

FEELING EMPTY? ORGAN TRAFFICKING & TRADE: THE BLACK MARKET FOR HUMAN ORGANS

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Abstract

Organ trafficking is the recruitment, transport, transfer, harboring, or receipt of persons by means of force, fraud, coercion, abduction, positions of vulnerability and exploitation, with the purpose being the removal of their organ(s) for transplantation. Currently, organ trafficking is affecting countries such as China, Mexico, Kosovo, South Africa, Mozambique, India, the United States, and Israel. These countries each play different roles in organ trafficking; some serve as countries of origin, others are destination countries, and a few are both origin and destination countries. This article will examine (1) the history of organ trafficking and how it takes place, and (2) why organ trafficking is a growing problem and how its increased demand is exasperating the problem. This article will also (3) analyze the legal responses to combating organ trafficking, (4) make predictions about how current United States legislation will be implemented and enforced to prevent organ trafficking, and (5) recommend how to combat organ trafficking by creating alternative methods to legally obtain organs.

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Introduction

Organ trafficking has been depriving innocent people of their fundamental right to life for decades.¹ Imagine living in a poor country, where you wake up in the morning and set out to find work and food for the day. As you walk peacefully to your home at the end of the day, you are grabbed and thrown into the back of an unmarked truck.² You wake up, screaming from excruciating pain, as a surgeon slices through your flesh to remove your kidney. Due to the costs associated with such a procedure, no anesthesia is administered and no medication is given to prevent infection.³ In the event that the surgery does not go as planned, no forms of emergency assistance are available. Your body is then dumped on a side street, and you are extremely lucky if you live. Should you report the incident to government officials? What if the government is actually involved in this inhumane activity?⁴

¹ Michael A. Bos, *Transplant Tourism and Organ Trafficking* (Oct. 2, 2007), available at http://www.esot.org/Files/Elpat/Content_Files/KmULJPresentationBos.pdf (reporting that nations are aware of trafficking and have been implementing laws to prevent organ trafficking since 2000). The exact year when organ trafficking began is not clear. However, in 2000 the United Nations adopted the U.N. Trafficking Protocol, defining trafficking as the “exploitation of human beings for sexual exploitation, forced labor, slavery, servitude. . .” and it included the “exploitation for the removal of organs as a form of trafficking.” *Id.*

² STEPHEN WILKINSON, *BODIES FOR SALE: ETHICS AND EXPLOITATION IN THE HUMAN BODY TRADE* 101-104 (2007) (stating that the sale of organs occurs in various ways: (1) organs can be stolen and sold for their cash value, where people are sometimes killed in the process; (2) in open markets, where organs from people who have died naturally or in accidents can be donated; and (3) by living donors who sell organs to people in need in order to pay debts); see also Ulla Fasting et al., *Children Sold for Transplants: Medical and Legal Aspects*, 5 *NURSE ETHICS* J. 518, 519 (1998) (“Now and then there are reports that children have been kidnapped, only to reappear later lacking one kidney, or that they simply disappear and are subsequently killed to have all their transplantable organs removed for profit.”).

³ H.R. 6573, 112th Cong. §2 (3)-(6) (2012) (outlining what the profit brokers and doctors receive for the surgeries).

⁴ *Id.* at (6)-(13) (findings made by Congress outlining how children are abducted and sold for organs and how some governments are involved in the black market for organs).

There are conflicting views on whether people are actually kidnapped for their organs.⁵ In fact, many believe these stories are just myths.⁶ However, there are reported accounts suggesting that abduction of organs is a harsh reality of organ trafficking.⁷ Reports indicate organ trafficking is so prevalent that there is a surplus of organs available for transplantation.⁸ Furthermore, there is evidence of governmental involvement, which contributes to and exacerbates the problem.⁹ Fortunately, most countries have enacted laws to prevent and prohibit organ trafficking from occurring.¹⁰

This article will examine organ trafficking on both domestic

⁵ Kathleen Scalise, *Extreme Research: Nancy Scheper-Hughes and Lawrence Cohen*, BERKELEY MAGAZINE (2000), http://berkeley.edu/news/magazine/summer_99/feature_darkness_scheper.html (providing a look into the beliefs of Lawrence Cohen and Nancy Scheper-Hughes, who have been researching organ trafficking in South America in an attempt to find the truth. Both professors at Berkeley University believe allegations of children “being kidnapped and murdered for their organs . . . are urban legends based on mistrust of government and people’s real fear of losing rights to their own bodies”).

⁶ *Id.*

⁷ Elena Guskova, *The Hunt: “Me and Military Criminals,”* GLOBAL RESEARCH (June 22, 2008), <http://www.globalresearch.ca/index.php?context=va&aid=9418> (discussing a book on man-hunt by the former Prosecutor for the International Criminal Tribunal of the former Yugoslavia that gives accounts of women and children corpses found with missing body parts).

⁸ Michael Finkel, *Complications*, N.Y. TIMES (May 27, 2001), <http://www.nytimes.com/2001/05/27/magazine/complications.html> (“There is actually a global surplus of kidneys-- sellers in India and Iraq lined up at hospitals, often willing to part with a kidney for less than \$1,000 -- and therefore no need to steal any.”).

⁹ Joan E. Hemphill, *China’s Practice of Procuring Organs from Executed Prisoners: Human Rights Groups Must Narrowly Tailor their Criticism and Endorse the Chinese Constitution to End Abuses*, 16 PAC. RIM L. & POL’Y J. 431, 431 (2007) (stating that in 1984 China authorized “Temporary Rules Concerning the Utilization of Corpses or Organs from the Corpses of Executed Criminals”).

¹⁰ Secretary-General, Council of Europe, *Replies to the Questionnaire for Member States on Organ Trafficking*, Ques. 5b, CDBI/INF, WORLD HEALTH ORGANIZATION (June 2, 2004), available at http://www.who.int/ethics/en/ETH_CDBI_CDSP_questionnaire_Organ_Trafic.pdf [hereinafter Secretary-General, *Questionnaire*] (listing eighteen countries that have laws prohibiting the sale or the purchase of an organ in another country).

and international levels¹¹ The wealthy hold an advantage in obtaining organs because they have the means to afford this high-priced commodity.¹² To provide a shameful example, United States citizens often travel internationally to receive organs extracted illegally from innocent people.¹³ Even for someone willing to pay for an illegally acquired organ, legal and ethical issues remain because residents of poor communities will be targeted for organ trafficking due to need, absence of information or the lack of other options.¹⁴ The increased demand for organs and the high prices people are willing to pay for the organs lead to involvement in organ trafficking from all social classes.¹⁵ The level of concern regarding organ trafficking was heightened in the United States when the Federal Bureau of Investigation (FBI) uncovered a New York City resident acting as an organ broker, bringing organ donors from Israel to the United States.¹⁶ Unfortunately, organ trafficking is an international problem

¹¹ Yosuke Shimazono, *The State of the International Organ Trade: A Provisional Picture Based on Integration of Available Information*, WORLD HEALTH ORG., Vol. 85, No. 2 (Dec. 2007), <http://www.who.int/bulletin/volumes/85/12/06-039370/en/> (explaining how live donors are brought from other countries to the U.S. or often organ recipients travel outside the U.S. to receive organs from live donors); Kishore D. Phadke & Urmila Anandh, *Ethics of Paid Organ Donation*, 17 PEDIATRIC NEPHROLOGY J. 309, 309-311 (May 2002) (“The concept of paid organ donation is . . . prevalent in many other developing countries.”).

¹² Scalise, *supra* note 5 (explaining the majority of organs are sold to the wealthy because of the high cost associated); *Global Black Market Preys on Poor Donors*, CQ GLOBAL RESEARCHER (Feb. 21, 2003), available at <http://library.cqpress.com/cqresearcher/document.php?id=cqresrre2003022100> [hereinafter *Global Black Market*].

¹³ Sheri R. Glaser, *Formula to Stop the Illegal Organ Trade: Presumed Consent Laws and Mandatory Reporting Requirements for Doctors*, 12 HUM. RTS. BRIEF 20, 20 (2005), available at <http://www.wcl.american.edu/hrbrief/12/2glaser.pdf> (explaining organs are extracted through bribery, force, or coercion).

¹⁴ *Id.* at 22.

¹⁵ Scalise, *supra* note 5.

¹⁶ *United States v. Rosenbaum*, 585 F.3d 259 (6th Cir. 2009); David Porter & Carla K. Johnson, *First Case of Organ Trafficking in U.S.*, MSNBC (July 24, 2009), http://www.msnbc.msn.com/id/32132371/ns/us_news-crime_and_courts/t/first-case-organ-trafficking-us/#.Tmff8HO0Y1t (providing that Levy Izhak Rosenbaum, serving as a broker, was responsible in “the sale of black-market kidneys, buying organs from vulnerable people from Israel for \$10,000 and selling

and occurs not just in poor and underdeveloped countries.¹⁷

Part I introduces the history of organ trafficking, how it takes place, and why it is a growing problem on a domestic and international level. Part II discusses the conflicting interests of those involved in organ trafficking and its moral implications. Part III explores the legal responses to organ trafficking and analyzes the evolution of human rights laws specifically dealing with organ trafficking. Also, it examines recent legislation, the controlling factors in enactment of such legislation, and proposed legislation. Part IV predicts future trends in implementing and enforcing laws to prevent organ trafficking, and the effects it may have on organ donations. Part V concludes with recommendations to ensure that human beings will have the means to legally obtain organs in an attempt to prevent organ trafficking.

I. Problems Associated with Organ Trafficking

Organ trafficking entails the recruitment, transport, 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, of a position of vulnerability, 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 by the removal of organs, tissues or cells for transplantation.¹⁸

them to desperate patients in the U.S. for as much as \$160,000”).

¹⁷ Fasting, *supra* note 2, at 518 (“Developments in transplantation techniques and increasing professional expertise have led to substantially higher percentages of successful transplants, but also to a significant imbalance in the demand for and supply of human organs, thus creating the basis for a highly profitable black market trade.”).

¹⁸ D.A. Budiana-Saberi & F.L. Delmonico, *Organ Trafficking and Transplant Tourism: A Commentary on the Global Realities*, 8 AM. J. TRANSPLANTATION 925, 925, (2008); *see also* *The Declaration of Istanbul on Organ Trafficking and Transplant Tourism*, 3 CLINICAL J. AM. SOC’Y NEPHROLOGY 1227-1231 (2008), available at <http://cjasn.asnjournals.org/content/3/5/1227.full.pdf+html>.

The issue of organ trafficking is increasing globally. Countries such as China, Mexico, Kosovo, South Africa, Mozambique, India, the United States, and Israel are among those most involved.¹⁹ Also, the United States contributes to the problem as one of the major destination countries for trafficked organs.²⁰ Organ trafficking commonly occurs in the following ways:

- (1) Traffickers force or deceive the victims into giving up an organ;
- (2) victims formally or informally agree to sell an organ (and are cheated because they are not paid for the organ or are paid less than the promised price); and
- (3) prisoners are forced by the government to give up their organs.²¹

It is difficult to account for the number of victims. Internationally, organ trafficking cases rarely are reported.²² In order to avoid media attention, many governments do not publicize crimes of organ trafficking.²³ Evidence of the crimes rarely is traceable because donors are often killed to enable vital organs to be removed and delivered swiftly to those depending on them to live.²⁴ Organ trafficking has created a high-profit market on an international level due to the high demand for organs.²⁵ People who face the probability

¹⁹ Elaine Pearson, *Coercion in the Kidney Trade? A Background Study on Trafficking in Human Organs Worldwide* 20-7, BUNDESMINISTERIUM FÜR WIRTSCHAFTLICHE ZUSAMMENARBEIT UND ENTWICKLUNG (Apr. 2004), available at http://www.childtrafficking.com/Docs/gtz_2004_organ_study_3.pdf.

²⁰ Elizabeth Pugliese, *Organ Trafficking and the TVPA: Why One Word Makes a Difference in International Enforcement Efforts*, 24 J. CONTEMP. HEALTH L. & POL'Y 181, 182 (2007).

²¹ Glaser, *supra* note 13, at 20.

²² Fasting, *supra* note 2, at 520 ("As is characteristic of a highly profitable criminal market (some parallels may be drawn with narcotics, weapons, etc.), hard facts are extremely difficult to obtain.").

²³ *Id.* ("When seemingly reliable information is made public, the source of such information is often 'silenced.'").

²⁴ *Id.* (explaining how children are often killed in order to have all their organs removed).

²⁵ Fasting, *supra* note 2, at 518.

of imminent death are willing to pay any price to survive.²⁶

Currently, many governments have enacted either criminal laws prohibiting organ trafficking or criminal laws specifically prohibiting the sale of organs.²⁷ However, governments rarely enforce these laws, and within these laws there exist loopholes permitting evasion. For example, laws fail to specify who shall take responsibility for the criminal act of organ trafficking.²⁸ Each country plays a different role in organ trafficking and may be classified as a country of origin, country of destination, or both. Countries of origin are the main source of organs. The organs extracted may remain within the country of origin or be exported to another country, the destination country. The countries that generate organ recipients and often serve as a location for such transplants are classified as destination countries. Few countries are both a source of origin and destination.

This section explores problems created by organ trafficking in each of the countries where it is most prevalent. Analyzing countries such as China, Mexico, Kosovo, South Africa, Mozambique, India, the United States, and Israel allows for a better understanding of the harmful implications caused by organ trafficking and classifies each country based on their connection with organ trafficking.²⁹

²⁶ Larry Rother, *The Organ Trade: A Global Black Market; Tracking the Sale of a Kidney on a Path of Poverty and Hope*, N.Y. TIMES (May 23, 2004), <http://www.nytimes.com/2004/05/23/world/organ-trade-global-black-market-tracking-sale-kidney-path-poverty-hope.html?pagewanted=all&src=pm>. During an interview with an American woman who traveled abroad to receive an organ, she told the news reporter her decision “was not an easy one, but was necessary nonetheless.” *Id.* The American woman was advised by her doctors that she needed to get a kidney transplant any way possible or she could expect to die; that is when she made the decision to travel abroad and receive an organ from an unrelated donor. *Id.*

²⁷ See *infra* Part III.

²⁸ Glaser, *supra* note 13, at 20.

²⁹ Ami Cholia, *Illegal Organ Trafficking Poses a Global Problem*, HUFFINGTON POST (July 24, 2009), http://www.huffingtonpost.com/2009/07/24/illegal-organ-trafficking_n_244686.html.

A. *Countries of Origin*1. *China*

China's involvement and interest in organ trafficking is unique.³⁰ China is one of the few countries that permit the sale of organs taken from prisoners who are sentenced to death.³¹ The government in China is involved in organ sales for profit, domestically and internationally.³² The Chinese government, in legalizing the use of organs from prisoners, created an open market making organs easily available for foreign buyers.³³ Chinese transplant specialists estimate prisoner cadavers make up about 99 percent of organs used in transplant surgeries.³⁴ The more prisoners the Chinese government can execute,³⁵ the more organs they have at

³⁰ Stephen Wigmore, *Are China's Prisoners Being Killed to Order?* TIMES HIGHER EDUCATION (May 19, 2006), available at <http://www.times-highereducation.co.uk/story.asp?storycode=203225§ioncode=26> (stating the British Transplant Society "issued a press release drawing attention to China's use of executed prisoners" to acquire organs in transplant operations and their sale to British patients seeking transplants overseas).

³¹ Hemphill, *supra* note 9, at 436; Ros Davidson, *Death Row Black Market for Organs*, SUNDAY HERALD (Eng.), Nov. 25, 2011, available at <http://www.highbeam.com/doc/1P2-19046654.html>.

³² Jonathan Watts, *China Introduces New Rules to Deter Human Organ Trade*, 369 THE LANCET 1917-18 (2007).

³³ Hemphill, *supra* note 9, at 436.

³⁴ *Id.* at 436-37.

³⁵ *Death Penalty 2012: Despite Setbacks, a death penalty-free world came closer*, AMNESTY INT'L (Apr. 10, 2013), <http://www.amnesty.org/en/for-media/press-releases/death-penalty-2012-despite-setbacks-death-penalty-free-world-came-closer-20> ("In 2012, at least 682 executions were known to have carried out worldwide... China once again executed more people than the rest of the world put together, but due to the secrecy surrounding the use of the death penalty in the country it was not possible to obtain accurate figures on the use of capital punishment in China"); Erik Eckholm, *Arrests Put Focus on Human Organs From China*, N.Y. TIMES (Feb. 25, 1998), <http://www.nytimes.com/1998/02/25/nyregion/arrests-put-focus-on-human-organs-from-china.html?src=pm> (explaining the overwhelming amount of people China sentences to death, and how many were executed). In 1996 Amnesty International stated, "4,367 people were put to death [in China], while more than 6,100 received death sentences." *Id.*

their disposition to sell at highly escalated prices.³⁶

Although China's constitution requires the "government to preserve and protect human rights,"³⁷ in 1984, China passed the "Temporary Rules Concerning the Utilization of Corpses or Organs from the Corpses of Executed Criminals" (TRCU) order.³⁸ The legal removal of organs from prisoners sparked controversy among human rights activists.³⁹ One claim is that the TRCU order fails to protect the rights of prisoners' and there are reports of prisoner abuse during the organ removal process.⁴⁰ For example, it is common practice for prisoners to be shot in the back of the head during execution.⁴¹ Even

³⁶ Hemphill, *supra* note 9, at 436–37; Christine Gorman et al., *Body Parts for Sale*, TIME MAGAZINE (Mar. 9, 1998), <http://www.time.com/time/magazine/article/0,9171,987948,00.html> ("Some activists fear that Chinese officials may have broadened the kinds of crimes punishable by death in order to line their own pockets."); *see also* H.R. 6573, 112th Cong. §2(15) (2012) ("Senator Patrik Vankrunkelsven of Belgium reported that in November 2006 he called two hospitals in China and was offered a kidney by each facility for the price of 50,000 Euros.").

³⁷ Hemphill, *supra* note 9, at 431.

³⁸ *Id.*; *see* Temporary Rules Concerning the Utilization of Corpses or Organs from the Corpses of Executed Criminals [hereinafter TRCU]. The 1984 order makes it legal to remove organs from prisoners sentenced to death provided the prisoner or family consent or the body is unclaimed. *Id.* The order provides that death must be confirmed by the supervising prosecutorial official before the corpse may be disposed of or used for any medical purposes. *Id.*; *see also* Human Rights Watch/Asia, Country Report 1994: Organ Procurement and Judicial Execution in China, August 1994, available at http://www.hrw.org/reports/1994/china1/china_948.htm#_1_21 (providing an English translation of China's TRCU Order).

³⁹ Gorman, *supra* note 36 (explaining that with "China's commercial use of prisoner organs, and mounting evidence of prisoner abuse, human rights groups worry that China's organ-procurement practice leads to the mistreatment of prisoners").

⁴⁰ Hemphill, *supra* note 9, at 432. "In 2001, Chinese surgeon Dr. Wang Guoqi testified before the United States Congress... Dr. Guoqi and a team of doctors were called to extract skin and kidneys from a prisoner's body. During the execution, the guard misfired his gun, shooting the prisoner several inches short of the target, and leaving him convulsing on the ground. Although the prisoner was still alive, the supervising official ordered the doctors to proceed with organ removal in a nearby ambulance." *Id.*

⁴¹ *People's Republic of China: The Olympics Countdown – Failing to Keep*

though there are times when prisoners do not die immediately, the surgeons still remove the organs to ensure freshness.⁴² In 2006, China amended the TRCU order by adding the “Provisions on the Administration of Entry and Exit of Cadavers and Treatment of Cadavers” (Provisions on Administration) in an attempt to prohibit organ trafficking.⁴³ However, this amendment still fails to protect prisoners from abuse.⁴⁴ For example, the order fails to address or regulate the organ removal procedures.⁴⁵ To avoid allegations of abuse or violations, the Chinese government claims to have the prisoners’ consent for the removal of their organs.⁴⁶ However, there are reports that prisoners are coerced into consenting for fear of being killed prior to their execution date.⁴⁷ The efficacy of the TRCU and Provisions on Administration is undetermined as a result of China’s “lack of transparency in the prison system.”⁴⁸ Despite the Chinese government’s claim that prisoners consent, Gao Pei Qi, a deputy chief of the Public Security Bureau (PSB) in China, stated “in the 10 years that I worked for the [PSB] I never saw or heard anything to suggest that death-row prisoners were asked for consent

Human Rights Promises, AMNESTY INT’L, (Sept. 21, 2006), <http://web.amnesty.org/library/index/ENGASA170462006>.

⁴² *People’s Republic of China*, *supra* note 41.

⁴³ Hemphill, *supra* note 9, at 431 (stating the order prohibits “organs from exiting Chinese territory without government authorization”).

⁴⁴ Nancy Morgan, *Human Organs: Another Chinese Export*, (July 7, 2000), available at <http://www.wnd.com/2000/07/4175/> (reporting on a case where five patients in an operation room in China received organ transplants from prisoners. The reporter believes it is likely the Chinese government carried out a mass execution).

⁴⁵ Hemphill, *supra* note 9, at 431.

⁴⁶ Wigmore, *supra* note 30 (explaining prisoner’s giving consent; however, this claim is questionable and the government is very secretive of such actions).

⁴⁷ *Id.* (emphasizing that the State Department’s “Country Report on Human Rights Practices in China” includes credible reports that organs have been removed from prisoners and transplanted to patients who have traveled from abroad to receive such organs).

⁴⁸ Watts, *supra* note 32 (reporting a story of a prisoner who was believed to have been executed immediately, despite the bribe given to them by the prisoner’s mother.) The prisoner’s mother believes that the money she brought forward to have her son removed from the death penalty was far less than the money the government could receive for his organs, hence, the reason for his execution. *Id.*

before donating organs.”⁴⁹ Therefore, it is unlikely the Chinese government will enforce orders such as the TRCU.

2. Mexico

Mexico is equally active in organ trafficking, with young women being the most common victims.⁵⁰ Reports indicate that organ trafficking increased the mortality rate for young women in Mexico.⁵¹ A spokesman for the group “We Want Our Daughters to Return Home”⁵² stated, “[t]here is a sense of panic here, especially among the mothers. Every time they see their daughters go out they are afraid they will not return.”⁵³ Some authorities believe these accounts are unsupported; but multiple bodies have been found in the desert outskirts of town with organs already extracted.⁵⁴ In another case, amateur organ traffickers removed the organs of women and

⁴⁹ Morgan, *supra* note 44.

⁵⁰ See Diana Washington Valdez, *Mexico Missing: Links to Organ Trafficking*, CHANNEL 4 NEWS (Jan. 12, 2010), <http://www.channel4.com/news/articles/world/americas/mexico+missing+links+to+organ+trafficking/3497537.html>.

⁵¹ Valdez, *supra* note 50 (stating more than 600 girls and women were murdered in Juarez, Mexico). “In central Juarez, there is a building which looks like a rehabilitation centre, however, undercover reporters state, inside there are women’s bodies on the floor, and male corpses have been seen taken in by hitmen.” *Id.*

⁵² David Adams, *Organ Trafficking Suspected in Mass Murder Case*, THE SUNDAY TIMES (May 27, 2003), <http://www.timesonline.co.uk/tol/news/world/article1136495.ece> (stating “We Want Our Daughters to Return Home” is a victims solidarity group in Mexico fighting for the lives of their daughters who have gone missing).

⁵³ *Id.*

⁵⁴ Nick Miles, *Organ Traffic Link in Mexico Murders*, BBC NEWS (May 1, 2003), <http://news.bbc.co.uk/2/hi/americas/2993831.stm> (“More than 80 of the killings have shown marked similarities, nearly all the victims were young women, factory workers who were strangled and whose remains were buried in the scrub desert on the outskirts of town.”); see Todd Leventhal, *The Child Organ Trafficking Rumor: A Modern “Urban Legend”* 2 (Dec. 1994), available at <http://pascalfroissart.online.fr/3-cache/1994-leventhal.pdf> (producing a report claiming that children being kidnapped for organs is a rumor and there is no evidence to substantiate such claims).

disposed of their bodies in a building operating as a rehabilitation center.⁵⁵

Furthermore, the problem is compounded by government corruption.⁵⁶ Local police officers reportedly assist traffickers by tampering with evidence in an effort to prevent prosecution.⁵⁷ The absence of reliable data also makes it difficult to investigate the parties involved in organ trafficking in Mexico.⁵⁸ Organ trafficking in Mexico takes various forms, and has global implications because the organs are sold to wealthy purchasers from around the world.⁵⁹

3. *Kosovo*

Organ trafficking has been a problem in Kosovo for several years.⁶⁰ Since the Kosovo War in 1999, charges and reports against those involved have been brought forward.⁶¹ Organ trafficking in

⁵⁵ Valdez, *supra* note 50.

⁵⁶ *Id.*

⁵⁷ Matthew Cullinan Hoffman, *Eminent Transplant Doctor Investigated for "Organ Trafficking" at Mexican Hospital*, LIFE SITE NEWS (July 15, 2008), <http://www.lifesitenews.com/news/archive/ldn/2008/jul/08071501> (exemplifying government corruption by reporting that the chief of the organ transplant program at Guadalajara's Civil Hospital was placed under investigation in 2008 for accepting bribes from patients on organ donor lists); Valdez, *supra* note 50; Adams, *supra* note 52.

⁵⁸ Salvador A. Cicero-Dominguez, *Assessing the U.S.-Mexico Fight against Human Trafficking and Smuggling: Unintended Results of U.S. Immigration Policy*, 4 NW. J. INT'L HUM. RTS. 303, 307 (2005).

⁵⁹ Adams, *supra* note 52 (stating people are being kidnapped on their way home from work). "Rumors have spread that roving gangs kidnapped the women to harvest their organs and sell them on the black market to wealthy people needing transplants - possibly in the United States." *Id.*

⁶⁰ Bojana Barlovac, *Del Ponte 'Ready to Take On' Organ Trade Probe*, BALKAN INSIGHT (May 17, 2011), <http://www.balkaninsight.com/en/article/del-ponte-ready-to-take-over-organ-trade-probe> ("The most recent allegations of organ trafficking in Kosovo and Albania stem from a [2010] December report by Council of Europe rapporteur Dick Marty."); *see also* H.R. 6573, 112th Cong. §2(2) (2012).

⁶¹ Nick Thorpe, *End of the Road for Kosovo Organ Claims?* BBC (May 27, 2010), <http://www.bbc.co.uk/news/10166800> (stating "Yellow House" is a house

Kosovo is different from other countries because of the heavy involvement of the Kosovo Army.⁶²

Among the reported accounts, one of the most disturbing revealed the involvement of the Kosovo Liberation Army (KLA) taking Serbian captives to a building referred to as the “Yellow House” where organs were extracted and sold.⁶³ Kosovo officials claim that the charges against those involved in organ trafficking at the Yellow House are unfounded.⁶⁴ However, two KLA soldiers confirmed they had taken Serbian and Albanian captives to the Yellow House for organ removal.⁶⁵ The two soldiers vanished after stating this; one soldier was killed in an unrelated case, and the other soldier has not been seen since.⁶⁶

In 2004, it was also reported that the International Criminal Tribunal for the former Yugoslavia (ICTY) destroyed approximately 400 pieces of organ trafficking evidence, which implicated the KLA.⁶⁷ Further in 2004, officials from the United Nations (U.N.) and

near a burrel in Central Albania, and is the location where captives were allegedly taken to have their organs extracted). The house is called the “Yellow House” because it was once painted yellow. *Id.*

⁶² *Id.*; Petrit Collaku and Michael Montgomery, *US Prosecutor to Lead Organ Trafficking Investigation*, BALKAN INSIGHT (Aug. 29, 2011), <http://www.balkaninsight.com/en/article/williamson-to-lead-investigations-on-marty-s-report>. The issues arising from organ trafficking in Kosovo are reported by Carla Del Ponte, former prosecutor for the International Criminal Tribunal for the former Yugoslavia (ICTY), who began independent investigations of organ trafficking in Kosovo. See Barlovac, *supra* note 60 (explaining Del Ponte released personal knowledge of the cases she investigated once she left her position in the ICTY).

⁶³ Thorpe, *supra* note 61 (describing the house where the Serbian captives were taken).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Barlovac, *supra* note 60; Michael Montgomery is a reporter and radio producer for the Center for Investigative Reporting, a nonprofit news organization, and reports that sources with direct knowledge informed him of evidence destroyed by the ICTY Office of the Prosecutor. Michael Montgomery, *Did the U.N. destroy more war crimes evidence?*, CENTER FOR INVESTIGATIVE REPORTING (May 4, 2009), <http://cironline.org/blog/post/did-un-destroy-more-war-crimes-evidence-504>.

Hague War Crimes Tribunal investigators, visited the Yellow House and found traces of blood on the floor and surgical equipment in the trash disposals.⁶⁸ Despite these findings, government officials maintain that the claims are unsubstantiated.⁶⁹ One war crimes official commented: “No bodies. No witnesses. All the reports and media attention to this issue have not been helpful to us. In fact they have not been helpful to anyone.”⁷⁰ The government continues to reject the claims despite the testimony and reports the ICTY received from sources describing how the organ trafficking took place.⁷¹

Nonetheless, the European Union (EU) has had some success prosecuting some of the guilty doctors involved in extracting organs.⁷² But that success has been limited due to the involvement of the Kosovo government following the war.⁷³

⁶⁸ See Thorpe, *supra* note 61. Matti Raatikainen, head of the war crimes unit of Eulex, the European Law and Justice Mission in Kosovo led the investigation. *Id.*

⁶⁹ Thorpe, *supra* note 61.

⁷⁰ *Id.*

⁷¹ *Kosovo: Two Charged in Medicus Organ Trafficking Case*, BALKAN INSIGHT (June 14, 2011), <http://www.balkaninsight.com/en/article/kosovo-two-charged-in-medicus-organ-trafficking-case> (stating “EU mission in Kosovo, confirmed the indictment against a Turkish doctor, Yusuf Sonmez, and Israeli Moshe Harel,” as well as seven others involved).

⁷² *Id.*

⁷³ Dick Marty, *Inhuman Treatment of People and Illicit Trafficking in Human Organs in Kosovo* at 2, PARLIAMENTARY ASSEMBLY (Dec. 12, 2010), http://assembly.coe.int/CommitteeDocs/2010/20101218_ajdoc462010provamended.pdf. Dick Marty, reporter, for the Council of Europe has been investigating the claims Del Ponte alleged, and states in his report:

Particularly during the first years of their presence in Kosovo, the international organizations responsible for security and the rule of law (KFOR and UNMIK) had to cope with major structural problems and serious shortages of staff with the skills to take on the tasks they were entrusted with, all this being aggravated by rapid and constant staff rotation.

Id.

*B. Countries of Origin and Destination**1. South Africa*

South Africa commonly is involved in organ trafficking as a location where other countries send organ recipients to have the procedures conducted.⁷⁴ Last year, Netcare St. Augustine Hospital, one of the major privately owned hospitals in Durban, South Africa, was charged with organ trafficking.⁷⁵ Investigators believe that more than 100 kidney transplants illegally took place at the hospital.⁷⁶ As a result, government authorities were able to negotiate a plea agreement with the hospital, in which the hospital agreed to pay approximately \$979,689.60 (7,820,000 rand) for conducting such criminal activity.⁷⁷ Organ trafficking has been an ongoing problem in South Africa for several years. For example, impoverished

⁷⁴ Pearson, *supra* note 19, at 26; Rother, *supra* note 26 (reporting Alberty Jose Da Silva's account of acting as an organ donor for a U.S. woman in exchange for \$6,000). Mr. Da Silva traveled to Africa in order to meet his organ recipient and have the surgery conducted. *Id.* The negotiations took place in Israel, and once completed, the woman traveled to South Africa to have the surgery. *Id.* The cost for the woman was more than \$60,000. *Id.* Mr. Da Silva claims he initially was interested because of the money involved, but then felt compassion to help save the life of a stranger. *Id.* Once Mr. Da Silva arrived in Africa, he was taken to a safe house, and later to Netcare St. Augustine Hospital, where he was able to meet his recipient. *Id.* Mr. Da Silva stated that the organ recipients were treated differently at the safe house. *Id.* Mr. Da Silva says the recipients "were lodged in beachfront hotels before the operation and, afterward, kept under intense observation and given detailed records to be handed over to their doctors back home." *Id.* After three days of observation, Mr. Da Silva traveled back home. *Id.*

⁷⁵ Donna Bryon, *Netcare South African Hospital Charged in Organ Trafficking*, THE HUFFINGTON POST (Sept. 16, 2010), http://www.huffingtonpost.com/2010/09/16/netcare-south-african-hos_n_719128.html.

⁷⁶ Bryon, *supra* note 75. ("Investigators believe Brazilians who passed a medical checkup were flown to South Africa, where their kidneys were illegally extracted and sold for transplants into Israeli patients.")

⁷⁷ *South African Hospital Pleads Guilty to Organ Trafficking Case*, THE TELEGRAPH (Nov. 10, 2010), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/southafrica/8124710/South-African-hospital-pleads-guilty-to-organ-trafficking-case.html> (stating hospital paid approximately 982,435 in U.S. dollars).

individuals from countries such as Brazil and Romania are coerced to travel to Durban to forfeit their kidneys for compensation.⁷⁸ One notorious case involved an individual who murdered six children in order to sell their organs.⁷⁹ Despite such prosecution, organ trafficking still takes place in South Africa.⁸⁰

2. *Mozambique*

Organ trafficking is also taking place in Mozambique.⁸¹ However, it is difficult to determine its magnitude because police officers are suspected of colluding with traffickers.⁸² Reports indicate that police officers “order the burying of corpses without ordering any autopsy or inquiry and without any legal proceedings.”⁸³ Mozambique passed the Human Tissue Act of 1983 (HTA),⁸⁴ which permits the removal of organs from cadavers after attempts to contact the family of the deceased have failed.⁸⁵ Additionally, the HTA gives doctors and medical officials the discretion to use unclaimed bodies for medical use.⁸⁶ This discretion, granted to doctors, creates a loophole in the law that has caused an

⁷⁸ H.R. 6573, 112th Cong. § 2 (6) (2012) (stating over 109 impoverished people were coerced and promised to be paid approximately \$120,000, but the payment was often not provided).

⁷⁹ Pearson, *supra* note 19; In 1995, the Rand Supreme Court prosecuted Moses Mokgethi for the murder of these six children. *Id.* See MATERIAL CULTURE: CRITICAL CONCEPTS IN THE SOCIAL SCIENCES, 150 (Victor Buchli ed., 2004).

⁸⁰ Glaser, *supra* note 13 (explaining the Human Tissue Act of 1983 criminalizes anyone who transfers any tissue, including flesh, bone, organ, or body fluid, in exchange for payment).

⁸¹ Pearson, *supra* note 19, at 27; Ben, *8 Countries Where Human Organs Are Harvested*, NEWSPICK (June 10, 2008), available at <http://news.upickreviews.com/8-countries-where-human-organs-are-harvested>.

⁸² *Human Organs Trafficking Revealed in Northern Mozambique*, AFROL NEWS (Jan. 12, 2011), <http://www.afrol.com/articles/10739>.

⁸³ *Id.*

⁸⁴ Ben, *supra* note 81; Human Tissue Act 1983 No. 164 (Oct. 22, 2012).

⁸⁵ Pearson, *supra* note 19, at 27.

⁸⁶ Ben, *supra* note 81.

increase in organ trafficking in Mozambique.⁸⁷

3. *India*

India may be considered home to organ trafficking because unlike countries where people are coerced, forced or kidnapped for their organs, in this country poor people are actually willingly providing their bodies for organ removal in exchange for compensation.⁸⁸ The typical transaction occurs when a person receives a promise for a certain amount of money in exchange for their organ.⁸⁹ Ironically, once the organ has been removed they are rarely compensated as promised.⁹⁰ Many times, surgeons in India conduct kidney transplants from their houses by convincing impoverished individuals they will be paid for their organs.⁹¹ Once the organs are removed, they are sold to wealthy Indians or foreigners who travel to India to receive the transplant.⁹²

Additionally, allowing payment for organ donations is creating transplant practices that give poor and inadequate treatment to the donor, causing a higher mortality rate.⁹³ In February 2008,

⁸⁷ *Id.*

⁸⁸ “India is known as the place where organ trafficking thrives the most.” See Alireza Bagheri, *Asia in the Spotlight of the International Organ Trade: Time to Take Action*, 2 *ASIAN J. WTO & INT’L HEALTH L. & POL’Y* 11, 12 (2007); “India was a commonly known organ-exporting country, where organs from local donors are regularly transplanted to foreigners through sale and purchase.” See also Shimazono, *supra* note 11.

⁸⁹ Bagheri, *supra* note 88, at 21.

⁹⁰ *Id.*

⁹¹ J. Hak, *Organ Trafficking Exposed in India*, THE HUMAN TRAFFICKING PROJECT (Feb. 1, 2008), <http://www.traffickingproject.org/2008/02/organ-trafficking-exposed-in-india.html> (explaining that in Delhi the poor are paid up to \$2,500 for an organ, which is a relatively small amount for the risk associated with such procedures).

⁹² *Id.*

⁹³ Michael M. Friedlaender, *The Right to Sell or Buy a Kidney: Are We Failing Our Patients?*, 359 *THE LANCET* 971 (Mar. 16, 2002) (stating first year mortality rates are ten percent higher than in acceptable modern transplant programs).

police raided an organ trafficking ring in India where men posed as doctors to remove kidneys from migrant workers.⁹⁴ The organs were intended for patients on waiting lists in other countries.⁹⁵

Organ trafficking in India is increasing the amount of organized crime.⁹⁶ The government's failure to enforce laws, such as the Transplantation of Human Organs Act (THOA),⁹⁷ allows organ traffickers to continue committing such crimes.⁹⁸ The lack of enforcement stems from police corruption, as well as, corruption among doctors who perform the surgeries.⁹⁹

C. *Destination Countries*

1. *The United States*

The lack of organ donations in the United States has not occurred overnight and this contributes to the increase in organ trafficking.¹⁰⁰ At the end of 2009, 107,046 people were on a waiting

⁹⁴ H.R. 6573, 112th Cong. §2 (29) (2012).

⁹⁵ *Id.*

⁹⁶ Bagheri, *supra* note 88, at 22 (stating the mafia involved in organ trade creates dangerous situations).

⁹⁷ Transplantation of Human Organs Act, Bill No. LIX-F, Ch. 6 §4, (1994) [hereinafter THOA] (stating the “[p]unishment for commercial dealings in human organs”).

⁹⁸ Bagheri, *supra* note 88, at 15 (banning the trade of human organs); Pearson, *supra* note 19, at 17 (“Only 5% of respondents stated altruistic reasons was a major reason in their decision to sell, thus clearly circumventing the 1994 law in India which supposedly only allows for live unrelated transplantation ‘for reasons of attachment or affection.’”).

⁹⁹ Pearson, *supra* note 19, at 22; *see also* J. Hak, *supra* note 91 (“[A] number of high-ranking police officers have been implicated in threatening, intimidating and assaulting donor-sellers who came forward to file complaints.”).

¹⁰⁰ *Table 1.3. Waiting List at End of Year 2002 to 2011*, Scientific Registry of Transplant Recipients, http://www.srtr.org/annual_Reports/2011/103_dh.aspx (last visited on Jun.10, 2013) (stating approximate amount of patients on waiting list at the end of the following years: 2002, 78,272; 2004, 85,063; 2006, 92,563; 2008, 99,978; 2010, 110,131; 2011, 112,971).

list for vital organs in the United States.¹⁰¹ In 2011, this number increased to 121,753 patients on the official organ waiting list who had not received transplants.¹⁰² With only 14,510 donors for all types of organs in 2010, and only 14,144 donors in 2011, there is an increasing need for organ donors.¹⁰³ In 2011, 28,535 organ transplants were conducted in the United States.¹⁰⁴ Every day, approximately eighteen people die while waiting for a transplant of a vital organ, such as a heart, liver, kidney, pancreas, or lung.¹⁰⁵ The following graph illustrates the magnitude of the problem.

¹⁰¹ *25 Facts About Organ Donation and Transplantation*, NATIONAL KIDNEY FOUNDATION, http://www.kidney.org/news/newsroom/fs_new/25factsorgdon&trans.cfm (last visited on Apr. 25, 2013).

¹⁰² *Transplant Report for 2010*, ORGAN PROCUREMENT AND TRANSPLANTATION NETWORK, <http://optn.transplant.hrsa.gov/latestData/rptData.asp> (last visited on Jun. 10, 2013) [hereinafter OPTN].

¹⁰³ *Id.*; The total number of donors is the sum of deceased organ donors and living organ donors. *Statistics*, DONATE LIFE AMERICA, <http://donatelife.net/understanding-donation/statistics/> (last visited on Apr. 25, 2013) [hereinafter DONATE LIFE AMERICA].

¹⁰⁴ “Organs recovered per donor is the average number of organs recovered per donor, calculated as the sum of recovered organs, i.e., in the case of kidneys recovered, up to two kidneys can be recovered from an individual donor, while only one heart can be recovered from each donor.” OPTN, *supra* note 102 (indicating total transplants conducted from living and non-living donors); DONATE LIFE AMERICA, *supra* note 103.

¹⁰⁵ OPTN, *supra* note 102; DONATE LIFE AMERICA, *supra* note 103.

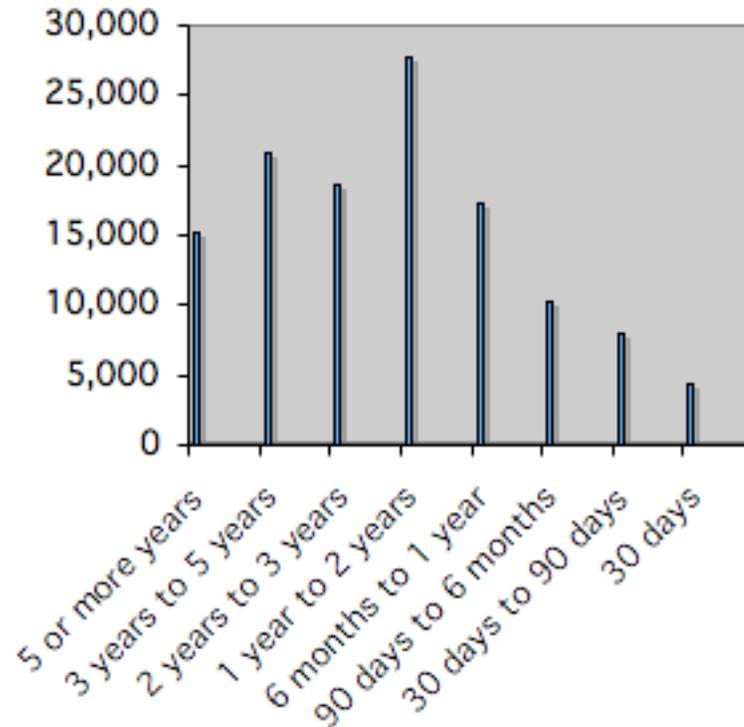


Chart: The number of people on the waiting list for vital organs and the amount of time they have been waiting, current through November 2011.¹⁰⁶

The increase in demand for organ donors is due to the advancement in technology and higher transplant survival rate.¹⁰⁷ Also, the decline in organ donations from cadavers has caused an

¹⁰⁶ OPTN, *supra* note 102.

¹⁰⁷ “Over the last few decades there has been a substantially higher percentage of successful organ transplants, but also a significant imbalance between the demand for and the supply of organs, therefore, creating the basis for a highly profitable black market trade in human organs.” Fasting, *supra* note 2; Trevor Harrison, *Globalization and the Trade in Human Body Parts*, 36 *CAN. REV. SOCIOLOGY & ANTHROPOLOGY* 21 (2008).

increase in the need for organ donors.¹⁰⁸ The United States government has failed to provide a solution for effectively meeting the needs of necessary organ donations due to the risks involved.¹⁰⁹ Statistics show that the United States is a leading country for international organ imports.¹¹⁰ However, similar problems exist in other developed countries such as Australia, Canada, Israel, and Japan.¹¹¹

The growing need for organs in the United States has created a black market economy for organ trade and trafficking.¹¹² People are brought into the United States to sell their organs and United States citizens are traveling abroad to find donors after waiting on donor lists for years.¹¹³ Traveling abroad to receive an organ transplant is referred to as “transplant tourism.”¹¹⁴ Transplant

¹⁰⁸ Harrison, *supra* note 107 (increasing safety measures have reduced the “number of deaths through accidents of suitable donors” as well as “the gradual ageing of the population after the 1980[s] in many developed countries, including the United States and Canada”).

¹⁰⁹ Dominick Tao, *Worldwide Market Fuels Illegal Traffic in Organs*, N.Y. TIMES (July 30, 2009), <http://www.nytimes.com/2009/07/30/nyregion/30organs.html> (discussing how the World Health Organization has been “wrestling for years with whether or how to legalize organ sales.” The article also quotes Sheila M. Rothman, “a professor of public health at Columbia University who studies living organ transplantation,” and she states [on the issue of legalizing organ sales], “it has opened a Pandora’s box of questions no government has been able to answer fairly”).

¹¹⁰ Nancy Scheper-Hughes, *Prime Numbers: Organs Without Borders*, FOREIGN POL’Y (Jan. 5, 2005), at 26, available at http://www.foreignpolicy.com/articles/2005/01/05/organs_without_borders; Pugliese, *supra* note 20, at 182.

¹¹¹ Shimazono, *supra* note 11 (“A report by Organs Watch, an organization based at the University of California, USA, identified Australia, Canada, Israel, Japan, Oman, Saudi Arabia and the USA as major organ-importing countries.”).

¹¹² Arthur Caplan, Ph.D. et al., *Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs*, Directorate General of Human Rights and Legal Affairs Council of Europe 21-22 (2009) (“The desperation of patients waiting for transplants leads to another tragic consequence, namely trafficking in OTC [organs, tissues, and cells] and the most terrible form of trafficking in this regard, trafficking in human beings for the purpose of organ removal.”).

¹¹³ Porter, *supra* note 16; Finkel, *supra* note 8.

¹¹⁴ Budiana-Saberi, *supra* note 18, at 925-26.

tourism accounts for one out of every ten organ transplants.¹¹⁵ Although not all transplant tourism is considered illegal, there may still be cases of trafficking involved.¹¹⁶ The United States does not allow for an open market for paid organ donations despite the need for organs.¹¹⁷

2. *Israel*

Israel is one of the most active nations in organ trafficking.¹¹⁸ The Israeli government's interest in trafficking organs is linked to financial gain.¹¹⁹ Although organ trafficking is illegal in Israel, the government encourages the practice by allowing the national health-insurance program to cover part or all of the costs of "brokered transplants."¹²⁰ For example, the Israeli Ministry of Defense is

¹¹⁵ Lisa Ling, *Inside the Body Trade*, National Geographic, NETFLIX (2007), http://movies.netflix.com/WiMovie/National_Geographic_Inside_the_Body_Trade/70144617?trkid=438403.

¹¹⁶ *Id.*

Not all medical tourism that entails the travel of transplant recipients or donors across national borders is organ trafficking. Transplant tourism may be legal and appropriate. Examples include, when travel of a related donor and recipient pair is from countries without transplant services to countries where organ transplantation is performed or if an individual travels across borders to donate or receive a transplant via a relative.

Id.

¹¹⁷ Caplan, *supra* note 112 (discussing governments in the past have taken measures to increase the supply of organs, however, with the shift in social policies there are now arguments that there should be an open market for paid organ donations or allow presumed consent). *Id.* The article also explains how Iran has developed a system to allow paying unrelated living donors. *Id.*

¹¹⁸ Cholia, *supra* note 29; Finkel, *supra* note 8.

¹¹⁹ Rother, *supra* note 26.

¹²⁰ Ruby Hawk, *Organ Brokers*, SOCYBERTY (Jan. 22, 2009), <http://socyberty.com/crime/organ-brokers/> (explaining brokers are responsible for connecting buyers and sellers of organs on a transnational level); Finkel, *supra* note 8 (explaining how the government looks away because it is often cheaper for insurance companies to pay for organ transplants, rather than pay for dialysis treatments).

willing to pay patients \$40,000 if they undergo transplants abroad.¹²¹ The Israeli government is aware these organs may be obtained illegally through brokers.¹²² Yet, the agency is willing to pay patients for what could be an illegal organ surgery because this is often cheaper than dialysis treatment.¹²³ For the same reasons, insurance companies in Israel are often willing to subsidize the remaining cost.¹²⁴ Unfortunately, the motivation in subsidizing the costs associated with paying for a brokered organ is driven by the high costs of alternative treatments.¹²⁵

As a result of people traveling internationally to obtain organ transplants, there is a high demand for organ donors abroad, which corresponds to the organ shortage.¹²⁶ The Israeli Ministry of Health (IMH) enacted the Organ Implantation Law allowing organ removal from cadavers.¹²⁷ However, the law requires specific permission from the decedent's family.¹²⁸ Additionally, the IMH has a procedure for organ donations from living donors in which they must "receive written permission from the ministry after assessment by a hospital committee that includes a psychologist and a social worker."¹²⁹ The process for non-related donors is more complicated, requiring that a national committee, prior to any action, interview a donor who is not in the person's immediate family.¹³⁰ These procedures result in a low percentage of domestic organ donations and a high demand for organs trafficked abroad.¹³¹

¹²¹ Friedlaender, *supra* note 93.

¹²² *Id.* (explaining how organ transplants are illegally conducted in other countries where the laws are not enforced).

¹²³ *Id.*

¹²⁴ Rother, *supra* note 26.

¹²⁵ *Id.*

¹²⁶ Friedlaender, *supra* note 93.

¹²⁷ *Id.*; Organ Implantation Law, 5768-2008, Sefer HaHukim (Official Gazette) 5748, No. 2144, at 394 (Nov. 8, 2012).

¹²⁸ Friedlaender, *supra* note 93.

¹²⁹ *Id.*

¹³⁰ Friedlaender, *supra* note 93 (discussing how unrelated living donors are rarely approved).

¹³¹ Finkel, *supra* note 8.

II. *Money vs. Morals - Conflicting Claims*

Organ trafficking violates human rights and exploits the vulnerable.¹³² Further, it violates the Universal Declaration of Human Rights, which states “[e]veryone has the right to life, liberty and security of person.”¹³³ This section will consider the conflicting interests and opposing views of victims, traffickers, organ recipients, and religious institutions.

A. *Victims*

There are harmful implications for the donor,¹³⁴ the recipient,¹³⁵ and other victims who are affected by the black market for organs.¹³⁶ A victim of organ trafficking is often a prisoner, young and easily influenced, or an immigrant who is not aware of his or her rights.¹³⁷ A victim of organ trafficking may have a cause of action for property rights to his or her body, coercion leading to pain and suffering, and exploitation of the poor.

An individual’s human rights are at risk when an organ is

¹³² Bos, *supra* note 1.

¹³³ Article 4 of the Declaration also states: “No one shall be held in slavery or servitude.” H.R. 6573, 112th Cong. §3 (3) (2012).

¹³⁴ Claire Andre & Manuel Velasquez, *Kidneys for Sale*, SANTA CLARA UNIVERSITY, <http://www.scu.edu/ethics/publications/iie/v1n2/kidneys.html> (last visited on Apr. 25, 2013) (describing the harm to donors who may be forced to sell their organs); *Ethics of Organ Transplantation*, CENTER FOR BIOETHICS (Feb. 2004), http://www.ahc.umn.edu/img/assets/26104/Organ_Transplantation.pdf (describing the pain to the donor).

¹³⁵ Shimazono, *supra* note 11 (“Newspaper articles have reported the deaths of patients who went abroad for overseas commercial transplants” and “[s]tudies . . . report a heightened frequency of medical complications, including the transmission of HIV and the hepatitis B and C viruses.”) *Id.* The reporter suggests that the complications may be caused as a result of “substandard medical practices.” *Id.*

¹³⁶ Yudhijit Bhattacharjee, *Organ Dealer*, 31 DISCOVER 64 (Apr. 2010) (explaining how doctors involved in the illegal trade are threatened by the mob when unsuspected deaths occur during surgery).

¹³⁷ Bos, *supra* note 1.

extracted from his or her body involuntarily, whether the organ is extracted from a living or nonliving person.¹³⁸ Currently, there is no U.S. legislation granting a person property rights over their organs.¹³⁹ However, under common law, there are instances when biological materials may be defined as property if stolen.¹⁴⁰

Additionally, victims endure pain and their lives are threatened due to the lack of medical attention and poor conditions during the transplants.¹⁴¹ The profit involved motivates organ trafficking; therefore, the less expense incurred during the organ transplants, the higher the profit for the doctors and brokers. Some victims have been admitted in hospitals for sickness and then have had their organs removed without their consent.¹⁴² Other victims have reported “serious medical consequences including chronic pain, weakness and ill health” after poorly performed transplants.¹⁴³ Once the transplant is completed, the victim often will not receive postoperative care, causing physical disabilities or life threatening illnesses.¹⁴⁴

Furthermore, the evidence suggests that organ trafficking benefits the wealthy¹⁴⁵ while exploiting the poor.¹⁴⁶ For a person

¹³⁸ Caplan, *supra* note 112.

¹³⁹ ROHAN HARDCASTLE, *LAW AND THE HUMAN BODY: PROPERTY RIGHTS, OWNERSHIP AND CONTROL* 79 (2007).

¹⁴⁰ *Id.* at 82.

¹⁴¹ Dr. Raneer Khooshie Lal Panjabi, *The Sum of a Human's Parts: Global Organ Trafficking in the Twenty-First Century*, 28 *PACE ENVTL. L. REV.* 1, 4 (2010).

¹⁴² *Trafficking for Organ Trade*, U.N. Global Initiative to Fight Human Trafficking, <http://www.ungift.org/ungift/en/humantrafficking/organtrade.html> (last visited Apr. 25, 2013).

¹⁴³ Dr. Panjabi, *supra* note 141, at 68.

¹⁴⁴ *Id.*

¹⁴⁵ For the purposes of this article, a “wealthy” person should be defined as a one who is able to afford the high cost of purchasing an illegal organ. *Wealth Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/wealth> (last visited on Jun. 10, 2013) (defining wealth as an abundance of valuable material possessions or resources).

¹⁴⁶ Henry Hansmann, *The Economics and Ethics of Markets for Human Organs, in Organ Transplantation Policy: Issues and Prospects* (1989) <http://www.organselling.com/hansmann.htm>. (“The poor would be the principal

who has been waiting on transplant lists and receiving dialysis treatment, the cost of paying a donor for an illegal organ often is irrelevant.¹⁴⁷ To ensure equality, the benefit to the organ recipient must not exceed the interest of the non-consenting donor for a nonrelated recipient.¹⁴⁸ The profit involved in the sale of organs often helps the impoverished escape poverty and is an incentive for them to sell their organs.¹⁴⁹

Applying Rational Choice Theory (RCT) may be helpful in understanding the economics driving the organ market. Under RCT, individuals will weigh the costs and benefits relative to their own perspective and ultimately choose to act in a way that provides the maximum advantage for them.¹⁵⁰ Individuals tend to give high value to resources they lack.¹⁵¹ Therefore, individuals with sufficient amounts of money, who lack healthy organs, are willing to pay the necessary costs associated with the benefits of new organs because this will provide maximum value for them. On the other hand, individuals who lack monetary means and are desperate for money may be willing to bear the costs of parting with their organs to earn a decent sum if they feel that they can live with this decision. Poor

sellers in a market for organs, and therefore such a market would unacceptably exploit the poor for the benefit of the rich.”). However, Hansmann then goes on to argue that society could help the poor to ensure that they are not inclined to sell their kidney only for monetary purposes, although, the poor are currently not convinced to reject highly dangerous jobs, such as “mining and meatpacking” that put their life at risk. *Id.*

¹⁴⁷ Friedlaender, *supra* note 93 (explaining how some transplant patients incur huge debts to receive an illegal organ, but refuse to continue to wait after being on the waiting list for years).

¹⁴⁸ *Id.* (“So even though someone might well benefit from obtaining my liver or receiving bone marrow from my body, these organs and tissues ought not to be removed from me without my permission.”).

¹⁴⁹ Cholia, *supra* note 29.

¹⁵⁰ Milton Friedman, *Essays in Positive Economics*, (University of Chicago Press 1970) (1953) <http://www.econ.umn.edu/~schwe227/teaching.s11/files/articles/friedman-1953.pdf>; Matthew E. Allen, *Free Kidney for Sale? Substitution, the Shortage, and Procurement Policy*, UNDERGRADUATE ECONOMIC REVIEW: Vol. 2: Iss. 1, Art. 3, 7-8 (2006), <http://digitalcommons.iwu.edu/cgi/viewcontent.cgi?article=1012&context=uer>.

¹⁵¹ Allen, *supra* note 150.

individuals may value the benefits of currency higher than the risks associated with the sale of their organs and thereby may feel they are maximizing their opportunities.

Living organ donors are often those living in poverty, as they are more vulnerable and are typically more willing to accept large amounts of money in exchange for an organ. For example, at a Tsunami refugee camp in Chennai, India, the poor were exploited for their organs because, for some, it was the only way to make money.¹⁵² A victim from the Tsunami refugee camp gave her story of how she was coerced into donating her kidney.¹⁵³ The victim was told her kidney was sold to the son of a wealthy foreigner for \$40,000.¹⁵⁴ However, the victim only received \$700, yet she was promised to receive \$3,500 and was threatened when she attempted to collect the remaining balance.¹⁵⁵

B. *Traffickers*

While there is no set profile of an organ trafficker, all traffickers have an interest in keeping the illegal trade alive. Simply put, the more organs that are trafficked equals more of a profit made. Gangs and criminal organizations are often involved in organ trafficking.¹⁵⁶ Along with individuals, corrupt Governments or state agents are frequently involved in some part of the process for the illegal organ trade.¹⁵⁷

Further, brokers and doctors have an interest and play a role in organ trafficking, oftentimes for a hefty profit.¹⁵⁸ Impoverished donors are often coerced to sell their organs for a profit of \$1,000 to

¹⁵² Ling, *supra*, note 115 (reporting that almost everyone in the village has a scar on the side of their body from having their kidney removed).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Valdez, *supra* note 50.

¹⁵⁷ H.R. 6573, 112th Cong. §2 (6)–(13) (2010); Valdez, *supra* note 50.

¹⁵⁸ H.R. 6573, 112th Cong. §2 (3)–(6) (2010).

\$5,000;¹⁵⁹ meanwhile, brokers receive between \$100,000 and \$200,000.¹⁶⁰ While some doctors also receive profits for performing the removal or organ transplant,¹⁶¹ there are doctors involved that disregard the illegal trade in order to save their patients.¹⁶² Some doctors “feel that the Hippocratic [O]ath prevents them from turning away a sick patient with an organ ready to be transplanted.”¹⁶³

C. *Organ Recipients*

Another group of individuals who have an interest in the trafficking of organs are those people who pay for and receive organs. Oftentimes, recipients of illegal organs are not necessarily considered “victims” of organ trafficking because they have paid for the organ and willingly undergo the procedure to acquire the illegal organ. However, it is easy to imagine situations where recipients can be victims. For one, a recipient might be a victim if he truly believed he purchased the organ legally. A second example could be if a person purchased a kidney, perhaps because it was cheaper and less tedious than going through dialysis treatments, but it later turned out that the supplier of the kidney harvested a diseased kidney, causing the recipient to become ill and subsequently die.¹⁶⁴ Consequently,

¹⁵⁹ Clare Nullis-Kapp, *Organ Trafficking and Transplantation Pose New Challenges*, WORLD HEALTH ORGANIZATION, Vol. 82, No. 9 (Sept. 2004), <http://www.who.int/bulletin/volumes/82/9/feature0904/en/index1.html>.

¹⁶⁰ *Id.*

¹⁶¹ See Agence Franc-Presse, *Five Doctors Jailed in Kosovo for Illegal Organ Harvesting and Transplants*, THE RAW STORY (April 29, 2013), <http://www.rawstory.com/rs/2013/04/29/five-doctors-jailed-in-kosovo-for-illegal-organ-harvesting-and-transplants/> (explaining that in April of 2013, a court in Kosovo “sentenced five doctors to up to eight years in prison for illegal organ harvesting and transplants” after it was found that approximately 30 illegal kidney removals were performed at the clinic where the doctors worked).

¹⁶² Global Black Market, *supra* note 12.

¹⁶³ Tao, *supra* note 109.

¹⁶⁴ David B. Samadi, *Consequences of the Rise in Illegal Organ Trafficking*, FOX NEWS (May 30, 2012), <http://www.foxnews.com/health/2012/05/30/consequences-rise-in-illegal-organ-trafficking/> (reporting that those who receive organs illegally are at a higher risk for disease and have lower survival rates).

recipients could become victims of organ trafficking and therefore have an interest in ending or regulating organ trafficking.

However, as stated above, many recipients know they are purchasing an illegal organ and yet do not care because that organ is essential for their very survival.¹⁶⁵ In this situation, recipients have an interest in keeping a supply of organs available. It seems to reason that most people would prefer to receive an organ legally. However, in countries like the United States where one must be put on a list to receive an organ, those in need of organs, and with the financial means to acquire such organs, will turn to the black market rather than being put on a waiting list for an organ that may never come. This is the entire reason that the black market thrives and why so many people have an interest in the continuation of organ trafficking.

D. Religious Perspectives

Some of the perspectives in favor of prohibiting human trafficking and the sale of organs derive from religious beliefs and the harmful effects resulting from such acts. In 2000, Pope John Paul II in his “[a]ddress to the XVIII International Congress of the Transplantation Society,” presented the Catholic community’s religious beliefs regarding the selling or trading of organs by “reinforc[ing] the transplant ethic of altruism and empathy for strangers that are the prerequisites for cadaveric organ sharing, and condemned an emerging commerce in human organs from live donors ‘because to use the body as an object is to violate the dignity of the human person.’”¹⁶⁶

Judaism allows for organ donations from cadavers, but only to save the life of a person.¹⁶⁷ Judaism teaches that organ donations

¹⁶⁵ Shimazono, *supra* note 11.

¹⁶⁶ Francis L. Delmonico & Nancy Sheper-Hughes, *Why We Shouldn't Pay For Human Organs*, 38 ZYGON 689, 690 (2003).

¹⁶⁷ “In all cases an organ or tissue may be removed only after the donor has been pronounced dead in accordance with the criteria of Jewish law. Thus, the moribund patient may not be moved, nor may other procedures be initiated, until death has actually taken place.” Avraham Steinberg, Minisymposium, *Ethical*

are “expected to be an altruistic action,” and, therefore, people should not accept payment for donating organs.¹⁶⁸ However, Judaism finds it acceptable for a person to pay living donors if it is the only means to receive an organ and save his or her own life.¹⁶⁹ Similarly, Islam allows for paid organ donations in the event there is no other means for obtaining the organ, as long as the paid donor is unharmed, and the donor is not pressured to donate the organ.¹⁷⁰ Both Judaism and Islam share the belief of prohibiting organ sales if the sales will create competition or criminal environments.¹⁷¹

III. *Legal Responses*

A. *Domestic Laws*

Most countries either adopt a socialist or a capitalist ideology in relation to organ trafficking.¹⁷² People adopting a capitalist ideology tend to believe that they should have the right to freely choose how they treat their own body, and that they alone should

Issues in Nephrology—Jewish Perspectives, 11 *NEPHROLOGY DIALYSIS TRANSPLANTATION* 961 (1996), available at ndt.oxfordjournals.org.

¹⁶⁸ *Id.* at 962.

¹⁶⁹ *Id.* (explaining the acceptance to pay for organs is “based on a realistic outlook concerning the need to save lives”).

¹⁷⁰ Mokhtar Al-Mahdi, Symposium: The Islamic Vision of Some Medical Practices, *Donation, Sale, and Unbequeathed Possession of Human Organs* (1987), <http://www.islamset.com/bioethics/vision/recom.html>.

¹⁷¹ Steinberg, *supra* note 167 (explaining the safety of the people is more important even if it causes difficulty for people to obtain organs); Al-Mahdi, *supra* note 170 (explaining the state should establish authority to control and avoid competition between the rich and poor).

¹⁷² JOSHUA GANS ET AL., *PRINCIPLES OF ECONOMICS* 157 (Greg Alford ed., 5th ed. 2012) (1999) (explaining Adam Smith’s capitalist Invisible Hand Theory where “[t]he invisible hand takes all the information about buyers and sellers into account and guides everyone in the market to the best outcome as judged by the standard of economic efficiency”); *Socialism Definition*, BRITANNICA.COM, <http://www.britannica.com/EBchecked/topic/551569/socialism> (last visited on Apr. 25, 2013) (defining socialism to exist in countries where the government regulates the market to create a balance in the input and output and calls for public rather than private ownership).

hold the decision to sell their organs, not the government.¹⁷³ However, this perspective on organ trading is contrary to U.S. laws and restrictions, which already prohibit a person to freely do as they please with their body in this regard.¹⁷⁴ The United States has an interest in ensuring the safety of their citizens. For example, the United States grants the states the power to prohibit prostitution.¹⁷⁵ Similarly, the National Organ Transplant Act of 1984 (NOTA) prohibits the sale or transfer of organs for money.¹⁷⁶ Nonetheless, the United States allows a person to choose whether he or she wants their organs donated so long as no compensation is provided.¹⁷⁷ On the contrary, Iran follows a socialist approach allowing the government to regulate an open organ market to ensure equal distribution.

The United States enacted the NOTA to establish guidelines for organ donation and transplantation.¹⁷⁸ It prohibits organ procurement by making it unlawful for any person to knowingly transfer or receive an organ for money.¹⁷⁹ If a person is found in violation of the law, they may be fined “no more than \$50,000 or imprisoned not more than five years, or both.”¹⁸⁰ Unfortunately, the penalties imposed under the NOTA did not deter this criminal activity from occurring, and the United States had to create new

¹⁷³ Delmonico, *supra* note 166, at 693 (“[T]he body is understood as a valuable commodity that belongs to the individual and which they can dispose of as they see fit.”); GANS, *supra* note 172, at 157.

¹⁷⁴ Delmonico, *supra* note 166, at 694.

¹⁷⁵ “Prostitution laws make it a crime in most states to offer, agree to, or engage in a sexual act for compensation. Depending upon applicable state law, the stages of a typical prostitution ‘transaction’ can involve charges against the provider of services, the customer paying for the services, and any middleman.” *Prostitution*, FINDLAW, http://criminal.findlaw.com/crimes/a-z/prostitution.html?DCMP=GOO-CRIM_SexualAssaultProstitution&HBX_PK=prostitution+laws+in (last visited on Apr. 25, 2013).

¹⁷⁶ 42 U.S.C. § 274e (a) (2007).

¹⁷⁷ *Id.* (explaining that in the U.S. organs may be voluntarily donated with no compensation or may be donated by an opt-in process at the time of death).

¹⁷⁸ Melissa Wong, *Coverage For Kidneys: The Intersection of Insurance and Organ Transplantation*, 16 CONN. INS. L.J. 535, 538 (2010).

¹⁷⁹ 42 U.S.C. § 274e (a) (2007).

¹⁸⁰ *Id.* § 274e (b).

legislation.¹⁸¹

In 2000, the United States passed the Trafficking Victims Protection Act (TVPA), imposing higher penalties against traffickers.¹⁸² Although the TVPA does not define “organ trafficking” directly as a form of trafficking, it does state that “severe forms of trafficking in persons” includes “the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”¹⁸³ Because traffickers often use such tactics as force, fraud, and coercion to obtain organs from unwilling donors, it is possible a prosecutor will be able to charge a person that committed organ trafficking under the TVPA. The legislative history of the act also supports the inclusion of all forms of trafficking.

However, the problem with organ trafficking in the U.S. derives from recipients going to a foreign country to receive the organ transplants. The current laws are ineffective because organ trafficking is not a crime once you leave the United States. The United States prohibits the sale of organs, but it does not address the issue on a transnational level, making it easy for people to travel to another country and purchase an organ.

India passed similar laws regulating the sale of organs, such as the Transplantation of Human Organs Act of 1994.¹⁸⁴ A person who violates the law may receive a sentence of up to five years, and may receive a fine of up to 10,000 rupees (approximately 205 U.S.

¹⁸¹ Pugliese, *supra* note 20, at 190.

¹⁸² 42 U.S.C. § 7101 (b) (14) (2000). The statute reads:

[E]xisting legislation and law enforcement in the United States and other countries are inadequate to deter trafficking and bring traffickers to justice, failing to reflect the gravity of the offenses involved. No comprehensive law exists in the United States that penalizes the range of offenses involved in the trafficking scheme. Instead, even the most brutal instances of trafficking in the sex industry are often punished under laws that also apply to lesser offenses, so that traffickers typically escape deserved punishment.

Id.

¹⁸³ 22 U.S.C. § 7102 (8)(b) (2008).

¹⁸⁴ THOA, *supra* note 97.

dollars).¹⁸⁵

Several countries in Africa also enacted laws to prohibit organ trafficking such as Namibia,¹⁸⁶ Ghana,¹⁸⁷ and Benin.¹⁸⁸ Namibia first incorporated organ trafficking into its laws in 2004.¹⁸⁹ In 2005, Ghana adopted the term “organ trafficking” as “exploitation to include the removal of organs.”¹⁹⁰ In 2006, Benin expanded its laws to prohibit “all forms of slavery or analogous practices, debt bondage, and servitude such as forced labor, the use of children in armed conflict, or for the purposes of organ transplant.”¹⁹¹ Similarly, organ trafficking is illegal in Kosovo.¹⁹² The law in Kosovo specifically defines organ trafficking for the purpose of exploitation including the removal of organs.¹⁹³

¹⁸⁵ THOA, *supra* note 97.

[A]ny person who renders his services to or at any hospital and who, for purposes of transplantation, conducts, associates with, or helps in any manner in, the removal of any human organ without authority, shall be punishable with imprisonment for a term which may extend to five years and with fine which may extend to ten thousand rupees.

Id.

¹⁸⁶ Benjamin N. Lawrance & Ruby P. Andrew, *A Neo-Abolitionist Trend in Sub-Saharan Africa? Regional Anti-Trafficking Patterns and a Preliminary Legislative Taxonomy*, 9 SEATTLE J. FOR SOCIAL JUSTICE 599, 633 (2011) (discussing that Namibia’s Prevention of Organized Crime Act, No. 29, was their first law to include human organ trafficking).

¹⁸⁷ Lawrance, *supra* note 186, at 633 (explaining that countries such as Ghana have enacted laws that fall under the blanket human trafficking model, which enacted laws including organ trafficking).

¹⁸⁸ *Id.* at 646 (discussing that in 2006 Benin passed a law specifically addressing the prohibition of organ trafficking among children under the definition of exploitation).

¹⁸⁹ *Id.* at 633.

¹⁹⁰ *Id.* at 639.

¹⁹¹ *Id.* at 646.

¹⁹² Matthew Brunwasser, *Trial Open for 7 Kosovars in Organ-Trafficking Case*, N.Y. TIMES (Oct. 4, 2011), http://www.nytimes.com/2011/10/05/world/europe/trial-opens-for-7-kosovars-in-organ-trafficking-case.html?_r=0.

¹⁹³ Trafficking in Persons, ARTICLE 139 CCK (Mar. 2, 2011), *available at* <http://www.eulexkosovo.eu/docs/justice/judgments/criminalproceedings/DCPrishtina/medicus/Ruling%20of%20confirmation%20judge%20%20March%202011%2>

In 2008, Israel passed a law allowing for organ donors to receive benefits from the government.¹⁹⁴ Such benefits include exemption from fees for state parks, compensation for psychological treatment, and recovery leave.¹⁹⁵ Additionally, the government will pay the donor about \$5,100 in compensation.¹⁹⁶ Also, any donors will be given a preference over others if they ever need an organ in the future.¹⁹⁷

In 2007, China enacted the Regulation on Human Organ Transplantation establishing a voluntary organ donation system and prohibiting commercial transplantation.¹⁹⁸ Prior to 2007, there was no legal framework regulating organ transplants in China.¹⁹⁹ However, under China's TRCU order,²⁰⁰ the government still allows for the removal of organs from prisoners.²⁰¹ In 2006, when concerned human rights activists began protesting, China enacted the "Provisions on the Administration of Entry and Exit of Cadavers and Treatment of Cadavers."²⁰² This order was enacted to preserve the rights of prisoners who were being forced to donate their organs, but

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¹⁹⁴ Amnon Meranda, *Knesset Approves Organ Donation Law*, YNETNEWS.COM (Mar. 25, 2008), <http://www.ynetnews.com/articles/0,7340,L-3523461,00.html>.

¹⁹⁵ *Id.*; Luc Noel & Dominique Martin, *Progress Towards National Self-sufficiency in Organ Transplants*, WORLD HEALTH ORGANIZATION, Vol. 87, No. 9 (Sept. 2009), <http://www.who.int/bulletin/volumes/87/9/09-068817/en/>.

¹⁹⁶ Meranda, *supra* note 194.

¹⁹⁷ *Id.*

¹⁹⁸ Jiefu Huang, M.D., et al., *A Pilot Programme of Organ Donation After Cardiac Death in China*, 379 THE LANCET 862-65 (Nov. 11, 2011), [http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(11\)61086-6/fulltext#bib2](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(11)61086-6/fulltext#bib2); *China Pledges to Phase Out Prisoner Organ Donations*, FRANCE 24 INTERNATIONAL NEWS (Mar. 23, 2012), <http://www.france24.com/en/20120323-china-moves-away-prisoner-organ-donations-death-row>.

¹⁹⁹ Huang, *supra* note 198.

²⁰⁰ *See infra* Part I §§(i)(a).

²⁰¹ Sam Crowe, Ph. D. & Eric Cohen, Ph. D., *Organ Transplantation Policies and Policy Reforms*, THE PRESIDENT'S COUNCIL ON BIOETHICS (Sept. 2006), <http://bioethics.georgetown.edu/pcbe/background/crowepaper.html#edn38>.

²⁰² Hemphill, *supra* note 9, at 436.

did not prohibit removing organs from prisoners.²⁰³ Additionally, the “law limits the importation and exportation of cadavers solely for the purposes of funerals and medical research. . . prohibit[s] trade in cadavers, and to make use of cadavers to engage in commercial activities.”²⁰⁴ The extent to which these laws are respected is uncertain. Human rights groups have expressed concern that the economic benefit will outweigh moral concerns and violations of human rights.²⁰⁵ The Chinese government has an incentive to sell organs; by enacting the TRCU order the government has created a continuous supply of organs from prisoner cadavers.²⁰⁶

Iran is the only country in the world that permits the sale of organs.²⁰⁷ The organ sales are regulated by the state to ensure equal distribution.²⁰⁸ Even though Iran allows the sale of organs, Iran prohibits allowing brokers to find donors.²⁰⁹ The state system allows for donors to receive compensation from the government, the recipient, and a charitable organization.²¹⁰

Other countries have not legalized an open market for organs, but allow incentives to promote organ donation.²¹¹ In Canada, the incentives for organ donations vary from employment insurance to receiving tax credits for medical expenses.²¹² The United Kingdom

²⁰³ Hemphill, *supra* note 9, at 436; Huang, *supra* note 198.

²⁰⁴ Lisa A. Giunta, *The Dead on Display: A Call for the International Regulation of Plastination Exhibits*, 49 COLUM. J. TRANSNAT'L L. 164, 180 (2010).

²⁰⁵ Hemphill, *supra* note 9, at 439.

²⁰⁶ *Id.* at 434.

²⁰⁷ Lisa M. Derco, *America's Organ Donation Crisis: How Current Legislation Must be Shaped by Successes Abroad*, 27 J. CONTEMP. HEALTH L. & POL'Y 154, 163 (2010).

²⁰⁸ *Id.* at 164.

²⁰⁹ Kerry Howley, *Kidneys for Sale: Iranian Organ Donation*, REASON.COM (May 13, 2008), <http://reason.com/archives/2008/05/13/kidneys-for-sale>.

²¹⁰ *Id.* (explaining the government will pay up to \$1,200 and give the donor limited health insurance, as well as allow charitable organizations to compensate the donor if the recipient is not able to).

²¹¹ Scott Klarenbach et al., *Living Organ Donors Face Financial Barriers: A National Reimbursement Policy is Needed*, 174 CAN. MED. ASS'N J. 797-798 (2006), available at <http://www.cmaj.ca/content/174/6/797.full>.

²¹² *Id.*

provides similar incentives by permitting the donor compensation for travel costs, including accommodation expenses and lost wages.²¹³

Some countries have enacted presumed consent laws in an attempt to make more organs available and deter organ trafficking.²¹⁴ In nations where presumed consent laws exist, everyone is an organ donor at the time of death, unless they choose to opt out.²¹⁵ However, these laws have their weaknesses because some nations still allow family members to opt out for the deceased, regardless of the decedent's wishes.²¹⁶ Perhaps "if the demand for organs were legally met, then people would have less incentive to illegally obtain organs and the black market would eventually diminish."²¹⁷ If a nation wants to increase organ donations through presumed consent then they must use the strict standard and not allow family members to opt-out for the deceased.²¹⁸

B. International Law

In an effort to prohibit trafficking in persons on an international level, the U.N. Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (commonly referred to as the Palermo Protocol) was adopted in 2000.²¹⁹ As of 2012, 117 countries signed the

²¹³ Derco, *supra* note 207, at 167.

²¹⁴ Glaser, *supra* note 13, at 21 (explaining that between 15 and 20 nations have enacted presumed consent laws).

²¹⁵ Glaser, *supra* note 13, at 21.

²¹⁶ *Id.* (discussing that Europe's weaker laws do not increase its organ supply).

²¹⁷ *Id.*

²¹⁸ *Id.* (stating Brazil has strict laws where the individual must opt out and does not allow anyone else to opt out for them at the time of their death).

²¹⁹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, G.A. Res. 55/383, pmb., U.N. GAOR, 55th Sess., U.N. Doc A/RES/55/383 (Nov. 15, 2000), *reprinted in* 40 I.L.M. 335, 337 [hereinafter Trafficking Protocol].

treaty.²²⁰ The protocol was created to promote international cooperation when trafficking takes place on a transnational level.²²¹ The protocol defines trafficking in persons to include servitude or the removal of organs.²²² It requires states to adopt measures necessary to establish criminal liability for offenses committed under the Protocol, and to adopt preventative measures in order to deter the criminal activity.²²³ Also, the Protocol urges states to consider a system for victims of trafficking, particularly by allowing victims to remain temporarily or permanently in the receiving country.²²⁴

Additionally, in 2002, the Council of Europe opened for ratification *The Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin* (Protocol on Transplantation of Human Organs).²²⁵ The convention has been ratified by twelve member states.²²⁶ The preamble to the Protocol on Transplantation of Human Organs addresses several reasons for the Protocol, such as the shortage of organs and tissues, as well as, the conditions under which a transplant should take place.²²⁷ Article 22 of the Convention prohibits organ and tissue trafficking specifically.²²⁸ Article 21 prohibits financial gain from the human body and its parts, and allows three specific instances when compensation for living donors may be justified: (1) compensation may be allowed for “justifiable expenses caused by the removal or by the related medical examinations”; (2) compensation for legitimate medical or related services as a result of the transplantation; and (3) “compensation in case of undue damage resulting from the removal of organs or tissues

²²⁰ *Id.* (explaining countries such as the United States, Israel, Egypt, Mozambique, Mexico, India and South Africa have signed the treaty).

²²¹ Trafficking Protocol, *supra* note 214, at Art. 2 (c).

²²² *Id.* at Art. 3 (a).

²²³ Trafficking Protocol, *supra* note 214, at Art. 5 §1.

²²⁴ *Id.* at Art. 7 §1.

²²⁵ Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin, C.E.T.S. No. 186 (Jan. 24, 2002) [hereinafter Protocol on Transplantation of Organs].

²²⁶ *Id.* (explaining no non-member states have ratified the convention).

²²⁷ *Id.*

²²⁸ *Id.* at Art. 22.

from living persons.”²²⁹ Article 21 also includes the prohibition of advertising the need of organs and offering or seeking compensation.²³⁰ The Protocol allows domestic law to determine the sanctions imposed for any offenders.²³¹

Furthermore, the Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, was adopted on May 3, 2005 by the Committee of Ministers.²³² On May 16, 2005, the Convention opened for signature and has since been ratified by 34 non-member states and 9 member states.²³³ It entered into force February 1, 2008, specifically addressing organ trafficking as a concern and reason for the Convention.²³⁴ The Convention states measures parties shall adopt to prevent and discourage trafficking.²³⁵ It requires that each state strengthen legislation and sanctions, ensure travel or identity documents cannot be falsified, and train proper authorities to identify and help victims. Also, the Convention suggests parties consider making it a criminal offense to “knowingly use the services of a victim of trafficking,” such as organ trafficking.²³⁶

²²⁹ *Id.* at Art. 21. The explanatory report of the convention specifically address that examples of when a donor may be compensated should not be considered exceptions to the principle. *Id.* The explanatory report also includes the prohibition of compensation for third parties, for example, health professionals or tissue banks. *Id.*

²³⁰ Protocol on Transplantation of Organs, *supra* note 225, at Art. 21.

²³¹ *Id.* at Art. 26.

²³² Treaty of Lisbon Amending the Treaty on European Union and the Treaty establishing the European Community (Dec. 1, 2009) O.J. (C 197), <http://conventions.coe.int/treaty/en/reports/html/197.htm> [hereinafter Treaty of Lisbon].

²³³ *Id.*

²³⁴ *Id.* at para. 26 (addressing Recommendation 1611 on trafficking in organs in Europe, where the Parliamentary Assembly suggested a strategy to combat organ trafficking).

²³⁵ *Id.* at Art. 6 para. 108.

²³⁶ *Id.* at Art. 19 para. 231.

IV. Prediction of Future Decisions

In the United States, laws likely will shift toward establishing higher penalties against organ traffickers. In October of 2012, a bill was introduced to establish higher penalties and deter traffickers.²³⁷ The Bill proposes to enact the “Trafficking in Organs Victims Protection Act” (TOVPA) to combat organ trafficking.²³⁸ Some of the stated reasons for the bill include: (1) findings by the World Health Organization (WHO) which approximates that 10 percent of all transplanted kidneys are obtained illegally; (2) specific reports from Kosovo, Moldova, and South Africa alleging people have been forced to remove their organs for sale; and (3) Afghanistan’s Interior Minister Ali Ahmed Lakali’s report of more than 100 arrests based on child abduction charges, stating children have been abducted for several reasons, one being to provide human organs.²³⁹ The bill lays out thirty-one findings by Congress of organ trafficking taking place around the world.²⁴⁰ While it is important to ensure human rights are not violated, enacting laws such as H.R. Bill 6573 may increase the demand for organs, since it will be more difficult for people to obtain organs illegally. If other countries do not enact similar preventative laws, the demand for organs may increase mortality rates around the world.

Additionally, if Congress does not take action to prohibit organ trafficking, it is likely states may begin to enact their own laws. The Tenth Amendment to the Constitution grants the states the power to make laws necessary to protect the health and safety of their citizens.²⁴¹ Currently, the following states have enacted statutes addressing organ trafficking: Washington,²⁴² Minnesota,²⁴³ North

²³⁷ H.R. 6573, 112th Cong. (2012); The bill was first introduced in September 2010 by Congresswoman Ileana Ros-Lehtinen, however, the bill received little attention and was then reintroduced in 2012. *See* H.R. 6148, 111th Cong. (2010).

²³⁸ H.R. 6573, 112th Cong. (2012) §1.

²³⁹ *Id.* §2 (1)-(2), (9).

²⁴⁰ *Id.* §2 (1)-(31).

²⁴¹ U.S. CONST. amend. X.

²⁴² WASH. REV. CODE ANN. § 9A.40.100, 1(a)(ii)(C) (West 2011) (“A person is guilty of trafficking in the first degree when: involved in the illegal harvesting or

Dakota,²⁴⁴ and Delaware.²⁴⁵ Also, in Massachusetts, a bill was introduced proposing a state law prohibiting organ trafficking.²⁴⁶ However, the federal government may enact necessary federal statutes regulating organ trafficking through the commerce clause. Article 1, Section 8, Clause 3 of the Constitution states Congress has the power to “regulate commerce with Foreign Nations, and among the several States, and with the Indian Tribes.”²⁴⁷ This grants Congress the power to enact a federal statute prohibiting any form of organ trafficking, because of its substantial effect on interstate market.²⁴⁸ In *Gonzalez v. Raich*, the court noted that “[w]hen Congress decides that the ‘total incidence’ of a practice poses a threat to a national market, it may regulate the entire class.”²⁴⁹ Organ trafficking promotes the sale of organs and it may pose a threat to the national organ donation system. The demand for organs then would increase and likely result in an increase of citizens traveling abroad to receive illegal organ transplants.

sale of human organs.”).

²⁴³ MINN. STAT. ANN. § 609.281, 5(1)(iii) (West 2011) (“Labor trafficking means: the removal of organs through the use of coercion or intimidation.”).

²⁴⁴ N.D. CENT. CODE ANN. § 12.1-40-02, 4(c) (West 2011) (“Labor trafficking’ means...for the purpose of: [t]he removal of organs through the use of coercion or intimidation.”).

²⁴⁵ DEL. CODE ANN. TIT. 11, § 787, b (4) (West 2011) (“A person is guilty of trafficking of persons for use of body parts when a person knowingly: (a) [r]ecruits, entices, harbors, provides or obtains by any means, another person, intending or knowing that the person will have body parts removed for sale; or (b) [b]enefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of this section.”).

²⁴⁶ S.B. 1951 § 53 (ii), 187th Gen. Ct. (Mass. 2011) (“Whoever: knowingly receives anything of value, directly or indirectly as a result of a violation of clause (i) shall be guilty of organ trafficking and punished by imprisonment in the state prison for not more than 15 years or a fine not more than \$50,000, or both.”).

²⁴⁷ U.S. CONST. art. 1, §8, cl. 3.

²⁴⁸ *U.S. v. Lopez*, 514 U.S. 549 (1995).

²⁴⁹ *Gonzalez v. Raich*, 545 U.S. 1, 17 (2005) (finding that the total incidence standard also applies to black markets).

V. Appraisal, Alternatives, and Recommendations

The black market for human organs derives from the demand of needy recipients. Virtually all countries are affected by the high demand for organs and the shortage of organs that can be legally obtained.²⁵⁰ For this reason, it is vital for governmental institutions to take necessary measures to increase voluntary organ donors by creating a legal organ donor compensation program.²⁵¹ Moreover, if the government does not allow an organ compensation program, raising criminal sanctions may help deter traffickers. Finally, it is important to educate the public on how to properly donate organs before or after death.

As society continues to change, there may be growing acceptance for organ donor compensation. Scholars and government officials already have proposed ways to increase organ donations and deter organ trafficking. Two main proposals by government officials are public compensation and organ markets.²⁵² Public compensation refers to compensating the donor in various ways, either through tax credits or cash payments.²⁵³ When the donor is deceased, the compensation may be through reimbursing funeral expenses.²⁵⁴ Under public compensation, the government would be responsible for regulating the type(s) of compensation legally permitted.²⁵⁵ Organ markets follow a similar concept to public compensation, without government intervention.²⁵⁶ Organ markets would allow either a living person or the family of a deceased person to openly

²⁵⁰ Shimazono, *supra* note 11.

²⁵¹ Samadi, *supra* note 164 (“One study ... found that despite 90 percent of Americans supporting organ donation, only 30 percent knew the essential steps to becoming a donor.”).

²⁵² *Staff Background Paper: Organ Transplantation: Ethical Dilemmas and Policy Choices*, GEORGETOWN.EDU, http://bioethics.georgetown.edu/pcbe/background/org_transplant.html#endnote1 (last visited on May 30, 2013).

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

sell their organs for cash payment.²⁵⁷ The difference is that an organ market would allow “the freedom to buy at any price as well as [the] freedom to sell at any price.”²⁵⁸ However, allowing the sale of organs at any price may create discrimination amongst the different classes and allow the wealthy to have access to the organs the less affluent will not be able to afford. Public compensation is more effective because it will ensure an increase in organ donors without the discriminatory effects against the poor. As the current problems illustrate, government’s involvement is required in regulating the organ sales to ensure fairness and safety of the donors.

For all reasons expanded upon in this comment, my proposal would be for the United States to legalize the selling of organs by creating an organ matching foundation. The organ matching foundation will prescreen potential donors to test their blood type beforehand in an effort to increase the number of live organ donors. This proposed concept is similar to how they match bone marrow donors with a recipient.²⁵⁹ Essentially, the potential donors are provided with an at-home test kit, which will allow them to provide their blood type information. The test kit will include a finger lancet, alcohol prep, plastic applicator sticks, and testing card. The potential donor will need to lance a finger and place a finger on the testing card to absorb the blood. Once the potential donor completes the test, the blood samples are mailed to the foundation, which will test and publish the results on an online profile for each potential donor. The information then will be entered into a national database for organ recipients to view online. Further screening may be necessary to ensure the potential donor is healthy. When a recipient is in need of an organ, he or she will have access to potential donors’ blood type information, making it easier and faster to find a matching donor. This will allow organ recipients to quickly find a matching donor under emergency situations while providing government regulation. Also, people who sign up to have their organs donated at death should participate in the prescreening program. Prescreening would

²⁵⁷ *Id.*

²⁵⁸ Staff Background Paper, *supra* note 252.

²⁵⁹ *Cheek Swab Guide: Introduction*, BE THE MATCH, <http://marrow.org/apps/swabguide/content/course.htm?aud=1> (last visited on Jun. 12, 2013).

allow the organs to be matched quickly and avoid waste.²⁶⁰ With the organ matching foundation the government will have the ability to monitor and regulate the sale of organs for both living and non-living donors. Non-living donors may be given the option to either donate the organs or sell the organs and apply the money to funeral expenses. Similarly, the United States may consider entering into agreements with other countries for transnational operations. If the United States allows the sale of organs, it likely will decrease the crimes involved as a result of the black market for organs. Also, the United States will have more control in ensuring organ removal is carried out safely.

In the event organ compensation is not allowed, it is in this author's opinion that at a minimum the sanctions for offenders must be heightened and the public must be educated. The current sanctions in place often have proven ineffective.²⁶¹ Therefore, there is a growing need to raise the sanctions of current sentencing laws, and amend laws to include penalties for each participant involved in organ trafficking.²⁶² Imposing higher penalties for organ trafficking likely will deter those involved in these criminal acts.

Also, while some countries regulate the sale of organs within their own borders, they do not prohibit the sale of organs in a different country.²⁶³ Therefore, people are able to travel to other countries and sell their organs, escaping the criminal liability of their sovereigns.²⁶⁴ Laws prohibiting the selling of organs will hold individuals involved in trafficking accountable. For example, holding doctors accountable when they know organs have been obtained

²⁶⁰ *Organ Allocation*, UNITED NETWORK FOR ORGAN SHARING, http://www.unos.org/donation/index.php?topic=organ_allocation (last visited on Apr. 25, 2013) (quoting "the length of time donated organs and tissues can be kept outside the body vary: Heart: 4-6 hours; Liver: 12-24 hours; Kidney: 48-72 hours; Heart-Lung: 4-6 hours; Lung: 4-6 hours).

²⁶¹ Secretary-General, *Questionnaire*, *supra* note 10, Ques. 7(a)-(b).

²⁶² See Budiana-Saberi, *supra* note 18. For purposes of this paper participants should be anyone in violation of organ trafficking as defined under the United Nations Trafficking Persons act, including brokers and doctors.

²⁶³ Secretary-General, *Questionnaire*, *supra* note 10, Ques. 5.

²⁶⁴ *Id.*

illegally may reduce and possibly eliminate organ trafficking.²⁶⁵ These laws will essentially remove the “don’t ask, don’t tell policy” doctors follow.²⁶⁶ Removing the “don’t ask, don’t tell policy” will not violate patients’ confidentiality rights because reporting illegally obtained organs would fall within the framework set forth by the “protection of the public” exception.²⁶⁷ Doctors should be sanctioned with “administrative, civil, or criminal penalties, depending upon the level of their intent and knowledge.”²⁶⁸ If doctors are not available to conduct the illegal organ transplants then the organ trafficking rings essentially will deteriorate.²⁶⁹

Additionally, it is important to educate the public, as well as, governmental authorities (in both origin and destination countries) of ways in which they may assist in diminishing organ trafficking. In countries of origin, the government should educate the poor communities of the health risks involved with being a live organ donor. Also, by creating seminars and outreach groups to visit countries, communities, or schools where people are often victimized the public will learn how to avoid becoming victims of organ trafficking, through fraud or coercion. Fraud and coercion occur

²⁶⁵ Glaser, *supra* note 13, at 22.

²⁶⁶ *Id.* at 21.

²⁶⁷ *Id.* explaining the protection of the public exception:

The exception permits a doctor to reveal confidential information about a patient if the doctor has grounds to think that the patient’s medical condition is a risk to others and that disclosure is necessary to protect the public from such a risk. The harm from a doctor breaking his or her duty of confidentiality to a patient includes potential embarrassment to the patient and damage to his or her reputation for the patient’s decision to obtain an organ from a trafficked person. Considerations of the public interest outweigh this harm, however, because organ trafficking is a risk to the public and a crime involving egregious violations of human rights. Misleading or forcing someone into giving up an organ is a violation of personal autonomy.

Id.

²⁶⁸ *Id.*

²⁶⁹ *Id.* (explaining “[r]eporting such an incident to the proper authorities could be an integral way to break up entire organ trafficking rings because reporting might lead to questioning and prosecuting people involved in the ring”).

when people are promised a sum of money for the transplant but after the transplant they do not receive any payment or only a fraction of the payment promised. Destination countries should educate and bring awareness of the importance of increasing cadaver donations by means of national campaigns.²⁷⁰ Destination countries also can heighten awareness by providing incentives to people who sign up to donate their organs at death.²⁷¹

Finally, as society evolves, perspectives change, but one thing remains constant, the demand for organs. This author holds that the United States will be better equipped to combat organ trafficking by legalizing the sale of organs through the creation of an organ matching foundation, as well as, the imposition of heightened sanctions and education of the public as a whole, creating an atmosphere of awareness for all classes of people and government; ensuring that the rights of innocent people are protected. As Mahatma Gandhi once said, “the difference between what we are doing and what we are capable of doing would solve most of the world’s problems.”²⁷²

²⁷⁰ Campaigns similar to Breast Cancer Awareness month will help publicize the need for organ donations.

²⁷¹ Hansmann, *supra* note 146 (stating Connecticut will reimburse the \$10 identification card charge if they sign-up to donate an organ at death).

²⁷² DR. WILLIAM L. SHEALS, *WALKING IN AUTHORITY: BIBLICAL EXAMPLES FOR MODERN TIMES* 26 (iUniverse, Inc. 2007).