant Act (THO) of 1994, where the purchase and sale of human organs was prohibited.¹⁴ After these first reports several more appeared as it happened in the United Kingdom (1988)¹⁵, and the main problem with them was the lack of police investigation reports and prosecutions; due to the difficulty of analyzing the events in more detail. A change began to emerge in the year 2000 thanks to the Israeli nephrologist Michael Friedlaender¹⁶, who uncovered a whole network of illegal

¹³ European Parliament. (2015). *Trafficking in Human Beings* (pp. 13-14). Belgium. Retrieved from [https://www.europarl.europa.eu/RegData/etudes/STUD/2015/549055/EXPO_STU\(2015\)549055_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2015/549055/EXPO_STU(2015)549055_EN.pdf) [accessed 21 February 2020]

¹⁴ The Transplantation of Human Organs and Tissues Act, 1994 (1994). India. Retrieved from <http://legislative.gov.in/sites/default/files/A1994-42.pdf> [accessed 21 February 2020]

¹⁵ Price D. & Mackay R., (1991) The trade in human organs. *New Law Journal*, 141; p. 1272 (Part I) and p. 1307 (Part II). [accessed 24 February 2020]

¹⁶ European Parliament. (2015). *Trafficking in Human Beings* (pp. 13-14). Belgium. Retrieved from

organ trafficking. From that case, around 2000 more cases appeared, until today. The Istanbul Declaration on Organ Trafficking and transplant tourism was implemented in 2008 with the main objective of prohibiting organ trafficking, once and for all; while putting pressure on a large number of Governments and countries, for an effective change in their legislations.

Organ trafficking is regulated along with tissue and cell trafficking (OTC) and can be defined as: "The management of any organ, tissue or human cell obtained and processed outside the national legal system for organ transplantation".¹⁷

1.2.2. THE NEED OF AN INTERNATIONAL DEFINITION

Despite many international declarations, protocols and instruments mentioning the concept of OTC trafficking, there is still no universal and unique definition whereby all countries agree and ratify. The fact that a universal definition existed would be really important because many states are considering a modification on its legislation, in order to compensate or reimburse some forms of OTC donation.

Despite the fact that there is no universal definition of traffic in OTC, the concept is described in different documents, protocols and declarations. The Bellagio Task Force Report on Transplantation, Bodily Integrity, and the International Traffic in Organs published in 1997, describes it as:

*"the purchase of organs from living persons or the provision of economic incentives to the kin of deceased donors."*¹⁸

[https://www.europarl.europa.eu/RegData/etudes/STUD/2015/549055/EXPO_STU\(2015\)549055_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2015/549055/EXPO_STU(2015)549055_EN.pdf) [accessed 21 February 2020]

¹⁷ European Parliament. (2015). *Trafficking in Human Beings* (pp. 18). Belgium. Retrieved from [https://www.europarl.europa.eu/RegData/etudes/STUD/2015/549055/EXPO_STU\(2015\)549055_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2015/549055/EXPO_STU(2015)549055_EN.pdf) [accessed 21 February 2020]

¹⁸ Rothman, D., Rose, E., Awaya, T., Cohent, B., Daar, A., & Dzemeshevich, S. et al. (1997). The Bellagio Task Force Report on transplantation, bodily integrity, and the international traffic in organs (p. II. The Sale of Organs). Retrieved from <http://www.icrc.org/en/doc/resources/documents/article/other/57jnyk.htm> [accessed 21 February 2020]

In the statement of Istanbul on Organ Trafficking and Transplant Tourism they provide that organ trafficking consists of:

“the recruitment, transport, transfer, harboring or receipt of living or deceased persons or their organs 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 to, or the receiving by, a third party of payments or benefits to achieve the transfer of control over the potential donor, for the purpose of exploitation by the removal of organs for transplantation.”¹⁹

Another international authority such as the Council of Europe, in its Recommendation Rec (2004) 7 states in its Article 2 (4) that:

For the purposes of this recommendation the term “organ and tissue trafficking” applies to:

- *the transportation of a person to a place for the removal of organs or tissues without his or her valid consent;*
- *the transportation of a person to a place for the removal of organs or tissues with his or her consent but in contravention of legislation or other controls in operation in the relevant jurisdiction;*
- *the transplantation of removed organs and tissues, whether transported or not, in contravention of legislation or other*

¹⁹ Declaration of Istanbul on Organ Trafficking and Transplant Tourism, 23: 3375–3380 (2008). Retrieved from http://www.multivu.prnewswire.com/mnr/transplantationsociety/33914/docs/33914-Declaration_of_Istanbul-Lancet.pdf [accessed 21 February 2020]

*regulations in operation in the relevant jurisdiction or in contravention of international legal instruments.*²⁰

Additionally, we find paragraph 119 of the Explanatory Report to the Additional Protocol where it is stated that:

*“As stated by Article 21 of the Convention, the human body and its parts shall not, as such, give rise to financial gain. Any trade in organs and tissues for direct or indirect financial gain, as defined by Article 21 of this Protocol is prohibited. Organ trafficking and tissue trafficking are important examples of such illegal trading and of direct financial gain. Organ or tissue traffickers may also use coercion either in addition to or as an alternative to offering inducements. Such practices cause particular concern because they exploit vulnerable people and may undermine people’s faith in the transplant system. This is why the prohibition of trafficking in organs and tissues is specifically referred to in Article 22.”*²¹

Finally, the latest banning of OTC traffic can be found in Article 22 of the Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin, which states:

*“The human body and its parts shall not, as such, give rise to financial gain or comparable advantage.”*²²

²⁰ Recommendation Rec(2004)7 of the Committee of Ministers to member states on organ trafficking (Adopted by the Committee of Ministers on 19 May 2004 at the 884th meeting of the Ministers' Deputies), Rec(2004)7 (2004). Article 2 retrieved from https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805dcf59 [accessed 25 February 2020]

²¹ Council of Europe. (2002). Explanatory Report to the Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin (par. 119). Strasbourg. Retrieved from <https://rm.coe.int/16800d37ac> [accessed 27 February 2020]

²² Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin, ETS No.186 (2002). Article 22 retrieved from <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/186> [accessed 25 February 2020]

When they mention a “financial benefit”, they take as a definition the one given by article 21 of the same Protocol²³, which states that the human body and its parts should not give rise to any economic benefit.

The conclusion that we can draw from the above definitions is that OTC traffic is considered unethical, but fundamentally illegal. Unlike THBOR, OTC traffic is based on the traffic of the different parts of the human body that come from donors, whether they are living or deceased. The scope of this concept is very broad and can encompass both the purchase and sale of tissues / organs from living people; such as organ / tissue theft from deceased persons.

Since there is not an international established definition for organ trafficking, and it is not included in the THBOR one, it cannot be punished as such, according to the Palermo Protocol. However, organ trafficking incurs a violation of the universal prohibition of obtaining any type of profit, commercializing the human body and its parts, and therefore will be punished under international conventions and national transplant laws.

The most abysmal difference between OTC trafficking and THBOR is the constituent element of the crime, hence, the object of it.²⁴ The object of the offence in the case of trafficking in OTC is the organs, tissues and cells; whereas in the case of THBOR the object is the trafficked person.

In summary, there is an important need to adopt, once and for all, a definition accepted by all states establishing the concept of OTC traffic, and link it to a legally binding international instrument, which will be responsible of

²³ Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin, ETS No.186 (2002). Article 21 retrieved from <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/186> [accessed 25 February 2020]

²⁴ Directorate General of Human Rights and Legal Affairs Council of Europe. (2009). Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs (p. 7). France: Secretariat of the Council of Europe Convention on Action against Trafficking in Human Beings Directorate General of Human Rights and Council of Europe. Retrieved from <https://rm.coe.int/16805ad1bb> [accessed 27 February 2020]

establishing the necessary measures to prevent such trafficking, while applies criminal measures to punish it.

1.3. PATTERNS IN ORGAN TRAFICKING

The most commonly used patterns in the case of organ trafficking usually occur around a group of countries already identified as “claimants”, “exporters” or “countries where transplants are carried out”²⁵. First, we find the group of countries generally known as "demand" countries, which symbolizes countries where there is a large number of patients who need organs; among them are the United States, Israel, Canada and the United Kingdom. On the other hand, we find the group of "donor-exporting" countries, hence, countries where a large number of people are subjected to organ donations, both legally and illegally. Here we are talking about Egypt, the Philippines, Pakistan, India and China. Finally, there is the group of countries where "transplants are carried out or performed" such as South Africa, Israel or the United States.

The concept of OTC trafficking is commonly associated with organized cross-border networks or mafia groups; however, some donors donate their organs in a gentler and more voluntary way, receiving rewards such as works of art, luxury cars or exotic vacations.

When we talk about patterns or “modus operandi” regarding organ trafficking, we found it described in the Istanbul Declaration, where establishes that organ trafficking consists of:

“ The recruitment, transportation, transfer, shelter or reception of living or deceased persons or their organs through the threat or use of force or other forms of coercion, kidnapping, fraud, deceit, abuse of power or a position of vulnerability, or to give or receive to a third party payments or benefits

²⁵ Ambagtsheer, J. (2017). Organ Trade (p. 32). Rotterdam: Erasums University Rotterdam. Retrieved from <https://repub.eur.nl/pub/99988> [accessed 27 February 2020]

to achieve the transfer or control over the potential donor, for the purpose of exploitation by removing organs for transplantation”²⁶

This definition includes organ trafficking in dead people, as well as transplant tourism and also THBOR.

Many international organizations have attempted to create a modus operandi pattern for organ trafficking using media-based reports and academic research. The conclusion in which all have agreed is that these are “very agile and extremely organized” operations formed by a network of health personnel, brokers and intermediaries.²⁷

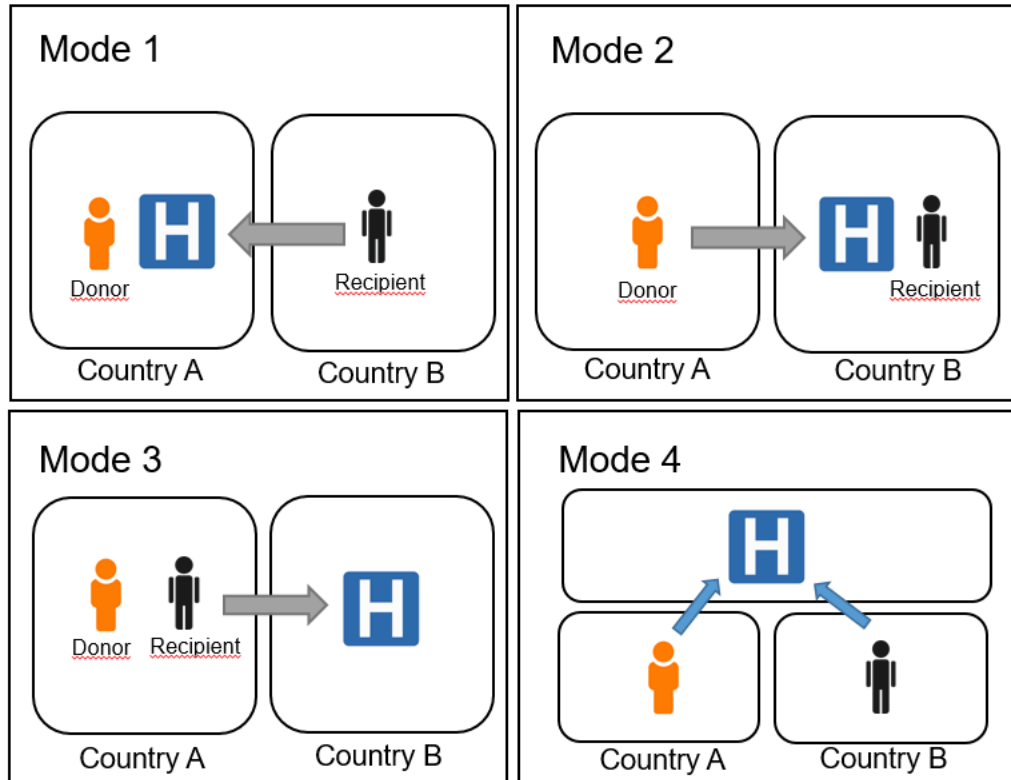
The main function of these networks is to exploit people with low resources and who generally suffer extreme poverty or other similar situations. In the majority of cases these subjects do not have an educational background that would allow them to assess the risks and harm of having an organ removal, and therefore are susceptible to be coerced or deceived.

On the other hand, we find the recipients of the organs, which are in a situation of despair due to the lack of organs in their countries of origin. These recipients are usually on transplant waiting lists, but they are looking for quick solutions due to the distress situation they are experiencing.

Researcher Yosuke Shimanzono in 2007 drew up a diagram showing the four basic modes of organ trafficking, which also includes THBOR.

²⁶ Declaration of Istanbul on Organ Trafficking and Transplant Tourism, 23: 3375–3380 (2008). Retrieved from http://www.multivu.prnewswire.com/mnr/transplantationsociety/33914/docs/33914-Declaration_of_Istanbul-Lancet.pdf [accessed 26 February 2020]

²⁷ Aronowitz, A. (2013). "Trafficking of Human Beings for the Purpose of Organ Removal. Are International Legal Instruments Effective Measures to Eradicate this Practice?" (p. 77). Utrecht: Utrecht University. Retrieved from https://www.researchgate.net/publication/303784028_Trafficking_of_Human_Beings_for_the_Purpose_of_Organ_Removal_Are_International_Legal_Instruments_Effective_Measures_to_Eradicate_this_Practice [accessed 27 February 2020]



Y Shimazono, 'Mapping transplant tourism', Presentation at the World Health Organization's Second Global Consultation on Human Transplantation, 28-30 March 2007, Geneva.

In "mode 1" the donor and the hospital are in the same country, whereas the organ recipient has to travel to that country. In the case of "Mode 2" it is completely contrary to "Mode 1" since in this case the container and the hospital are in the same place, and in contrast to the previous scheme, the donor is the one that must be moved. Continuing with the "Mode 3", the two parts of the relationship are in the same physical location but have to move to another country different from their one, to carry out the operation. Last but not least, the "Mode 4" is quite similar to the previous one but with the only difference that in this case, both donor and recipient are in different countries, and therefore, for the first time among the 4 figures, the situation stops involving only two countries and starts involving 3.

As a conclusion of the diagram we can agree that it is a part of the structure and operation of an OTC trafficking network and implies that both the recipients and providers have to move.²⁸

When the illegal traffic is involved in transplant operations or surgeries, they are usually carried out with a fairly short time and even without sufficient recovery to return back to their normal selves. The fact that both donors and recipients do not have a recovery with enough time for the risk to which they are exposed to disappear, is due to the fact that once the operation is completed, they are forced to return home to avoid police investigation and to diminish the risk of detention.

These four modes explained above, apart from being used to explain the patterns of organ trafficking, are also based on a type of illegal organ trafficking such as the figure of transplant tourism, which will be explained later.

2. LEGAL FRAMEWORK AGAINST TRAFFICKING IN HUMAN BEINGS (INCLUDING THE REMOVAL OF ORGANS)

At this point we will focus on the legal framework against the crime of trafficking in human beings (THB) also including trafficking in human beings for the purpose of organ removal (THBOR). As it is mentioned above, the THBOR is a form of organized transnational crime, which undermines the dignity of the individual and his human rights.²⁹ As a consequence, it is an act widely criminalized both nationally and internationally, and is not surprising that the Palermo Protocol was joined by another additional Protocol where the

²⁸ European Parliament. (2015). *Trafficking in Human Beings* (p. 23-24). Belgium. Retrieved from [https://www.europarl.europa.eu/RegData/etudes/STUD/2015/549055/EXPO_STU\(2015\)549055_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2015/549055/EXPO_STU(2015)549055_EN.pdf) [accessed 28 February 2020]

²⁹ Head of United Nations Crime Prevention Office Says Trafficking in Humans, Drugs Violates Human Rights, Undermines Development | Meetings Coverage and Press Releases. Un.org. (2013). Retrieved 27 April 2020, from <https://www.un.org/press/en/2013/gashc4067.doc.htm>. [accessed 28 February 2020]

trafficking in persons for the removal of organs is described explicitly and in detail, together with its consequent penalty.

Over the years, more instruments have been created to fight this transnational crime in a European, international and regional level. In the case of international instruments, we find the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons or also known as the Palermo Protocol. At European level exists the recent Directive 2011/36 / EU, on the prevention and fight against trafficking in human beings and the protection of its victims. Finally, at the regional level there is the 2005 Council of Europe Convention on Action against Trafficking in Human Beings.

2.1. UNITED NATIONS PALERMO PROTOCOL

The Palermo Protocol, whose full title is “Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children” is an addition to the United Nations Convention against Transnational Organized Crime of May 2009. The Convention is complemented by three Protocols: the Protocol against the Smuggling of Migrants by Land, Sea and Air³⁰; the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts, Components and Ammunition³¹; and finally, the one that we will analyze, the Protocol to prevent, suppress and punish trafficking in persons, especially women and children.³² A rather particular feature of this Convention and its

³⁰ Protocol Against The Smuggling Of Migrants By Land, Sea And Air, Supplementing The United Nations Convention Against Transnational Organized Crime, No. 39574 (2000). Retrieved from https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-b&chapter=18 [accessed 28 February 2020]

³¹ Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, No. 39574 (2001). Retrieved from https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-c&chapter=18&clang=en [accessed 28 February 2020]

³² Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime UN Doc A/53/383 (2003). (Palermo Protocol) available at <https://www.ohchr.org/en/professionalinterest/pages/protocoltraffickinginpersons.aspx> [accessed 21 February 2020]

subsequent protocols is that, in order for countries to be able to be part of any of the Protocols, they must first be part of the Convention, which was adopted by resolution 55/25 of the General Assembly on November 15, 2000. The Convention was opened for signature by Member States in Palermo (Italy) on December 12-15, 2000 and entered into force on September 29, 2003.

Focusing on the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children', as its name clearly indicates, is based on trafficking in human beings but also includes trafficking in human beings for the purpose to remove the organs. Furthermore, it is one of the most important regulatory instruments, as a result of being the first to provide a definition on THB and also incorporate trafficking for organ removal as a form of it. In its article 3 (a) establishes:

"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, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs".³³

Apart from establishing a definition for the concept of THB and THBOR, it also specifies that the ratification of the Protocol implies the adoption of the necessary legislation to guarantee the prohibition, criminalization and

³³ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime UN Doc A/53/383 (2003). Article 3 (Palermo Protocol) available at <https://www.ohchr.org/en/professionalinterest/pages/protocoltraffickinginpersons.aspx> [accessed 21 February 2020]

consequent punishment of the punishable act of trafficking in human beings.³⁴ It also establishes that assistance, protection and help must be provided to repatriate victims of trafficking³⁵; and of course, to facilitate the incorporation of programs to prevent trafficking, establish an effective exchange of information, and train professionals to apply the law and the appropriate measures to the security, border control, and validity of travel documentation.³⁶

In conclusion, the objective of the Protocol is to protect and help victims while respecting their human rights; and give visibility to the concept of trafficking in human beings, so it can be recognized as a form of organized crime. For this to happen, it must reunite the three essential elements when determining whether it is an organized crime or not. The three essential elements are established by article 3 (a) of the protocol and consist in the following ones:

- Action: In the case of THB these are recruitment or transportation.
- Means: The means used to achieve the action are fraud, deception and coercion.
- Purpose: Extraction of organs to later exploit and commercialize them.

Thanks to the broad definition established for TBH and TBHOR, along with the scope given to the concept, many European and international organizations

³⁴ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime UN Doc A/53/383 (2003). Article 5 (Palermo Protocol) retrieved from <https://www.ohchr.org/en/professionalinterest/pages/protocoltraffickinginpersons.aspx> [accessed 28 February 2020]

³⁵ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime UN Doc A/53/383 (2003). Article 6 and 8 (Palermo Protocol) retrieved from <https://www.ohchr.org/en/professionalinterest/pages/protocoltraffickinginpersons.aspx> [accessed 28 February 2020]

³⁶ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime UN Doc A/53/383 (2003). Article 9 and 13 (Palermo Protocol) retrieved from <https://www.ohchr.org/en/professionalinterest/pages/protocoltraffickinginpersons.aspx> [accessed 28 February 2020]

have used the Protocol as the “backbone” of their measures, which are applied against traffickers of human beings.

As we well know, all three elements are necessary to consider a case as a THBOR one; however, section (C) of Article 3 specifies that an exception exists. According to the article, when the victim is a child, only two of the three elements mentioned above will suffice, and these will be the "action" element and the "purpose" one.

Despite being one of the most widely used and adopted regulatory instruments by the international community, presents some inherent weaknesses. The first of them is the lack of clarity in its definitions, which implies the deficient understanding of it, and as a consequence, their bad application; particularly, when the drafters of the Protocol refer to "coercion". The United Nations Model Law against Trafficking in Persons gives a definition of this term³⁷:

"Coercion" shall mean use of force or threat thereof, and some forms of non-violent or psychological use of force or threat thereof, including but not limited to:

- (i) Threats of harm or physical restraint of any person;*
- (ii) Any scheme, plan or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person;*
- (iii) Abuse or any threat linked to the legal status of a person;*
- (iv) Psychological pressure;*

As it is a very extensive and imprecise definition, it involves serious problems for the judges when determining whether coercion has existed or not, due to its ambiguity.

³⁷ United Nations Office on Drugs and Crime (UNODC). Model Law against Trafficking in Persons (2009) (p.9), retrieved from https://www.unodc.org/documents/human-trafficking/UNODC_Model_Law_on_Trafficking_in_Persons.pdf [accessed 3 March 2020]

The intentions of the drafters in the Protocol are also not clear regarding the term “abuse of a position of vulnerability”³⁸, considering that it is one of the means by which victims can be exploited. Its definition is also located in the United Nations Model Law against Trafficking in Persons where it is defined as:

*“Abuse of a position of vulnerability” shall refer to any situation in which the person involved believes he or she has no real and acceptable alternative but to submit”*³⁹

As it is a definition where the term “real and acceptable alternative” is not clear, nor is it clear how it should be applied, the United Nations Model Law against Trafficking in Persons had to explain that it consists in an “open concept”; hence, “governments may consider adopting a definition that focuses on the offender and their intention to take improper advantage of the situation of the victim”¹⁶. In accordance to what it is mentioned, States have flexibility of definition when processing cases suspected of trafficking.

To conclude, some problems were found with the term "organ extraction" due to the lateness of the negotiations, despite the fact that Argentina suggested the inclusion of "extraction of body organs or organic tissue" in the first session of Ad Hoc Special Committee for the Preparation of a Convention against Transnational Organized Crime⁴⁰. It was not until the ninth session when they decided to include “organ removal” as an additional form of exploitation.

³⁸ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime UN Doc A/53/383 (2003). Article 3 (Palermo Protocol) retrieved from <https://www.ohchr.org/en/professionalinterest/pages/protocoltraffickinginpersons.aspx> [accessed 28 February 2020]

³⁹ United Nations Office on Drugs and Crime (UNODC). Model Law against Trafficking in Persons (2009) (p.9), retrieved from https://www.unodc.org/documents/human-trafficking/UNODC_Model_Law_on_Trafficking_in_Persons.pdf [accessed 3 March 2020]

⁴⁰ United Nations General Assembly. (2000). Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions (pp. 6 par.27). Retrieved from https://treaties.un.org/doc/source/docs/A_55_383-E.pdf [accessed 3 March 2020]

Despite the fact that other exploitation purposes are defined in the Protocol, trafficking in persons for the purpose of organ removal was not taken into account by international law, and therefore had no definition, nor in the Palermo Protocol. It was not until the Secretariat of the Conference of the Parties to the Convention drafted a background document where it was explained that trafficking in organs, tissues and cells was not covered by the Protocol. To end, before this concept was included in the "for purposes of further discussion" section of the Protocol, there was a huge lack of consideration for it.

2.2. COUNCIL OF EUROPE CONVENTION ON ACTION AGAINST TRAFFICKING IN HUMAN BEINGS (2005)

The Council of Europe Convention (CoE) on Action Against Trafficking in Human beings was adopted on May 16, 2005 and entered into force on February 1, 2008. This convention adopts the definition previously established in the Palermo Protocol and for the first time Organ harvesting is also included as a form of human trafficking. The definition mentioned above is established in Article 4 (a) of the Convention:

"Trafficking in human beings" 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, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs".⁴¹

⁴¹ Council of Europe Convention on Action against Trafficking in Human Beings, 16.V.2005 (2005). Article 4 (a) retrieved from <https://rm.coe.int/168008371d> [accessed 3 March 2020]

Furthermore, the Convention also focuses its attention on the protection of victims who have suffered THB and, of course, their rights; as well as the prevention and prosecution of traffickers.

It is the most important regional instrument, apart from being an initiative that comes from the Council of Europe and, therefore, is mainly based on inter-European cooperation. One of the main characteristics of the Convention is that regardless, of whether the victim has given consent or not, the removal of organs as a purpose of human trafficking; constitutes a criminal offense. In addition, in Article 4 (b) of the Convention, it is established that:

*“The consent of a victim of “trafficking in human beings” to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;”*⁴²

Despite the similarity with the Palermo Protocol, the CoE Convention adds some important nuances; as well as establishes an approach to trafficking, from a perspective more focused on the victim. In addition, it places more emphasis on states' obligations to protect victims, as it is reflected in Chapter III of the treaty, but it should be borne in mind that this protection will depend on whether "trafficking" can be demonstrated in criminal proceedings.

Unlike the Palermo Protocol, the term “abuse of a position of vulnerability” is well defined in the Explanatory Report of the Council of Europe Convention On Action Against Trafficking In Human Beings¹⁸. The report defines the abuse of a position of vulnerability as:

“By abuse of a position of vulnerability is meant abuse of any situation in which the person involved has no real and acceptable alternative to submitting to the

⁴² Council of Europe Convention on Action against Trafficking in Human Beings, 16.V.2005 (2005). Article 4 (b) retrieved from <https://rm.coe.int/168008371d> [accessed 3 March 2020]

abuse. The vulnerability may be of any kind, whether physical, psychological, emotional, family-related, social or economic."⁴³

Analyzing the previous definition of "abuse from a position of vulnerability", it also includes the abuse of economic insecurity or the poverty of victims, who hope to improve their economic situation or their family one, accepting to have an organ removed.

In conclusion, the Council of Europe Convention on Action Against Trafficking In Human Beings (2005) despite fighting against human trafficking, its scope is limited because it does not reach all aspects of the commercialization, in this case, of organs. Nevertheless, the last novelty that the Council of Europe has notified is that they are working to add organ trafficking to the CoE, and therefore, be the first legally binding international instrument to regulate trafficking in organs

2.3. EUROPEAN UNION

At european level, the European Union adopted the Framework Decision of the EU Council of 2002⁴⁴ on combating trafficking in human beings, whose main objective was the complementation and reinforcement of the instruments that were already being used to combat trafficking in human beings. The problem with this Decision was that in its article 1 it focused only on "trafficking in human beings" for the purpose of exploiting them sexually or with forced labor, as its title indicates. Although the Framework Decision followed the criteria and established the definitions that the Palermo Protocol stated, any reference was

⁴³ Council of Europe. (2005). Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings. (pp. 15, par. 83) Warsaw. Retrieved from <https://rm.coe.int/16800d3812> [accessed 3 March 2020]

⁴⁴ Council Framework Decision of 19 July 2002 on combating trafficking in human beings, 2002/629/JHA (2002). Retrieved from <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0629:EN:HTML> [accessed 3 March 2020]

made to the THBOR, even though the trafficking in humans was penalized on it.

As a consequence, the Council Framework Decision 2002/629 / JHA was replaced by the new Directive 2011/36 / EU, on the prevention and fight against trafficking in human beings and the protection of its victims, formally adopted on 5 April 2011. Unlike the Framework Decision 2002/629 / JHA, the Directive 2011/36 / EU adopted a broader concept of what should be considered trafficking in human beings and therefore, included other forms of exploitation not covered by the Framework Decision. In its article 2 (3) includes trafficking in human beings for the removal of organs as a type of trafficking:

“Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs.”⁴⁵

In addition, apart from expanding the budgets in which an act can be considered as THB, it also establishes a more severe system regarding to sanctions and penalties for traffickers, regulated in articles 4 and 6. Regarding article 9 of The Directive, it establishes a novelty in its paragraph 1, and states that:

“Member States shall ensure that investigation into or prosecution of offences referred to in Articles 2 and 3 is not dependent on reporting or

⁴⁵ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101, 1 15.4.2011 (2011). Retrieved from https://ec.europa.eu/anti-trafficking/legislation-and-case-law-eu-legislation-criminal-law/directive-201136eu_en [accessed 3 March 2020]

accusation by a victim and that criminal proceedings may continue even if the victim has withdrawn his or her statement.”⁴⁶

Extraterritorial jurisdiction is also increased due to Article 10 of the Directive, which establishes that the Courts of the Member States may be competent to hear THB crimes when they have been committed, either totally or partially, in another Member State. This principle will be the cornerstone for the application of future national criminal law.

Regarding the protection of victims and their assistance, it is regulated in articles 11 to 17 of the Directive, and have been based on international standards, and as a direct consequence, have been further expanded.

Another feature of Directive 2011/36 / EU, on the prevention and fight against trafficking in human beings and the protection of its victims, is the establishment of a coordinator to combat trafficking in persons. The figure of the coordinator is described in article 20 of the Directive and manifests that its functions are the establishment of better cohesion and coordination between the different European institutions, Member States, European agencies and international actors. In addition, he collects the information that the States provide, in order to contribute to the report of the European Commission on the fight against trafficking in persons. Last but not least, he is also responsible for overseeing the implementation of the strategy that the European Union has developed for the Eradication of Trafficking in Human Beings 2012-2016.⁴⁷ The Strategy lists five priorities which the European Union should use to tackle

⁴⁶ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101, 1 15.4.2011 (2011). Article 9 retrieved from https://ec.europa.eu/anti-trafficking/legislation-and-case-law-eu-legislation-criminal-law/directive-201136eu_en [accessed 3 March 2020]

⁴⁷ European Commission. (2012). The EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016. Retrieved from https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/eu_strategy_towards_the_eradication_of_trafficking_in_human_beings_2012-2016_1.pdf [accessed 3 March 2020]

trafficking in human beings and within each of them a set of actions that have to be implemented in the following five years, are described:

- a) Identification, protection and assistance to victims of trafficking.*
- b) Intensify the prevention of trafficking in human beings.*
- c) Increased prosecution of traffickers*
- d) Greater coordination and cooperation between key actors and political coherence*
- e) Greater knowledge and effective response to emerging concerns related to all forms of trafficking in human beings.*

3. LEGAL FRAMEWORK AGAINST ORGAN TRAFFICKING

Despite the fact that transplants have become more common, the organ shortages also continued to increase, becoming a universal problem. Due to the lack of organs to be transplanted, the waiting lists for transplants are constantly increasing and consequently, many patients die before being able to receive the transplant.

This problem leads patients to despair situations, making them resort to different forms of organ marketing; in other words, patients who are on the waiting list but have a stable budget, are driven, because of despair, to the marketing of organs and thus, be able to obtain one faster than being on the waiting list.

In response to the previous situation, international and european organizations, over the years, have created both ethical and legal standards, which prohibit the commercialization of organs.

3.1. LEGAL FRAMEWORK AND INTERNATIONAL STANDARDS

When it comes to a transnational crime, it is extremely important to establish legal initiatives in the international sphere, that favor cooperation between States, and therefore criminalize the traffic internationally. In the contrary, if

the responsibility to fight crime was placed in the hands of each individual State, the transnational concept of the fact would be ignored.

Unlike the crime of THBOR, regulated mainly in the Palermo Protocol; the organ trafficking has not adopted a legally binding international instrument. Nevertheless, there are several international documents in the field of medicine, among others, where the concept of organ trafficking appears.

3.1.1. WORLD HEALTH ORGANIZATION (WHO)

The World Health Organization (WHO) together with its assembly, known as the World Health Assembly (WHA), have been working since 1987 on several non-binding international instruments against international organ trafficking. These international documents consist of a set of guiding principles⁴⁸ charged with condemning the practice of organ trafficking⁴⁹, while providing suggestions to the different States to eliminate it. In addition, the WHO has also been working on ethical standards in the field of human organ and tissue transplants, together with the organ donation.

The WHA first condemned, in Resolution WHA 40.13 on the development of guiding principles for human organ transplants in May 1987, the organ trade⁵⁰, as it was considered incompatible with the most basic human values and was contrary to the Universal Declaration of Human Rights together with the WHO Constitution. In addition, it also requested the Director-General to consider developing a set of guiding principles on organ trafficking.

⁴⁸ World Health Organization. (2010). WHO GUIDING PRINCIPLES ON HUMAN CELL, TISSUE AND ORGAN TRANSPLANTATION. Retrieved from https://www.who.int/transplantation/Guiding_PrinciplesTransplantation_WHA63.22en.pdf [accessed 3 March 2020]

⁴⁹ World Health Organization. (2010). WHO Guiding Principles On Human Cell, Tissue And Organ Transplantation. Retrieved. Principle 11 from https://www.who.int/transplantation/Guiding_PrinciplesTransplantation_WHA63.22en.pdf [accessed 3 March 2020]

⁵⁰ World Health Assembly. (1987). Fortieth World Health Assembly Geneva, 4-15 May 1987 WHA40.13 Development of guiding principles for human organ transplants. Retrieved from <https://www.who.int/transplantation/en/WHA40.13.pdf?ua=1> [accessed 3 March 2020]

In resolution WHA42.5 on preventing the purchase and sale of human organs in May 1989, the purchase or sale of organs was condemned, and national legislators were asked to intensify their efforts.⁵¹

In 1991, the World Health Assembly, through resolution WHA44.25, adopted the first version of the Guiding Principles and focused on issues such as the non-commercialization of both organs and tissues; and to the duly informed consent in a freely and voluntarily way.⁵² They also establish the prohibition of any commercial transaction in the area of transplants, and of course, special attention is paid to the protection of minors and the most vulnerable groups. .

On May 2, 2003, the WHO produced a report on "Human Organ and Tissue Transplantation" referring to the latest medical and legal developments that occurred. The report stipulated that due to improvements in "immunosuppression", the need for donors to be genetically related to the person who was going to receive the organ was reduced, and therefore, before the donation occurred, special attention should be provided to the consent, since it should be given voluntarily and informedly. The report also emphasized that the proposal that was established to offer monetary incentives to those who supply material from the human body to increase access to transplantation; should be analyzed very carefully.⁵³

In October of that same year in Madrid, there was the first global consultation on "Ethics, access and safety in organ and tissue transplantation: issues of global interest", where the access, safety and the ethical part of transplants was examined.

⁵¹ World Health Assembly. (1989). Preventing the Purchase and Sale of Human Organs (WHA 42.5) (p.1).

⁵² World Health Organization. (1991). Forty-Fourth World Health Assembly (p. 21). Geneva. Retrieved from https://apps.who.int/iris/bitstream/handle/10665/173858/WHA44_1991-REC-1_eng.pdf?sequence=1&isAllowed=y [accessed 3 March 2020]

⁵³ World Health Organization. (2003). Human organ and tissue transplantation (pp. 2-3). Retrieved from https://apps.who.int/gb/archive/pdf_files/EB113/ceb11314.pdf [accessed 3 March 2020]

In 2008 an update of the Guiding Principles occurred, and the prohibition of the purchase or sale of organs was established, adding special emphasis between the existing relationship with human trafficking and the sale of organs.⁵⁴

The WHA63.22 Resolution, adopted by the 63rd World Health Assembly in May 2010, endorsed the revised version of the Guiding Principles published in 2010, where measures were established to protect and defend the most vulnerable groups such as, groups of people in extreme poverty, from violations of organ and tissue sales, or from transplant tourism. The WHA63.22 Resolution, apart from endorsing the revised version of the Principles, encourages MS to implement the Guiding Principles so that transparent and equitable systems are established when allocating organs and tissues; as well as, promoting voluntary, unpaid and altruistic systems of donation; and a good collection of data related to organ trafficking.⁵⁵

The 11 guiding principles established by the World Health Assembly will be briefly explained below:

In the first Guiding Principle, it is established that only the organs of deceased bodies can be removed, as long as the consents required by law, have been obtained in the proper method and there are no indications that the deceased person had objected (in the absence of formal consent by the victim when he or she was alive) or that their relatives are against the donation. Therefore, the backbone of this principle is the free and informed consent. In addition, national legislation must define the previous requisites before obtaining consent. Finally,

⁵⁴ European Parliament. (2015). *Trafficking in Human Beings* (p. 29). Belgium. Retrieved from [https://www.europarl.europa.eu/RegData/etudes/STUD/2015/549055/EXPO_STU\(2015\)549055_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2015/549055/EXPO_STU(2015)549055_EN.pdf) [accessed 28 February 2020]

⁵⁵ World Health Organization. (2010). WHO Guiding Principles On Human Cell, Tissue And Organ Transplantation. Retrieved from https://www.who.int/transplantation/Guiding_PrinciplesTransplantation_WHA63.22en.pdf [accessed 3 March 2020]

in case that the deceased person agreed to donate his organs, but his relatives refused; the will of the deceased shall prevail over his relatives one.⁵⁶

Regarding the second guiding principle, it establishes that when a doctor has determined the death of a potential donor, he cannot take care of the removal of the organs or the subsequent transplant procedures. In addition, he will not be able to carry out the attention of the possible recipients of the aforementioned organs, and thus avoid conflicts of interest.⁵⁷

The third Guiding Principle highlights the preference of removing the organs of deceased persons. In the case of donations from living adults, provides:

*“Donation from deceased persons should be developed to its maximum therapeutic potential, but adult living persons may donate organs as permitted by domestic regulations. In general living donors should be genetically, legally or emotionally related to their recipients.”*⁵⁸

Paragraph two of this Guiding Principle seeks to protect donors from any undue pressure or influence. That is why, it establishes that consent must be voluntary, informed and free. This will only occur when personal attention to donors is guaranteed, when monitoring is well organized, and when donor selection criteria have been scrupulously applied and monitored.

⁵⁶ World Health Organization. (2010). WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation (pp. 2-3). Retrieved from https://www.who.int/transplantation/Guiding_PrinciplesTransplantation_WHA63.22en.pdf [accessed 3 March 2020]

⁵⁷ World Health Organization. (2010). WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation (pp. 3). Retrieved from https://www.who.int/transplantation/Guiding_PrinciplesTransplantation_WHA63.22en.pdf [accessed 3 March 2020]

⁵⁸ World Health Organization. (2010). WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation (pp. 3-4). Retrieved from https://www.who.int/transplantation/Guiding_PrinciplesTransplantation_WHA63.22en.pdf [accessed 3 March 2020]

In the fourth Guiding Principle, the removal of organs for transplant purposes to minors is prohibited. However, some exceptions may apply depending on national legislation, which include the donation of regenerative tissue to family members or kidney transplants in the case of twins, for example.⁵⁹

In the case of consent, both the consent of the minor and the parents or legal guardian one, will be required. In the event of a conflict of consent, the review and approval of an independent body, such as a court or other competent authority, should be required. However, the minor's objection will prevail over any other.

The fifth Guiding Principle establishes:

“Cells, tissues and organs should only be donated freely, without any monetary payment or other reward of monetary value. Purchasing, or offering to purchase, cells, tissues or organs for transplantation, or their sale by living persons or by the next of kin for deceased persons, should be banned.

The prohibition on sale or purchase of cells, tissues and organs does not preclude reimbursing reasonable and verifiable expenses incurred by the donor, including loss of income, or paying the costs of recovering, processing, preserving and supplying human cells, tissues or organs for transplantation.”⁶⁰

⁵⁹ World Health Organization. (2010). WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation (pp. 4). Retrieved from https://www.who.int/transplantation/Guiding_PrinciplesTransplantation_WHA63.22en.pdf [accessed 3 March 2020]

⁶⁰ World Health Organization. (2010). WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation (pp. 5-6). Retrieved from https://www.who.int/transplantation/Guiding_PrinciplesTransplantation_WHA63.22en.pdf [accessed 3 March 2020]

In other words, the human body together with its parts cannot be, under any circumstances, an object of commercial transaction and; as a consequence, it is prohibited to receive or give payments, also including some type of reward or compensation for it. This principle is the central principle for the prohibition of organ trafficking, also known as the cornerstone of it. Despite what is established in the first paragraph, the reimbursement of reasonable expenses incurred in the donation, in the recovery, or in the supply of cells, among others; it is not prohibited.

Regarding the sixth Guiding Principle, it establishes the prohibition of advertisements that announce the availability or the need of organs. However, there is an exception to this concept, and consists of the advertisement of altruistic donations, since they can be carried out in accordance with the corresponding national regulations.⁶¹

In accordance with the seventh Guiding Principle, it focuses on the situation and participation of medical or other health professionals regarding organ transplantation procedures in which they have reasons to suspect that the aforementioned organs have been subjected to commercial operations; or when the patient offers to pay for them before or after the intervention. In the event that the above situation occurs, healthcare professionals should under no circumstances refer patients to the facilities where transplants are performed, either abroad or in the country where they are nationals.⁶²

However, if transplant patients are already in these facilities, the care from these same doctors is allowed; nevertheless, they will not be incurring professional

⁶¹ World Health Organization. (2010). WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation (pp. 6). Retrieved from https://www.who.int/transplantation/Guiding_PrinciplesTransplantation_WHA63.22en.pdf [accessed 3 March 2020]

⁶² World Health Organization. (2010). WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation (pp. 6-7). Retrieved from https://www.who.int/transplantation/Guiding_PrinciplesTransplantation_WHA63.22en.pdf [accessed 3 March 2020]

sanctions if they refuse to provide it, as long as they refer the patients to another place.

Regarding the eighth Guiding Principle, it is used to reinforce the previous Guiding Principle, since it prohibits doctors, health professionals, hospital personnel, or even medical centers; from receiving a payment higher than the fee for the services provided, which it is already justified.⁶³

Principle 9 establishes that committees that have been duly constituted, must define the rules for the allocation of organs, in an equitable, justified and transparent manner. It also establishes that donated organs must be made available to patients solely based on the medical need of the patient and not for economic or other reasons.⁶⁴

The tenth Guiding Principle stresses that it is essential that procedures for donors and recipients must be equally safe, high-quality and essential. Furthermore, it establishes that the long-term results of donation and transplantation must be evaluated by both the recipient and the living donor, in order to document the damages and benefits produced. Finally, it provides that the implementation of quality systems is necessary to maintain and optimize the level of quality, efficacy and safety of the organs, tissues and cells for transplantation. Surveillance and traceability are also included in these systems, including adverse events or reported reactions.⁶⁵

⁶³ World Health Organization. (2010). WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation (pp. 7). Retrieved from https://www.who.int/transplantation/Guiding_PrinciplesTransplantation_WHA63.22en.pdf [accessed 3 March 2020]

⁶⁴ World Health Organization. (2010). WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation (pp. 7-8). Retrieved from https://www.who.int/transplantation/Guiding_PrinciplesTransplantation_WHA63.22en.pdf [accessed 3 March 2020]

⁶⁵ World Health Organization. (2010). WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation (pp. 8-9). Retrieved from https://www.who.int/transplantation/Guiding_PrinciplesTransplantation_WHA63.22en.pdf [accessed 3 March 2020]

The 11th Guiding Principle, addresses the issue of donation and establishes:

“The organization and execution of donation and transplantation activities, as well as their clinical results, must be transparent and open to scrutiny, while ensuring that the personal anonymity and privacy of donors and recipients are always protected.”⁶⁶

Therefore, the requirement of an execution and organization regarding donation and transplant activities is established. In the case of clinical results, it is established that they must be transparent and open to scrutiny. Finally, it is stipulated that the privacy of donors and recipients must be protected and therefore personal anonymity must be maintained.

In addition to developing the Guiding Principles, the WHO published the Global Glossary of Terms and Definitions on Donation and Transplantation⁶⁷ in 2009, whose main objective is to clarify the communication in the field of donation and transplants, as its name suggests. This clarification can be addressed both for purposes with different nature (legal, ethical, etc.) and for the general public.

Despite the fact that the WHO has established a set of principles and regulations that help medical authorities and professionals to get their bearings, they are not legally binding, as is well known. In addition, the guiding principles also focused on international trafficking in persons.

3.1.2. DECLARATION OF ISTAMBUL

⁶⁶ World Health Organization. (2010). WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation (pp. 9). Retrieved from https://www.who.int/transplantation/Guiding_PrinciplesTransplantation_WHA63.22en.pdf [accessed 3 March 2020]

⁶⁷ World Health Organization. (2009). Global Glossary of Terms and Definitions on Donation and Transplantation (pp. 10 (point 26)). Geneva. Retrieved from <https://www.who.int/transplantation/activities/GlobalGlossaryonDonationTransplantation.pdf?ua=1%20pag%2010> [accessed 4 March 2020]

Over the years, different medical associations have been working to reach an international consensus aimed at condemning organ trafficking. In the case of the Istanbul Declaration on organ trafficking and transplant tourism (hereinafter, the Istanbul Declaration), was created in 2008 as a result of cooperation between two important medical societies such as: the Transplant Society and the International Society of Nephrology. The declaration establishes the definition of organ trafficking, together with transplant tourism and their trade. Its main objective is to foster consensus on practical principles in addition to recommending alternatives, which address the issue of scarcity of human organs. The directive also establishes professional guidelines for transplants and emphasizes collaboration within the international medical community. The Declaration also calls for an adaptation of national legislation regarding the promotion of the use of the figure of donation in corpses and, therefore, the consequent reduction of this burden on living donors.

The DOI, therefore, is not an instrument to apply the law or a legally binding treaty, hence, it is a simply Declaration used to guide the professional medical behavior and, of course, its health care institutions.⁶⁸ Furthermore, it establishes a set of principles of a moral nature to govern organ transplantation and donation, along with a series of proposed practices to stop, prevent or fight organ trafficking. However, in the Declaration itself, the reimbursement of the legitimate expenses caused by the transplant is allowed; and there is not a prohibition regarding donation rewards or specifically regulated incentives.

The definition of organ trafficking has been elaborated by based terminology of the Council of Europe Convention against trafficking in human organs (2015), and therefore, it is considered organ trafficking:

⁶⁸ Danovitch, G., Chapman, J., Capron, A., Levin, A., Abbud-Filho, M., & Al Mousawi, M. et al. (2013). Organ Trafficking and Transplant Tourism: The Role of Global Professional Ethical Standards-The 2008 Declaration of Istanbul. In *Transplantation* Volume 95, Number 11, June 15, 2013 (pp. 2-4). Retrieved from https://www.researchgate.net/publication/236638775_Organ_Trafficking_and_Transplant_Tourism_The_Role_of_Global_Professional_Ethical_Standards-The_2008_Declaration_of_Istanbul [accessed 4 March 2020]

*“(a) removing organs from living or deceased donors without valid consent or authorisation or in exchange for financial gain or comparable advantage to the donor and/or a third person;
(b) any transportation, manipulation, transplantation or other use of such organs;
(c) offering any undue advantage to, or requesting the same by, a healthcare professional, public official, or employee of a private sector entity to facilitate or perform such removal or use;
(d) soliciting or recruiting donors or recipients, where carried out for financial gain or comparable advantage; or
(e) attempting to commit, or aiding or abetting the commission of, any of these acts.”*⁶⁹

Apart from the creation of the Declaration in 2008, an instrument called the Istanbul Declaration Custody Group (DICG) was also created to defend and promote the basic principles of the Istanbul Treaty; together with the promotion of transparency regarding the practice of transplantation. In addition, the DICG is also responsible of educating about organ donation and transplantation, and also to encourage different organizations to adhere to DOI principles.⁷⁰

3.1.3. WORLD MEDICAL ASSOCIATION

The World Medical Association (WMA) is its 37th World Medical Assembly in Brussels (1985), issued an official Declaration on the subject of

⁶⁹ Declaration of Istanbul on Organ Trafficking and Transplant Tourism, 23: 3375–3380 (2008) (pp. 2). Retrieved from http://www.multivu.prnewswire.com/mnr/transplantationociety/33914/docs/33914-Declaration_of_Istanbul-Lancet.pdf [accessed 6 March 2020]

⁷⁰ Ambagtsheer, J. (2017). Organ Trade (p. 92). Rotterdam: Erasums University Rotterdam. Retrieved from <https://repub.eur.nl/pub/99988> [accessed 6 March 2020]

commercializing with living human organs.⁷¹ In that declaration the purchase and sale of organs was condemned; and it also required governments to use effective measures to prevent commercialization.

The second Declaration of the WMA, in this case on donation and transplantation of human organs, was adopted in 2000.⁷² It promoted the use of ethical principles to guide and give advice to medical associations and people related to the health field, in relation to the issue of organ donation and transplantation. The Declaration of the World Medical Association on donation and transplantation of human organs, also focused its wording on the issue of non-commercialization of human organs, and in its paragraph 30 stated:

*“Payment for organs for donation and transplantation must be prohibited. A financial incentive compromises the voluntariness of the choice and the altruistic basis for organ donation. Furthermore, access to needed medical treatment based on ability to pay is inconsistent with the principles of justice. Organs suspected to have been obtained through commercial transaction must not be accepted for transplantation. In addition, the advertisement of organs in exchange for money should be prohibited. However, reasonable reimbursement of expenses such as those incurred in procurement, transport, processing, preservation, and implantation is permissible.”*⁷³

In the 58th WMA General Assembly in Pilanesberg, South Africa (2006), the Declaration on Donation and Transplantation of Human Organs, which had

⁷¹ World Medical Association. (1985). Statement on the Live Organ Trade (adopted by the 37th World Medical Assembly). Brussels. Retrieved from https://www.wma.net/e/policy/17-m_e.html [accessed 6 March 2020]

⁷² World Medical Association. (2000). Statement on Human Organ and Tissue Donation and Transplantation (adopted by the 52nd WMA General Assembly). Edinburgh. Retrieved from http://www.wma.net/e/policy/17-180_e.html. [accessed 6 March 2020]

⁷³ World Medical Association. (2000). Statement on Human Organ and Tissue Donation and Transplantation (adopted by the 52nd WMA General Assembly) (par. 30). Edinburgh. Retrieved from http://www.wma.net/e/policy/17-180_e.html. [accessed 6 March 2020]

been adopted at the 52nd General Assembly of the WMA in Edinburgh, Scotland, was revised.

The new Declaration on Donation and Transplantation of Human Organs (2006) developed a policy similar to the previous Declarations, based on ethical principles and providing guidance to all people and associations in the medical field, including those who develop protocols or policies on these issues. In addition, it was emphasized the need to improve organ donations along with good measures regarding donor choice, to ensure that they are carried out freely and informedly; hence, without any pressure or coercion.

Regarding the issue of organ marketing, the Declaration on Donation and Transplantation of Human Organs (2006), again reaffirmed its position and reiterated in its section H (4)⁷⁴, its most absolute prohibition.

It is important to emphasize that although the WMA Declaration provides guidance to all health professionals, it is not binding.

Regarding the ethical obligation of doctors, it is included in its section F (5) where states:

*“Physicians who are asked to transplant an organ that has been obtained through a commercial transaction should refuse to do so and should explain to the patient why such a medical act would be unethical: because the person who provided the organ risked his or her future health for financial rather than altruistic motives, and because such transactions are contrary to the principle of justice in the allocation of organs for transplantation.”*⁷⁵

⁷⁴ World Medical Association. (2006). Statement on Human Organ and Tissue Donation and Transplantation (adopted by the 57nd WMA General Assembly) (par. H(4)). Pilanesberg. Retrieved from http://www.wma.net/e/policy/17-180_e.html. [accessed 6 March 2020]

⁷⁵ World Medical Association. (2006). Statement on Human Organ and Tissue Donation and Transplantation (adopted by the 57nd WMA General Assembly) (par. H(5)). Pilanesberg. Retrieved from http://www.wma.net/e/policy/17-180_e.html. [accessed 6 March 2020]

3.2. LEGAL FRAMEWORK AND EUROPEAN STANDARDS

3.2.1. COUNCIL OF EUROPE RESOLUTION (1978)

In 1978, the Committee of Ministers adopted the Resolution (78) 29 on the harmonization of the legislation of the Member States in relation to the extraction, grafting and transplantation of human substances, including in the last ones, living or deceased persons, establishing certain principles in both cases.

The Resolution limits the transplantation of non-regenerative substances to only genetically compatible people, except in cases where there is a great possibility of success and therefore, according to article 4,⁷⁶ exceptions may be applied.

Regarding the anonymity regulated in article 2⁷⁷, the resolution agrees to maintain it as long as there is no family or closely personal relationship with the recipient. The same article also establishes that the donor must receive adequate information about the risks and consequences and, of course, as established in article 3, there must be free consent from the donor. In the case of minors and the incapacitated, their legal guardians will be in charge.

Finally, it also prohibits the use of human substances from both living persons (article 9) and deceased persons (article 14) for profit. However, in its article 14 it establishes:

“However, loss of earnings and any expenses caused by the removal or preceding examination may be refunded. The donor, or potential donor, must be compensated, independently of any possible medical responsibility, for any

⁷⁶ Council of Europe, Committee of Ministers. Resolution (78)29 on 'Harmonisation of legislations of member states relating to removal, grafting and transplantation of human substances'. (78)29 (1978). Article 4 [accessed 6 March 2020]

⁷⁷ Council of Europe, Committee of Ministers. Resolution (78)29 on 'Harmonisation of legislations of member states relating to removal, grafting and transplantation of human substances'. (78)29 (1978). Article 2 [accessed 6 March 2020]

damage sustained as a result of a removal procedure or preceding examination, under a social security or other insurance scheme.”⁷⁸

Therefore, both the living donor and the possible recipient, may be reimbursed for possible damages caused by the examinations or medical liability occurred. The principles established by the Regulation, were only created to be implemented in the national legislation of each Member State, but they are not legally binding, nor do they include provisions regarding sanctions.

3.2.2. THIRD CONFERENCE OF EUROPEAN HEALTH MINISTERS

In November 1987, the European Health Ministers met in Paris to hold the 3rd Conference of European Health Ministers (Paris, November 16-17, 1987), where measures for the protection of human rights were discussed along with freedoms related to health and medical care. Guidelines were drawn up at the Conference which were mainly based on Resolution (78) 29 on the harmonization of the legislation of the Member States in relation to the extraction, grafting and transplantation of human substances of the Committee of Ministers; at the same time that they created a base for the cooperation and the work that could take place in the future, with the member states of the Council of Europe. In other words, they created a solid foundation for the creation of the CoE Convention on Biomedicine.

Along with the creation of these bases, they also drew different conclusions, such as the need to protect the rights and freedoms of individuals; to develop policies to inform individuals about the importance of organ transplantation; promoting cooperation among Member States; or even avoid the commercialization of the organs.⁷⁹

⁷⁸ Council of Europe, Committee of Ministers. Resolution (78)29 on 'Harmonisation of legislations of member states relating to removal, grafting and transplantation of human substances'. (78)29 (1978). Article 14 [accessed 6 March 2020]

⁷⁹ Committee of Ministers of Council of Europe. (1987). 3rd Conference of European Health Ministers (p. 16). Paris. Retrieved from

Likewise, Chapter I includes topics such as cases in which organs may be removed from deceased and living donors, and the establishment of restrictions or guidelines regarding the procedure to be carried out in such cases. The concept of organs also includes the skin and bone marrow, but in this case the testicles, ovaries, embryos, eggs, sperm and blood are excluded.

Again, reference is made again to the need for free consent, noting that extractions should not be carried out on legally incapacitated persons, except in special cases as provided in paragraph 10:

“exceptional cases, however, justified on therapeutic grounds in the recipient, a substance which can regenerate may be removed from a legally incapacitated person if his/her legal representative has given consent. If the donor has the capacity of understanding, his/her consent must also be required.”⁸⁰

Regarding Chapter II, it is based on the prohibition of the commercialization of human organs together with the publicity of them; and establishes in its paragraph 16 that despite the prohibition of trading with organs, there may be compensation to living donors in the event of loss of earnings or any other expense caused by the examination or elimination of this marketing.

In the case of Chapters III and IV the criteria for the use of human organs are established and also, the controls that must be carried out to move them; as well as, to transplant them in the officially recognized institutions.

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804c6d07> [accessed 6 March 2020]

⁸⁰ Committee of Ministers of Council of Europe. (1987). 3rd Conference of European Health Ministers (p. par. 9 and 10, appendix II (I.B)). Paris. Retrieved from <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804c6d07> [accessed 6 March 2020]

Chapter V establishes the need to inform the public about the importance of transplants along with the importance of organizational measures to encourage the European cooperation.

Last but not least, Chapter VI refers to the promotion of European cooperation, and for example, establishes that there must be communication between them so that organs are not wasted as they cannot find recipients in other countries. That is why, as long as they cannot be used based on medical criteria the organs in the donor's country; should be available to patients from other countries.

The 3rd Conference of European Health Ministers of 1987, together with Resolution (78) 29 on the harmonization of the legislation of the Member States in relation to the extraction, grafting and transplantation of human substances of the Committee of Ministers, served as the basis of the following international legal instrument: the 1997 Convention for the Protection of Human Rights and Human Dignity with respect to the application of biology and medicine: Convention on Human Rights and Biomedicine (CETS No. 164), which Despite being a politically strong statement, it remained non-binding.

3.2.3. THE COUNCIL OF EUROPE CONVENTION ON HUMAN RIGHTS AND BIOMEDICINE (1997)

After many discussions, the Council of Europe realized the need of another instrument that would harmonize the existing standards, relating them to the application of biology and medicine. Finally, in 1997 the Convention for the Protection of Human Rights and the Dignity of the Human Being was adopted with regard to the Application of Biology and Medicine, also known as the Convention on Human Rights and Biomedicine, based in guaranteeing the integrity, the fundamental rights and liberties of humans, in the context of biology and medicine.

In addition, its objective is also the protection of the dignity and the identity of human beings, and therefore, they prevail over the interests of society or science, according to its articles 1 and 2.⁸¹

The determining points of this Convention were the requirements when it comes to removing organs and tissues from living donors, the free and informed consent, and finally, the prohibition to commercialize with organs of the human body.

Starting with free and informed consent, we find it in Chapter II of the Convention on Human Rights and Biomedicine, where in its article 5 establishes that, an intervention of a sanitary nature can only be carried out when the person has given his consent in a free and informed way, adding that this consent can be freely withdrawn at any time, and therefore, the intervention will not take place. In the cases of legally incapacitated persons, their consent will be regulated in accordance with articles 6, 17 and 20 of the Convention.⁸²

The consent must be also informed, which means that the necessary information must be provided to the patient so that he can give his consent taking into account all the risks and consequences that may arise. This article does not require any specific form when giving consent, however article 19 requires specific consent either in writing or in front of an official body when removing body parts for purposes of transplant in living people.

Regarding the requirements for the extraction of organs, tissues and cells from living donors for transplant purposes, we find them regulated in Chapter VI of

⁸¹ 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 (1997). Oviedo. Retrieved from <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/164> [accessed 31 January 2020]

⁸² Directorate General of Human Rights and Legal Affairs Council of Europe. (2009). Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs (pp. 36-38). Joint Council of Europe/United Nations. Retrieved from <https://rm.coe.int/16805ad1bb> [accessed 31 January 2020]

the Convention. In its article 19 it is established that the extraction can only be carried out for the therapeutic benefit of the recipient as long as there is no other organ, tissue or cell available from a deceased person and there is no other alternative method that has the same effectiveness. . The rules regarding legally incapable persons are found in article 20 of this same Convention.

Finally, regarding the non-commercialization of organs, we find it included in Chapter VII. Article 21 is the most relevant provision of the entire Convention and establishes that:

“The human body and its parts shall not, as such, give rise to financial gain.”⁸³

In that article, the principle of human dignity regulated in article 1 of the Convention is clearly applied. However, although organ commercialism is denied, a donor is not precluded from receiving compensation, such as compensation for loss of income due to removal.

Finally, when an infraction of any of the provisions of the Convention is incurred, Articles 23, 24 and 25, respectively, will apply. In the event that an illegal infraction of one of the principles or rights of the convention has been committed, article 23 establishes that the states must provide the corresponding judicial protection, either to prevent or to stop those infractions. Once an intervention has occurred and led to causing harm to a patient; this patient, according to article 24, will be entitled to compensation.

Finally, Article 25 requests Member States to establish appropriate sanctions in their legislation in the event of a violation of any of the provisions of the Convention.

⁸³ 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. Oviedo, ETS No.164 (1997). Article 21 Retrieved from <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/164> [accessed 31 January 2020]

The Convention has been signed by 35 States, of which 29 have ratified it, and are therefore legally bound to it.⁸⁴

3.2.4. ADDITIONAL PROTOCOL TO THE COE CONVENTION

The Additional Protocol to the Convention on Human Rights and Biomedicine, regarding the transplantation of organs and tissues of human origin,⁸⁵ was published in 2002 and its main objective was the protection of human beings in the field of organ transplants and donations. In it, principles such as solidarity when exchanging organs; equitable access to the organs available for transplantation; and the traceability of organs, tissues and cells; among others are established.

Three of the most important principles are found in Article 3 of the Protocol: traceability, equity and solidarity. In the case of traceability, it is established that it must be possible to trace organs, tissues and cells; from when they were extracted until they reached the donor, and vice versa. Regarding equity, it is important the existence of a system that allows access to patients in an equitable way and; thus, avoid possible disadvantages between them. Finally, there must be solidarity between countries that participate in the Protocol, as established in Article 3 (3).

The novelty par excellence in this Protocol is that for the first time, the ban on organ trafficking is mentioned directly, and therefore the term of “commercialization” in the European sphere, for the first time, is no longer going to be used.

⁸⁴ Directorate General of Human Rights and Legal Affairs Council of Europe. (2009). Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs (pp. 37). Joint Council of Europe/United Nations. Retrieved from <https://rm.coe.int/16805ad1bb> [accessed 31 January 2020]

⁸⁵ Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin. Strasbourg, ETS No.186 (2002). Retrieved from <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/186> [accessed 31 January 2020]

To conclude, as established in article 28, the provisions of this Protocol must be considered as additional articles to the 1997 Convention on Human Rights and Biomedicine and, therefore, will have the same binding power.

PART 2: CONSENT, PARTS INVOLVED AND VARIATIONS OF TRAFFICKING WITH ORGANS

1. TRANSPLANT TOURISM AND TRAVEL FOR TRANSPLANT

Transplant tourism is found for the first time in the Istanbul Declaration as:

*"travel for transplantation that involves organ trafficking and/or transplant commercialism or if the resources (organs, professionals and transplant centers) devoted to providing transplants to patients from outside a country undermine the country's ability to provide transplant services for its own population."*⁸⁶

In the case of travel for transplants, it consists of "the movement of organs, donors, recipients or transplant professionals across jurisdictional borders for transplant purposes," as stated in the DOI.⁸⁷

The problem with the transplant tourism ban is that not all countries prohibit it, as it is difficult to differentiate it from "travel for transplant". The difference between them, although it is well reflected in the DOI, in practice it is not that obvious.

⁸⁶ Declaration of Istanbul on Organ Trafficking and Transplant Tourism, 23: 3375–3380 (2008) (pp. 3376). Retrieved from http://www.multivu.prnewswire.com/mnr/transplantationsociety/33914/docs/33914-Declaration_of_Istanbul-Lancet.pdf [accessed 8 March 2020]

⁸⁷ Declaration of Istanbul on Organ Trafficking and Transplant Tourism, 23: 3375–3380 (2008) (pp. 3376). Retrieved from http://www.multivu.prnewswire.com/mnr/transplantationsociety/33914/docs/33914-Declaration_of_Istanbul-Lancet.pdf [accessed 8 March 2020]

Due to the lack of information on this figure, it can only be affirmed that it is clearly attached to highly complex legal issues, such as the right to privacy, the duty of medical care, the privilege of non-disclosure and finally, the oath of professional secrecy.⁸⁸

Regarding the international legislation of “transplant tourism”, we find that there is a poor and scarce definition; and the WHO, the International Society of Nephrology (ISN) and the Transplant Society (TTS) are the only organizations that have come to address the concept.

In the case of the WHO in its Resolution 57.18 of the World Health Assembly (WHA), it mentions transplant tourism and requires that States, protect the most vulnerable groups, from the figure of transplant tourism. He is also convicted in the DOI, where he has been previously defined.

The difference between the previous two regulations is that the DOI was created to influence transplant professionals, the WHO resolution is intended to influence governments.

2. “PRESUMED CONSENT” AND THE DIFFERENT TYPES OF CONSENTS

Presumed consent or consent of voluntary exclusion is understood to be one that will assume the consent of wanting to donate their organs automatically, unless the deceased in life refused to be an organ donor.

Despite the fact that many countries have this consent system, such as Spain; in practice, it is not used as much.

⁸⁸ Transplant Tourism. (2020). Retrieved 22 April 2020, from <http://hottproject.com/about-the-crime/other-crimes/transplant-tourism.html> [accessed 8 March 2020]

Apart from the consent system called "presumed consent", there are two more systems, which are collected and defined by Eurotransplant:⁸⁹

- **Informed or express consent:** This is a voluntary system of organ donation whereby relatives give permission at the time of death, usually in the knowledge that the potential donor had expressed a wish to become a donor.

- **Request required:** physicians in charge of potential donors are required to ensure that someone speaks to the family about organ donation, as is the case in the USA.

In the case of "presumed consent" there is no international regulation that regulates it; as a result, we have to obey the national legislation of each country. The content and application of the laws on "presumed consent" vary depending on the country.⁹⁰

Here are some of the countries with different types of consent:

- I. **Spain:** In 1979, the Law 30/1979, of October 27, on organ extraction and transplantation was implemented⁹¹ and was subsequently followed by various orders and decrees, including the important Royal Decree of December 30, 1999 (Nr. 2070/1999).⁹² The Law established that the removal of organs was only allowed if the deceased had not objected. In

⁸⁹ Legislation - Eurotransplant. (2020). Retrieved from <https://www.eurotransplant.org/about-eurotransplant/legislation/> [accessed 10 April 2020]

⁹⁰ Abadie, A., & Gay, S. (2006). The impact of presumed consent legislation on cadaveric organ donation: A cross-country study (pp. 600-602). Elsevier. Retrieved from <https://economics.mit.edu/files/13164> [accessed 10 April 2020]

⁹¹ Ley 30/1979, de 27 de octubre, sobre extracción y trasplante de órganos. BOE núm. 266 (1979). Retrieved from <https://www.boe.es/buscar/doc.php?id=BOE-A-1979-26445> [accessed 10 April 2020]

⁹² Real Decreto 2070/1999, de 30 de diciembre, por el que se regulan las actividades de obtención y utilización clínica de órganos humanos y la coordinación territorial en materia de donación y trasplante de órganos y tejidos. BOE núm. 3 (1999). Retrieved from <https://www.boe.es/buscar/doc.php?id=BOE-A-2000-79> [accessed 10 April 2020]

order to know if the deceased had made objections, a series of options were included, such as asking relatives, searching their personal belongings, examining their medical records, etc..⁹³

- II. **Belgium:** In Belgium the Law on Organ Harvesting and Transplantation was approved in 1986,⁹⁴ which establishes that, if a person does not want to donate, they can register their opposition, in the Central Health Authority or in a National Registry, although there is no legal obligation to do so. Therefore, the organs may be removed as long as the deceased has not objected to the relevant authorities. There is an exception, and that is that even though the doctors are not obliged to ask the deceased's family for permission or to inform them of their intention to do so; if one of them objects to this extraction, the doctor will not be able to carry it out. Still, donor objections prevail over their families ones.

Consent is presumed both for Belgian citizens and for people who have lived for at least six months in the country; plus, donors can change their minds at any time.⁹⁵

- III. **Austria:** In the case of Austria, the Organ Transplant Act of 1982 governs,⁹⁶ and establishes a strict presumed consent system. It establishes that the relatives of the deceased will not be informed in the

⁹³ Gevers, S., Janssen, A., & Friele, R. (2004). Consent Systems for Post Mortem Organ Donation in Europe. In *European Journal of Health Law*: 11, 2004, nr. 2, p. 175-186 (p. 179). Nivel. Retrieved from <http://postprint.nivel.nl/PPpp1930.pdf> [accessed 11 April 2020]

⁹⁴ 13 JUIN 1986. - Loi sur le prélèvement et la transplantation d'organes, (M.B. 14/02/1987) (1987). Retrieved from https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn=2012070308 [accessed 11 April 2020]

⁹⁵ Michielsens, P. (1996). Presumed consent to organ donation: 10 years' experience in Belgium. In *Journal of the Royal Society of Medicine* (pp. 663-666). Retrieved from <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1296026/> [accessed 11 April 2020]

⁹⁶ Bundesgesetzblatt für die Republik Österreich, 18 June 1982, Serial No. 273 (1982). Retrieved from https://www.ris.bka.gv.at/Dokumente/BgblPdf/1982_273_0/1982_273_0.pdf [accessed 12 April 2020]

event of removal of the deceased's organs, much less will they be able to refuse the removal.

IV. **France:** In France, the Caillavet Law applies, which was approved in December 1976,⁹⁷ establishing a strict presumed consent system. In 1978, an Additional Decree⁹⁸ was approved, stating that, relatives could indicate whether the donor had objections or declare their desire not to donate despite having died.⁹⁹ It is currently governed by Loi 94-654, also known as one of the three laws of bioethics, but the regulation of the “presumed consent” remains the same as established by the Decree.¹⁰⁰

V. **Brazil:** In Brazil, the “presumed consent” was legally adopted in 1997 with Law No. 9,434, De 4 De Fevereiro De 1997¹⁰¹; but the Brazilian

⁹⁷ Loi n°76-1181 du 22 décembre 1976 relative aux prélèvements d'organes, n° 76-1181 (1976). Retrieved from <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000699407> [accessed 12 April 2020]

⁹⁸ Décret n°78-501 du 31 mars 1978 pris pour l'application de la loi du 22 décembre 1976 relative aux prélèvements d'organes, n° 78-501 (1978). Retrieved from https://www.legifrance.gouv.fr/affichTexte.do?jsessionid=EC02D8009B7687D21F0482668679B95A.tpdjo07v_2?cidTexte=JORFTEXT000000702669&dateTexte=19970405 [accessed 12 April 2020]

⁹⁹ Morris, E. (2003). The organ trail: express versus presumed consent as paths to blaze in solving a critical shortage. In Spec Law Dig Health Care Law 295:9-34 (p. 1135). Retrieved from https://heinonline.org/HOL/Page?handle=hein.journals/kentlj90&div=45&g_sent=1&casa_token=YqSiY_jDhaIAAAAA:SDj7mi_sLXV0WusjtHbp7GK8wNGpGZydLNCakfFiSeUMyWaF2j6Dypps42Xw-pxbE3d_06CdF9I&collection=journals [accessed 12 April 2020]

¹⁰⁰ LOI no 94-654 du 29 juillet 1994 relative au don et à l'utilisation des éléments et produits du corps humain, à l'assistance médicale à la procréation et au diagnostic prénatal (1), no 94-654 (1994). Retrieved from <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000549618&categorieLien=id> [accessed 12 April 2020]

¹⁰¹ Lei de Transplantes; Lei de Remoção de Órgãos e Tecidos; Lei da Retirada Compulsória de Órgãos de 4 de Fevereiro de 1997, n° 9.434 (1997). Retrieved from <https://www2.camara.leg.br/legin/fed/lei/1997/lei-9434-4-fevereiro-1997-372347-norma-pl.html> [accessed 12 April 2020]

Medical Association together with the Federal Council of Medicine criticized the law saying that, most doctors would not have wanted to remove the organs, without prior family consent; even though it was required by law, because it constituted a violation of the deceased rights and medical ethics, forcing doctors to participate in practices that were contrary to their consciences.¹⁰²

- VI. **Singapore:** In 1987 the Human Organ Transplant Act 1987 (No. 17 of 1987)¹⁰³ was approved and, determined that all citizens when they reach the age of majority, in Singapore are 18 years old, a letter will be sent to them informing that if they do not oppose or make any explicit objection, they will be considered as their consent for organ donation was given.¹⁰⁴

A rather particular feature of consent legislation is that, not only depends and varies at the state level, but it also can vary at the local or provincial level. A clear example is Wales, which at the end of 2015 decided to change legislation, and add the “presumed consent” in its own legislation, while the rest of the United Kingdom maintains “informed consent” legislation.

3. DONORS AND RECIPIENTS OF ORGAN TRADE

¹⁰² Bailey, E. (2020). Should the State Have Rights to Your Organs? Dissecting Brazil's Mandatory Organ Donation Law (p. 711). University of Miami Law School Institutional Repository. Retrieved from <https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1269&context=umialr> [accessed 12 April 2020]

¹⁰³ Human Organ Transplant Act 1987, No. 15 of 1987 (1987). Retrieved from <https://sso.agc.gov.sg/Acts-Supp/15-1987/Published/19880430?DocDate=19870710> [accessed 12 April 2020]

¹⁰⁴ Iyer, T. (1987). Kidneys for transplant--"opting out" law in Singapore. (pp. 131-140). Elsevier. Retrieved from <http://scholarbank.nus.sg/handle/10635/45362> [accessed 12 April 2020]

3.1. BACKGROUND AND CHARACTERISTICS OF ORGAN DONORS AND RECIPIENTS

In the case of THBOR or illegal organ trafficking there are two main figures: the donor and the recipient. We find the definition of the terms in the Global Glossary of Terms and Definitions on Donation and Transplantation created by the WHO, where states that the donor is “a human being, living or deceased, who is a source of cells, tissues or organs for the purpose of transplantation”¹⁰⁵ and that the recipient is “The human being into whom allogeneic human cells, tissues or organs were transplanted”.¹⁰⁶

Through several studies carried out over the years, it has been possible to determine characteristics that all donors or all recipients have in common with each other. In the case of donors, they all share the following points:

- People who come from developing countries, also known as "organ exporters".¹⁰⁷
- They have low levels of education or a very precarious education, reaching cases of illiterate people.
- Normally there is a lack of basic information regarding the medical issue, and therefore they are not aware of the risks and consequences of organ removal.
- They are in vulnerable positions, such as extreme poverty, being a refugee or being an illegal immigrant.

¹⁰⁵ World Health Organization. (2009). Global Glossary of Terms and Definitions on Donation and Transplantation (pp. 10 (point 26)). Geneva. Retrieved from <https://www.who.int/transplantation/activities/GlobalGlossaryonDonationTransplantation.pdf?ua=1%20pag%2010> [accessed 18 April 2020]

¹⁰⁶ World Health Organization. (2009). Global Glossary of Terms and Definitions on Donation and Transplantation (pp. 13 (point 59)). Geneva. Retrieved from <https://www.who.int/transplantation/activities/GlobalGlossaryonDonationTransplantation.pdf?ua=1%20pag%2010> [accessed 18 April 2020]

¹⁰⁷ Ambagtsheer, J. (2017). Organ Trade (p. 32). Rotterdam: Erasmus University Rotterdam. Retrieved from <https://repub.eur.nl/pub/99988> [accessed 18 April 2020]

- They are found in countries where regulation of human trafficking is practically non-existent.
- They are usually men between 18 and 30 years old.

In the case of organ recipients, they share other characteristics such as:¹⁰⁸

- Live in countries with long transplant waiting lists
- They look for transplants as preventive methods before using other methods such as dialysis.
- It gives them respect to ask the organs to relatives.
- They are not accepted on the waiting lists or have been excluded due to certain conditions.

Although the same criteria are not always followed, organ recipients usually come from a more favorable economic environment than organ suppliers, although this should not necessarily always be the case.

3.2. LEGAL CONSEQUENCES FOR RECIPIENTS AND DONORS

The purchase of organs is completely prohibited in almost all the countries of the world; hence, if it was carried out despite everything, the legal consequences for the recipients would be regulated by the Criminal Law of the country where the organ was purchased. These laws can only be applied within the territory of that same state, and therefore it will not be possible to deal with transplant tourism. A clear example is when a Spanish patient buys an organ in the territory of another state such as India, it will only be criminally responsible and prosecuted by Indian law and; thus, it cannot be prosecuted by the law of the country where he lives, in this case, Spain.

¹⁰⁸ Aronowitz, A. (2013). "Trafficking of Human Beings for the Purpose of Organ Removal. Are International Legal Instruments Effective Measures to Eradicate this Practice?" (p. 75-76). Utrecht: Utrecht University. Retrieved from https://www.researchgate.net/publication/303784028_Trafficking_of_Human_Beings_for_the_Purpose_of_Organ_Removal_Are_International_Legal_Instruments_Effective_Measures_to_Eradicate_this_Practice [accessed 18 April 2020]

In the case of Spanish criminal law, the legal consequences for organ recipient are stated in article 156 bis (3) of Organic Law 10/1995, of November 23, of the Penal Code.¹⁰⁹

Donors or also known as organ providers, are generally considered to be the main victims of these crimes, and therefore receive protection and assistance from governments.

3.3.ORGANIZATIONS AND INDIVIDUALS INVOLVED IN ORGAN TRAFFICKING

In the organ trafficking crime, the network that operates in the commission of the crime cannot act on its own; instead, it needs professional medical personnel, donors, vendors, hospital personnel, nephrologists, nurses, among others.

One of the most important figures in a trafficking network is the so-called “broker” figure who is in charge of recruiting “donors”, both internationally and locally. Another good definition for this figure is the one established in “Trafficking in part (s): The commercial kidney market in a Manila slum, the Philippines, Global Social Policy”, which defines brokers as:

*“an intermediary between a kidney buyer and seller who connects the two using his/her knowledge of medical personnel and facilities that engage in illegal transplantations. The broker’s key asset in this market is his/her greater knowledge of other stakeholders to whom the seller does not have direct access.”*¹¹⁰

¹⁰⁹ Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal. BOE núm. 281 (1995). Article 156 bis retrieved from <https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444> [accessed 18 April 2020]

¹¹⁰ Yea, S. (2010). Trafficking in part(s): The commercial kidney market in a Manila slum, Philippines (p. 372). Retrieved from

Its objective, as indicated in the description, is to establish and regulate the supplies of recipients, together with the control of logistics and payments.

Commonly in traffic networks, usually exists the figure of a corridor, but in some cases of transnational networks, there can be more than one.

In a traffic network there is not only the figure of the broker, but also figures such as local recruiters or other facilitators intervene. The basic difference between the previous ones and brokers is that; in the case of local recruiters they are “people who work to find or identify the real organ vendors / vendors.” In addition, local recruiters, as their name indicates, are in charge of operating within a single territory or within a specific geographical area. It is suspected that for each recruit that has been successfully completed, recruiters are likely to receive a monetary amount.

Apart from the above figures, the “caregivers” who accompany the organ recipients throughout their trip are also part of the network, together with hotels or safe houses where the patients wait to receive the transplant. The executors who are in charge of getting the organ safe and sound to the recipients of the other country, are also part of the network. Finally, the interpreters who facilitate the task of communication between the parties., are also included in.¹¹¹

4. RESPONSIBILITY OF MEDICAL AND HEALTH EXPERTS

When an organ trafficking or THBOR case occurs, police authorities always focus the main attention on the leaders of the trafficking networks, or the commonly known as "brokers". However, for a trafficking network to work,

https://www.researchgate.net/publication/254095845_Trafficking_in_parts_The_commercial_kidney_market_in_a_Manila_slum_Philippines [accessed 18 April 2020]

¹¹¹ European Parliament. (2015). Trafficking in Human Beings (pp. 21). Belgium. Retrieved from [https://www.europarl.europa.eu/RegData/etudes/STUD/2015/549055/EXPO_STU\(2015\)549055_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2015/549055/EXPO_STU(2015)549055_EN.pdf) [accessed 19 April 2020]

there has to be one of the key elements, such as medical professionals along with hospitals and laboratories.

Apart from these previous elements, when the procedures to remove and transplant the organs are being performed, it is also necessary the collaboration of anesthetists, surgeons, and medical specialists in the transplanted organ, together with nurses and laboratory technicians, who are also involved. Because of their intentional and voluntary way to commit the crime, they should be punished with the same sanctions as the other organisms of the trafficking network.

Unlike the crime of THB, which is penalized very harshly in the respective Penal Codes; in the cases of transplant specialists, these sanctions are lower due to the fact, that the act committed is only considered as obtaining illegal profits, according to their respective national legislations. Criminal liability can also be diminished because it is extremely difficult to determine if the doctor knew that the patient was or had the intention to commit the crime of organ trafficking or THBOR.

Transplant professionals have also an obligation to comply with the Health Law, which affects their legal responsibility. The obligations or rights to which they are subject are, for example, the duty to provide medical care, professional secrecy, etc.

Health professionals are not always directly involved in organ trafficking because of their own free will; but sometimes they get indirectly involved by unintentionally contributing to an illegal transplant, such as performing a blood and tissue test, in order to find a possible donor;¹¹² and therefore, they could be exempted from the legal duty to report their patients, for possible crimes committed.

¹¹² European Parliament. (2015). Trafficking in Human Beings (pp. 62). Belgium. Retrieved from [https://www.europarl.europa.eu/RegData/etudes/STUD/2015/549055/EXPO_STU\(2015\)549055_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2015/549055/EXPO_STU(2015)549055_EN.pdf) [accessed 19 April 2020]

Unlike the aforementioned, the Declaration of the Canadian Transplant Society¹¹³ and the Canadian Society of Nephrology on organ trafficking and transplant tourism, together with the Istanbul Declaration; established complete opposite provisions. In their documents, they incite medical professionals to ban and prevent transplant tourism, among others; despite not being binding instruments.

The fact that physicians "may refuse to provide medical records to patients or transfer their patient to another physician" as set out in the Declaration of the Canadian Transplant Society, may lead to violation of the WMA International Code Of Medical Ethics,¹¹⁴ and the consequent violation of the rights of patients.

It is clear that there is almost no legislation regarding this issue, that is why DICG, ISN¹¹⁵ and Eurotransplant¹¹⁶ have taken initiatives to involve health professionals in a debate on professional responsibilities and the possible application of a code of conduct. That is the reason why we can affirm that the EU should pay more attention to the acts of these health professionals, who in turn are complicit in trafficking networks, and apply more severe sanctions to deter them.

¹¹³ Policy Statement of Canadian Society of Transplantation and Canadian Society of Nephrology on Organ Trafficking and Transplant Tourism (2011). Retrieved from https://www.cst-transplant.ca/Library/documents/Organ_Trafficking_Transplantation_Tourism_Policy_August_2010_Final.pdf [accessed 19 April 2020]

¹¹⁴ WMA International Code Of Medical Ethics (2006). Pilanesberg. Retrieved from <https://www.wma.net/policies-post/wma-international-code-of-medical-ethics/> [accessed 19 April 2020]

¹¹⁵ United Nations High Level Meeting on Universal Health Coverage. (2019). Moving Together To Built Kidney Health Worldwide [Blog]. Retrieved from https://www.theisn.org/images/Advocacy_4_pager_2019_Final_WEB_pagebypage.pdf [accessed 19 April 2020]

¹¹⁶ Registry - Eurotransplant. (2020). Retrieved 22 April 2020, from <https://www.eurotransplant.org/professionals/registry/> [accessed 19 April 2020]

PART 3: INTERNATIONAL ANALYSIS OF TRAFFICKING WITH ORGANS CASES

1. NETCARE TRAFFICKING NETWORK, SOUTH AFRICA

1.1. BACKGROUND OF THE CASE

During 2001 and 2003, more than 100 Israeli patients underwent a kidney transplant at one of the three South African hospitals, owned by the medical company Netcare.

These patients were recruited by the broker Ilan Perry, who was responsible both for recruiting sick patients, but also potential donors. Kidney transplants were carried out in South African territory, where the broker had an agreement with the Netcare company, and their respective hospitals.

During the first months, the kidneys came from Israeli donors, who received an amount of USD 20,000 from the USD 100,000-120,000 paid by the patient to receive the transplant. As time went on, the traffic network realized that they could acquire cheaper kidneys in countries with a higher poverty level than Israel, such as Romania and Brazil; where donors agreed to give their kidney for USD 6,000; and the brokers saved USD 14,000.

Besides finding possible Brazilian donors, they also found two new recruiters, who were in charge of preparing visas, passports, preparatory blood tests, etc. Once the Brazilian donors had all the necessary documents in Brazil, they travelled to South Africa, where local actors acting as interpreters were already waiting for them, and accompanied them to their respective hotels.

According to the Human Tissue Act of 1983, on its Chapter I section 2¹¹⁷, it required that in all transplants in which the donor and the recipient were not related to each other in a family way, they must obtain prior approval from at least two competent authorities, such as ministerial advisers. In the case of

¹¹⁷ Human Tissue Act (1983). South Africa. Retrieved from <http://www.kznhealth.gov.za/humantissueact.pdf>. [accessed in 23 of April]

Netcare, the brokers and their accomplices had all recipients and donors sign documents, where they claimed that they were related to each other, when it was not true. Once after, all the corresponding blood tests had been carried out in a blood bank; where the bank workers were in charge of carrying out the cross-comparison of both parties. After this process, the intervention of transplant was carried out and the consequent recovery; in one of the Netcare hospitals, which were in Johannesburg, Cape Town and Durban.¹¹⁸

In the end, apart from the two brokers and Netcare, other actors appeared such as two transplant coordinators, a South African nephrologist, four transplant surgeons and finally several interpreters.

1.2. INVESTIGATION PROCESS

The police investigation began in 2003 through a call made by an claimant, to which was later added the information given by the anthropologist Nancy Scheper-Hughes and her organization Organs Watch, which detected different indications that pointed to a possible case of transplants with commercialized organs, at the Hospital San Agustín.

The complainant who uncovered the entire illegal trafficking network was one of the organization brokers, who denounced a donor for having left with the money received in advance and without having donated his kidney. The police then detained the donor and his wife at the airport and took a statement from them.

A few days later, the police obtained a search warrant to inspect Netcare facilities, confiscating relevant files such as patient records and surgery reports. They also searched the blood bank and also confiscated the crossmatch tests.

¹¹⁸ European Parliament. (2015). *Trafficking in Human Beings* (pp. 13-14). Belgium. Retrieved from [https://www.europarl.europa.eu/RegData/etudes/STUD/2015/549055/EXPO_STU\(2015\)549055_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2015/549055/EXPO_STU(2015)549055_EN.pdf) [accessed 21 April 2020]

Once all the previously confiscated documents were scrupulously analyzed, the continuous falsifications made to relate the recipients with the donors was clearly demonstrated; and subsequently a nephrologist, a local coordinator, an organ agent and an interpreter were arrested.

After the arrest, statements were taken and hearings were held, including traveling to Brazil and Romania to interview different donors and brokers from local bodies. As for Israel, the collaboration was much more difficult and until the case against the surgeons and brokers was withdrawn, the investigators were unable to visit the country. However, despite all the evidence, the South African state decided to provisionally drop the charges against Netcare in 2007, due to two main reasons: the inability to extradite Ilan Perry to South Africa and the delay in the evidence by the state. In 2010 the charges were reinstated again.

1.3. JUDGMENT AND CHARGES

In 2010, charges were filed against two transplant coordinators, four surgeons, a nephrologist, an interpreter, and the company Netcare Corporation. Of all the above, only six were convicted: the four surgeons and the two coordinators.

In the case of the surgeons and coordinators, they were accused of participating in illegal transplants, and arrested in 2004 and 2005, but released on bail. In 2012, the permanent suspension of the trial was requested due to the delay in starting the trial and the lack of evidence, which was granted.

In the case of Netcare, it was sentenced to a fine of USD 380,000 (equivalent to 4 million rand)¹¹⁹, for having carried out more than 109 illegal transplants (five of them to minors), involving recipients and donors without any type of relationship despite what the forged documents established. In addition, Netcare lost a sum of USD 345,000 (equivalent to 3.8 million rand) to the Asset

¹¹⁹ The rand is the currency of legal tender in South Africa since 1961, year when it replaced the South African pound. It is divided into 100 cents. Retrieved from <https://www.globalexchange.es/en/currencies-of-the-world/south-african-rand>

Forfeiture Unit. Ultimately, the CEO of Netcare was charged with criminal charges but dropped as a result of reaching a plea agreement.¹²⁰

According to the calculation sheet of the Netcare case, the charges with which they were accused were: fraud; illegal acquisition; use or supply of (minor) tissues, blood or gametes; use or possession of profits from illegal activities; illegal receipt of (minor) payments; falsification and statement.

As for Ilan Perry, the first broker, he was arrested in his home country, Israel, for tax evasion, but was later released on bail. However, he decided to flee Israel, but was detained in Germany, thanks to an international arrest warrant, where he was finally released again.

On the other hand, the Brazilian broker was sentenced to nine years of prison in his country but decided to escape in 2009. Later, in 2013, he was arrested in Rome due to an international arrest warrant and was extradited in 2014 to Brazil.

1.4. LEGAL LOOPHOLES AND OTHER PROBLEMS

Organ trading is currently prohibited in most countries of the world including South Africa; but at the time of the commission of the crimes, the Law on which South Africa based its prohibition was old and where many loopholes existed.

At the time, when the illegal transplants were committed, South Africa did not have any legislation specifically establishing the ban on THBOR or organ trafficking. The only applicable laws were the Human Tissues Law of 1983 and the Organized Crime Prevention Law of 1998; which were neither adequate nor applicable for the case. Furthermore, one of the main gaps in the Human Tissue Law was that it was only directed towards people or organizations that received monetary remuneration from an organ; however, the purchase of organs was

¹²⁰ European Parliament. (2015). *Trafficking in Human Beings* (pp. 13-14). Belgium. Retrieved from [https://www.europarl.europa.eu/RegData/etudes/STUD/2015/549055/EXPO_STU\(2015\)549055_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2015/549055/EXPO_STU(2015)549055_EN.pdf) [accessed 21 April 2020]

not illegal, just as it was not illegal for authorized health institutions to receive payments for an organ.

In this Law, there were no regulations regarding the purchase of organ intermediation, transnational transplants, nor provisions regarding specific relationships between donors and recipients.

Currently, in South Africa there is a Law to Prevent and Combat Trafficking in Human Beings, and it is governed in accordance with the Palermo Protocol (2013). As it was a post-trial law, the defendants could not be prosecuted by THBOR despite the fact that there were many indications that it was a crime of trafficking in persons, including the essential elements to make it a crime, such as donor coercion, abuse of a position of vulnerability by recruiting people with extreme levels of poverty and without the possibility of obtaining adequate post-operative care in their countries.

2. MEDICUS TRAFFICKING NETWORK, KOSOVO

2.1. BACKGROUND OF THE CASE

Throughout 2008, 24 transplants with commercialized organs were performed at the Medicus clinic, located in Pristina (Kosovo). The clinic was owned by Mr. Lufti Dervishi, who also practiced as a urologist and was responsible for plotting the entire illegal trafficking network.

Dervishi decided to attend the 20th Annual Congress of the European Urological Association that was held in Istanbul in 2005, where he spoke of the need for kidney transplants in Kosovo. In addition, he also added the growing need and desire to be able to locate a doctor specialized in the subject.

Due to attending this Congress, Dervishi met Yusuf Sonmez, a Turkish transplant surgeon, whom he contacted in 2006. From there they decided,

together with an Israeli organ intermediary and the director of Medicus, to perform kidney transplants in Kosovo.

During the month of December 2007, the surgeon asked the Kosovo Ministry of Health (MOH) for the necessary license to practice as a non-citizen health professional; which was granted to him in January 2008. They also decided to sign a work contract between the surgeon and the private Medicus clinic, to handle kidney transplants.

Dervishi, director general of the clinic, applied for the granting of a license to make the kidneys possible. To do this, he had to hold several meetings with senior officials in the field of health such as the Minister of Health and his Advisor. The main reasons for requesting the license were that he met the requirements and conditions necessary to carry them out, as well as his desire that local professionals could help their own citizens, avoiding their displacement to other countries to carry out the same intervention. The requested license was contrary to the Kosovo Health Law where transplants were prohibited, but the Ministry of Health still approved it. The license, apart from contravening the main Kosovo Health Law, also did not meet the conditions or requirements to be considered as a real “license”.

After obtaining the license, a number of 24 transplants were carried out among donors from countries such as Israel, Moldova, Turkey, Russia, Ukraine, Belarus and Kazakhstan; along with receivers from Ukraine, Israel, Turkey, Poland, Canada and Germany.

Donors between the ages of 20 and 30 contacted the brokers through Internet pages or newspaper advertisements. From there they had to carry out blood tests, and fly to the Pristina airport, where they had to present some letters of invitation from the private Medicus clinic, establishing that they would undergo a review of heart disease.

Once the entire procedure was achieved, they were taken to the clinic, where they practically had no time to give consent voluntarily and consciously, because directly after signing the necessary documents, they underwent the organ removal intervention. The postoperative period followed the same speed; Hence, after 4 or 5 days they were sent back home, most of the time without the promised amount of USD 30,000 or only with a part of it.

In the case of the documents they had to sign, most of them were false statements written in their local language where donors could not understand, along with the "donation deeds", which consisted of claiming that they were donating their organs for reasons altruistic, without them knowing it.

The recipients of this operation were people over 50, desperate to find a solution, paying up to USD 108,000 for a kidney.

2.2. INVESTIGATIONS

For the first time in 2008, the Kosovo police authorities and their Immigration service began to pay attention to the number of foreigners arriving in the country with letters from the Medicus Clinic. In these letters, foreigners were invited to carry out a heart treatment for cardiac problems; which set off alarms among the authorities, since that clinic was not known for treating that kind of diseases. In addition, the treatments in the countries of origin of those foreigners were considered better than those that could be performed in Kosovo.

A few months later, the researcher discovered that at that time, two "patients" involved in THB were in Kosovo, but they were planning to return to their respective countries. Days later, these two people, together with an Israeli broker, were detained and interrogated at the Pristina airport. One of them, the donor, while he was being interrogated, showed evident signs of physical discomfort. After a lot of questions, he explained that he had sold his kidney for USD15,000. Once he confessed, he underwent a medical examination, which

confirmed that he was in terrible medical conditions and that he was unable to travel.

After this confession, the private clinic Medicus was registered, and the recipient of the interrogated donor's kidney was also identified.. The investigation was carried out by the local police, the Organized Crime Department and the international police of the United Nations Mission in Kosovo (UNMIK).

Both the owner and the director of Medicus were arrested and their records were confiscated. Subsequently, the investigation was led by UNMIK, until the EU Rule of Law Mission in Kosovo (EULEX) was deployed and decided to carry out this complex investigation.

The main problems of the investigation were three:

- Kosovo's political elite was allegedly related to the owners of Medicus, and it was suspected that they could be involved in trafficking.
- The clinic was searched without the police having issued a court order.
- There was a lack of legal assistance, of an international nature, as Kosovo was not a sovereign state according to the points of view of the different countries.

2.3. JUDGEMENT AND CHARGES

In the trial, six out of 24 donors declared, and were considered victims of abuse of their vulnerable position; and in certain cases, also victims of fraud / deceit, coercion apart from being exploited with the intention of removing their kidneys.

In 2013, the urologist and the owner of Medicus; together with the director and the Turkish surgeon were found guilty of THBOR (included in article 139 of the Kosovo Penal Code) and also accused of organized crime.

The owner of the clinic was also accused of illegal medical care, apart from other common charges such as: abuse of official position, fraud, falsification of documents and inflicting serious bodily harm. The sentences included penalties of up to eight years along with a fine of 10,000 euros. Both the Israeli broker and urologist left Kosovo after being detained and were wanted under Interpol's International Order.

2.4.CONCLUSIONS OF THE CASE

The Medicus case is the first case in which THBOR is successfully prosecuted by doctors, which focused international attention. Unlike the previous South African case, in this case Kosovo already had legislation to convict defendants under the THBO provision, which corresponds to Article 139 (1) of the CCK.¹²¹

One of the main reasons for choosing Kosovo as a country to commit a crime of this caliber is the lack of application of the law in certain cases; along with the socioeconomic reasons of the country; and its extremely weak organ transplant infrastructure. In addition, it should be remembered that, at the time the crimes were committed, Kosovo was in the post-war period and therefore there was a fairly wide legal vacuum, reaching a period of quite unstable transition and without a central authority figure.

¹²¹ UNMIK Regulation On the Provisional Criminal Code of Kosovo of 6 July 2003. No. 2003/25 (2003). Article 138. Retrieved from http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=66365&p_country=YUG&p_classification=01 [accessed 18 April 2020]

CONCLUSIONS

Any type of illegal trafficking involving organs is usually transnational in nature, thus facilitating travel between countries and connections between brokers and their victims.

Organ trafficking as a general concept is not simply a medical problem, it is also a legal and socio-economic one. As for the legal facet, which is the one that corresponds to us to examine in this work, it is clearly affected by not finishing the determination of the scope and the definition of such concept. While it is true, in recent decades, international organizations such as the UN, the Council of Europe, the OSCE or the European Union have focused more on developing legal instruments and an appropriate legal framework for the international problem known as THB, which unfortunately has increased quite a bit.

Despite the creation of this legal framework, there are still legal gaps in THBOR, since it does not cover the totality of organ trafficking and its different types; hence they are being unnoticed and many times, without being prosecuted. However, in recent years, regulatory measures regarding organ donation and transplantation have been developed, establishing a solid foundation when applying the law against THBOR.

Still, to reach a point of absolute control of the situation and, if possible, the complete abolition of organ trafficking, a binding international legal instrument is required. The function of this instrument should be the criminalization and punishment of all types of organ trafficking, such as illegal harvesting without involving human trafficking.

Another necessary measure regarding the elimination of this global problem is the prevention. The main function of prevention is to avoid the crime from being committed; and therefore, education and awareness programs are needed, especially in the most vulnerable groups, such as the impoverished and young people.

Along with the two previous measures, the promulgation of organ donations from deceased people could be added, and so on; streamline transplant waiting lists.

Organ traceability and data collection from transplant tourists may also be a future applicable measure, since, if strictly applied, it will be possible to prevent any organ illegally removed from entering the national transplant system, without having been previously detected or accounted for.

Finally, the responsibility of both donors and recipients should be clearly established; together with the prohibition of the reimbursement of illegal transplants, and last but not least, the creation and development of a Code of action for health professionals.

Although these illegal conducts are normally carried out in third world or developing countries, it does not imply that developed and richer countries can escape reality; since with the money they provide, they are directly or indirectly promoting and supporting illegal trafficking and human trafficking networks.

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