



VYTAUTO DIDŽIOJO UNIVERSITETAS
TEISĖS FAKULTETAS

Eimantas Kuralavičius

Does the Organ Trade Constitute a Fundamental Human Rights Violation?

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Vadovas prof. Charles Szymanski _____
(Moksl. laipsnis, vardas, pavardė) (Parašas) (Data)

Apginta doc. dr. Tomas Berkmanas _____
(Fakulteto dekanas) (Parašas) (Data)

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SANTRAUKA

Eimantas Kuralavičius, "Ar prekyba organais pažeidžia pamatines žmogaus teises?"

Visam pasaulyje siaučiant Antrajam Pasauliniam karui, tuomečiam JAV prezidentui Franklinui Ruzveltui reikėjo sugalvoti pateisinimą JAV karinių pajėgų intervencijai į šį konfliktą, kadangi tuo metu šioje šalyje galiojo įvairūs šalies neutralumą užtikrinantys įstatymai. 1941-ųjų sausio 6 d. Ruzveltas kreipėsi į tautą pareikšdamas, kad joks amerikietis negali ramiai stovėti ir tikėtis iš diktatorių žodžio laisvės, laisvės nuo baimės, norų laisvės ar religinės laisvės. Ši kalba vėliau įgavo „Keturių laisvių kalbos“ vardą, o joje paminėtos laisvės tapo pamatinėmis žmogaus laisvėmis, galiausiai istorijos eigoje evoliucionavo į „Visuotinę žmogaus teisių deklaraciją“, kuri šiuo metu yra kaip visų tarptautiniu lygmeniu pripažįstamų pamatinių žmogaus teisių sąrašas. Prekyba organais yra sąvoka, kuria apibūdinamas platus sąrašas veiksmų, kuriais komercializuojami žmogaus organai ir kitos kūno dalys siekiant juos persodinti kitam žmogui. Šie veiksmai neretai įvairiomis formomis atliekami būdais, kurie gali suponuoti žmogaus teisių pažeidimą. Tarp tokių patenka tokie atvejai kaip žmonių gabenimas norint išoperuoti jų organus pardavimui, persodinimų turizmas, kai pacientai keliauja į kitas šalis, kad galėtų pasidaryti neteisėtas organų persodinimo operacijas ir kt. Tokie atvejai vyksta dėl didelio organų stygiaus pasaulyje, kadangi iš altruistiškų donorų gaunamų organų nei iš tolo nepakanka patenkinti organų „paklausai“ ir dėl to asmenys, kuriems reikalingi nauji organai, kad galėtų išgyventi imasi kraštutinių veiksmų.

Pagrindinis darbo tikslas buvo atsakymo į išsikelto hipotezę, jog prekyba organais pažeidžia pamatines žmogaus teises, paieškos. Darbu taip pat buvo siekta aprašyti pamatines žmogaus teises, jų hierarchiją ir tipus, apibrėžti prekybą organais, jos ypatybes ir tipus, analizuoti kaip prekyba organais gali pažeisti žmogaus teises ir sukurti pavyzdinį modelį tarptautiniam prekybos organais reguliavimui. Moksliniame darbe buvo naudojami lyginamosios analizės, dokumentų analizės ir loginės analizės tyrimo metodai. Hipotezės patvirtinimo ar atmetimo tikslu darbe buvo analizuojami jau egzistuojantys įstatymai ir tarptautinės sutartys, reguliuojančios prekybą organais pasaulyje atskirų šalių ir tarptautiniais lygmenimis, taip pat buvo nagrinėjami įvairūs atvejai ir bylos iš įvairių pasaulio šalių, susijusios su organų prekyba ir gabenimu bei buvo įvertinta jų įtaka tarptautinei teisei ir jų santykis su pamatinių žmogaus teisių saugojimu.

Pirmoje darbo dalyje yra analizuojami įvairūs atvejai ir bylos, susiję su neteisėtu organų pašalinimu iš žmonių ir prekyba žmogaus kūno dalimis. Darbe aptariami Kinijoje, Indijoje, Kosove ir Latvijoje vykę atvejai, susiję su žmogaus teisių pažeidimu ir organų prekyba. Kinijoje įstatymai leidžia iš nuteistųjų mirties bausme kalinių paimti organus kaip iš donorų, taip pat, įstatymai draudžia išpažinti vieną „Qigong“ religijos atšaką – „Falun Gong“. Įvairūs pranešimai ir tyrimai praneša, kad Kinija turi išvysčiusi slaptą sistemą savo ligoninės, kur nelegaliai yra persodinami šios krypties

pasekėjų, nuteistų ir dėl įvairių priežasčių mirusių laisvės atėmimo įstaigose, organai. Indijoje 2008-aisiais buvo atskleistas nelegalus prekybos organais ir transplantacijos operacijų atlikimo tinklas, kur buvo išnaudojami neturtingiausi benamiai indai, jiems pažadant darbą ir susitikus per darbo pokalbį atskleidžiant, kad darbo nėra ir galima užsidirbt atiduodant savo organus. Galiausiai, atlikus šias procedūras, šie asmenys būdavo paleidžiami nedavus žadėto atlygio arba sakant, kad jis bus duotas tik jei šie ras dar keletą žmonių, kurie sutiktų atiduoti organus už siūlomą atlygį. Kosove, įvairių šaltinių teigimu, vykstant Kosovo nepriklausomybės karui, „Kosovo Išlaisvinimo armija“ gabendavo jaunos karo belaisvius serbus į šiaurės Albaniją ir ten pašalindavo jų organus, o juos pačius nužudydavo. Prie šio atveju pateikiama ir analizė, kodėl prekyba organais bent jau artimiausioje ateityje netaps Tarptautinio baudžiamojo teismo jurisdikcijos dalimi. Galiausiai, pirmoje darbo dalyje analizuojamas Latvijos atvejis ir Europos Žmogaus Teisių teismo byla, kurioje neleistinai buvo pašalinta dalis medžiagų iš avarijoje žuvusio vyro kūno. Byla parodė, kad dabartinėje situacijoje, kai trūksta tiesiogiai prekybai organais skirto tarptautinio įstatymo, teismas gali remtis ir interpretuoti Europos žmogaus teisių konvencijos straipsniais gindamas artimųjų ir paties velionio teises. Pripažinta, kad nesuteikimas tinkamų sąlygų artimiesiems nesutikti su mirusiojo kūno dalių pašalinimu suteikiant tokia teisę šalies įstatymuose pažeidžia artimųjų teises į asmeninį gyvenimą.

Antroje darbo dalyje yra aptariami įvairūs egzistuojantys įstatymai, tarptautinės sutartys ir rekomendacijos, veikiantys vietiniu šalių ir tarptautiniu lygmenimis. Pažymėtina yra 2015 metais Europos Tarybos sudaryta sutartis, kuri draudžia bet kokią žmogaus organų ir kitų jo kūno dalių komercializaciją. Tai yra pirmą tarptautinę sutartį susijusią su žmogaus organų gabenimu ir pardavimu. Šiuo metu ji dar neturi galios, kadangi kol kas ji yra pasirašyta 18 šalių iš kurių tik Albanija ją yra ratifikavusi, o įsigaliojimui reikia 5 ratifikavimų iš kurių 3 turi būti Europos Tarybos šalys. Taip pat, verta atkreipti dėmesį į pastaraisiais metais Australijoje, Singapūre, Izraelyje ir Pakistane priimtus įstatymus, leidžiančius tam tikras finansines ir socialines lengvatas iš valstybės asmenims, kurie sutinka būti organų donorais. Izraelyje šie įstatymai jau davė rezultatų didinant žmonių, sutikusių būti donorais skaičių ir mažinant užsienyje Izraelio piliečių daromų organų persodinimo operacijų skaičių. Šioje darbo dalyje taip pat apžvelgiami JAV teisės aktai, Stambulo deklaracija, ir pasaulyje galiojantys įstatymai, saugantys nepilnamečių asmenų teises, susijusias su prekyba organais.

Galiausiai, remiantis nagrinėtais žmogaus teisių pažeidimo, susijusio su prekyba organais pavyzdžiais, buvo prieita išvados, kad hipotezė, jog prekyba organais pažeidžia pamatines žmogaus teises yra patvirtinta. Taip pat, remiantis darbe atlikta analize paaiškėjo, kad yra reikalingas bendras tarptautinis įstatymas, reguliuojantis prekybą organais supranacionaliniu lygmeniu, todėl yra pateikiamas pavyzdinis šio įstatymo modelis paremtas valstybių praktika ir moksline literatūra. Šis modelis nustato valstybėms suteikti finansines ir socialines lengvatas skatinant didinti donorų skaičių

ir bendrą žmonių norą būti neatlygintiniais organų donorais, taip pat turėtų labiau koncentruotis ne į galutinį rezultatą (prekybą organais), o į patį tikslą ir žmonių ar organų nelegalaus gabenimo esmę – išnaudojimą. Turėtų būti pateikiami aiškūs ir universalūs sąvokų paaiškinimai, šalims leidžiama kooperuotis persekiojant ir teisiant įstatymą pažeidusius asmenis ir pristatyti prasmingas sankcijas už įstatyme numatytų normų nesilaikymą. Tuo tarpu, kol toks įstatymas neegzistuoja, remiantis Elberte prieš Latviją bylos pavyzdžiu, asmenys gali ginti savo teises, atvejuose, susijusiuose su prekyba organais remdamiesi Europos Žmogaus Teisių konvencija.

SUMMARY

Eimantas Kuralavičius, “Does the Organ Trade Constitute a Fundamental Human Rights Violation?”

The main aim of this work was to give an answer to the raised hypothesis of organ trade constituting a fundamental human rights violation. To achieve this various legislations directed at the subject of organ trade, as well various cases of organ trade and organ trafficking around the world were analysed and the impact they had on legal side and in terms of respecting the fundamental human rights was assessed.

In the first part of the work, various cases regarding unlawful organ removal and trade were discussed. Chinese Falun Gong case showed how the government could exploit convicted criminals and religious groups by passing legislations allowing their organ harvest and creating a secret transplant system across country's hospitals. Indian Gurgaon trafficking network case showed how people from poor social classes can be unlawfully exploited for their organs. Kosovar case showed the exploitation of ethnic groups with intent to sell their organs. Finally, Latvian case of unlawful tissue removal showed that European Convention of Human Rights can be interpreted by courts in matters relating to human body part trafficking in absence of international legislation meant specifically for organ trade.

In the second part of the work, various legally binding and non-binding domestic and international legislations in relation to organ trade that are currently made were analysed.

Finally, it was concluded that hypothesis of organ trade constituting a fundamental human rights violation is confirmed. Also, analysis in work has shown that an unified international legislation regarding organ trade is needed, so an exemplary law model based on domestic examples and scientific literature is given.

INTRODUCTION

Organ trade, including organ trafficking, is a term which refers to a whole range of illegal activities that aim to commercialize human organs and tissues for the purpose of transplantation. It encompasses the trafficking of persons with the intent to remove their organs; transplant tourism where patients travel abroad seeking an (illegal) transplant with a paid donor; and trafficking in organs, tissues and cells, which refers to commercial transactions with human body parts that have been removed from living or deceased persons.¹ As of 2011, about 90000 people in the United States of America were waiting for new organs for transplantation. During that year, 4600 patients were removed from that list because they died and another 2100 became too sick to be able to withstand a transplantation surgery. On average, a person will wait three and a half years for an organ to become available for transplant. There is a significant shortage of available organs worldwide and the legality of organ trafficking or organ trade is a hot and relevant debate in both national and international law.²

Legal status of organ trade all around the world remains inconsistent. For quite some time Iran has been the only country that legally allows human organs to be bought and sold. In 2013, Iran was partially joined by Australia and Singapore, both of which legalized financial compensation for living organ donors.³⁴ On the other hand, in 2015 the European Council created and signed the world's first international treaty on human organ trade called the Council of Europe Convention against Trafficking in Human Organs, which, as of now, is only ratified by 1 country and signed by 17 and which deemed any donation of organs from living donors for any compensation illegal.⁵⁶

Scientific research shows that of the 72 economic researchers who worked with organ trade, 68% were in favor of legalizing the organ trade, while only 21% were against it. Most of them cite low risk, bigger donor protection, longer life of screened kidney donors, better quality of live donor organs because there is more time to find best donor-receiver matches and better post-operative donor care than in black market among the arguments in favor of making human organ trade legal.⁷

However, there is a whole different side of organ trade. Because of a demand being much higher than the supply, a big black organ market exists to fill in the gaps. There are many allegations and confirmed cases of cruel crimes being made in order to supply the black market: Serbia's attempt

¹ Michael Bos, Directorate-General for External Policies Policy Department, *Study Trafficking in human organs*, (European Union, 2015)

² Abby Wisel Schachter, *The Case for Legal Organ Sales*, <http://reason.com/archives/2011/11/11/the-case-for-legal-organ-sales> [accessed on 2017 03 07]

³ Rashida Yosufzai, *Live Donors to Get Financial Support*, <http://www.theaustralian.com.au/news/latest-news/living-donors-to-receive-financial-support/news-story/a5751fe5b68c4191eb9403d1620f0918> [accessed on 2017 03 07]

⁴ David Gutierrez, *Singapore to Legalize Financial Compensation for Organ Donors*, http://www.naturalnews.com/026619_Singapore_organ_donor_WHO.html [accessed on 2017 05 10]

⁵ *European nations sign world's first organ trafficking treaty*, <https://www.yahoo.com/news/european-nations-sign-worlds-first-organ-trafficking-treaty-224021693.html?ref=gs> [Accessed on 2017 03 05]

⁶ Council of Europe Convention against Trafficking in Human Organs (2015 03 25, CETS no. 216)

⁷ Jon Diesel, *Do Economists Reach a Conclusion on Organ Liberalization?*, *Econ Journal Watch* (2010 09, vol. 7 no. 3)

in an ongoing international case to make Albania's actions against Kosovar Serbs, when they allegedly dragged them to some facility and killed them and sold their organs to other countries⁸ or claims about Falun Gong practitioners being pursued in China and getting their organs harvested to supply huge market of organ all around the world are only two of a big amount of confirmed and alleged cases of huge scale organ harvesting.⁹

Various human right groups like "Organs Watch" oppose idea of legalizing human organ trade.¹⁰ With many countries going in opposite directions in regulating organ trade and there being little to none international legal regulation on it, it is important to research this topic and get an answer as to whether organ trade should be considered a fundamental human rights violation and thus be made illegal in international law worldwide or vice versa and where should individual countries go with their jurisdictions.

The aim of this work is to analyze different legislations directed at the subject of organ trade, various cases of organ trade and organ trafficking around the world and to assess what effects they had in terms of respecting the fundamental human rights.

The main goals of the research are:

- To give a conception of fundamental human rights, their hierarchy and types
- To give a description of organ trade, its properties, aspects and types
- To analyze how an organ trade could violate fundamental human rights
- To make an exemplary law model to regulate organ trade

Methods of the research: comparative analysis, document analysis and logical analysis.

Research's hypothesis is that organ trade should constitute a fundamental human rights violation.

⁸ Carla del Ponte, *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity* (Other Press, 2008)

⁹ David Kilgour, David Matas *Bloody Harvest The Killing of Falun Gong for their organs* (Seraphim Editions, 2009)

¹⁰ Patricia McBroom, *An "organs watch" to track global traffic in human organs opens Mon., Nov. 8, at UC Berkeley* <http://www.berkeley.edu/news/media/releases/99legacy/11-03-1999b.html> [Accessed on 2017 05 10]

THE SUMMARY OF THE DEFINITION OF FUNDAMENTAL HUMAN RIGHTS, ORGAN TRADE AND TRANSPLANT TOURISM

Fundamental Human Rights

Travel back to January 6th of 1941. With World War II taking place all over the globe and United States of America neutrality laws still in effect, US president Franklin Roosevelt has to find a rationale for his country's intervention into fight and abolishment of neutrality acts. He goes on to give a speech which will go down in a history as one of the pivotal moments in international human rights history. In this speech he criticized US isolationism by saying, that “[n]o realistic American can expect from a dictator's peace international generosity, or return of true independence, or world disarmament, or freedom of expression, or freedom of religion—or even good business” and that “[t]hose, who would give up essential liberty to purchase a little temporary safety, deserve neither liberty nor safety.”¹¹

Nowadays we call it “The Four Freedoms Speech” because in it Franklin Roosevelt introduced the four fundamental freedoms: the freedom of worship, freedom from want, freedom from fear and freedom of speech.¹² These served as a justification for war as well as a motivation for troops to keep on fighting during the remainder of WWII.

After the war, when Nazi crimes and atrocities became apparent to world the need for a international document that protected human freedoms and rights all around the world arose. The Four Freedom became an inspiration and basis for a 1948 United Nations Universal Declaration of Human Rights and were even cited in the preamble of it.¹³ Even though it is not legally binding on itself, it has since been adopted for the purpose of defining such phrases as “fundamental freedoms” and “human rights” that appear in the United Nations Charter (in fact, one of the reasons which influenced the creation of the Declaration was a lack of sufficient definition of the rights to which the UN Charter referred to). That means that it is a fundamental constitutive document of UN and is binding on all UN members. As a result, Universal Declaration of Human Rights serves as a list of all acknowledged legal fundamental human rights. Declaration has 30 articles in all, each representing a different fundamental human right. Among them are such rights as being born free and equal, right to life, right to privacy, right to asylum, ownership rights, freedom of thought, worker's rights, , freedom to move, etc. A full list of all fundamental human rights is provided in the Annex 1 of this work.

¹¹ Franklin D. Roosevelt, *1941 State of the Union address “The Four Freedoms”* (6th January, 1941)

¹² *Id*

¹³ The Universal Declaration of Human Rights (1948 12 10, General Assembly resolution 217 A)

Since this work frequently mentions “fundamental” human rights, it is noteworthy to mention the current President of the International Residual Mechanism for Criminal Tribunals Theodor Meron’s work (1986) “On a Hierarchy of International Human rights” in which he, through examination of various documents and treaties such as an UN Charter, Universal Declaration of Human Rights, the International Convention on the Elimination of All Forms of Discrimination Against Women, etc. concluded that terms such as “fundamental human rights”, “human rights”, “rights and freedoms” are being used interchangeably. This suggests that there is no real hierarchy of human rights and term “fundamental human rights” does not mean something bigger or more powerful than, for example, term “human rights”. International law to this day lacks an agreement on criteria which would help distinguish human rights on hierarchical terms even though various treaties and documents are usually using many hierarchical terms when describing different rights.¹⁴

Unfortunately, even an act as honorable as saving a life via organ transplant could hide a human rights violation in ways of organ trade and trafficking.

¹⁴ Theodor Meron *On a hierarchy of International Human Rights*, *The American Journal of International Law* (1986, vol.80)

Organ Trade

In 1954, a team of surgeons successfully transplanted the first kidney from Ronald Herrick to his identical twin Richard who was dying from kidney disease.¹⁵

Possibility of an organ transplant made many people, especially who needed replacement of their own organs because of their health conditions, very happy and gave them a chance at having good health or even saving their life, but at the same time it created a problem of getting these replacement organs. Huge number of patients who need an organ replacement led to much higher organ demand than supply could satisfy which in turn led into a big scarcity problem in organ trade. The shortage of organs is virtually a universal problem. As of 2011, about 90000 people were waiting for new organs for transplantation in the United States. In a following year, only 17000 (10500 of those came from dead (cadaver) donors) people from that list received organ transplants, while 4600 patients disappeared from that list because they died and another 2100 people became too weak to be able to withstand a transplantation surgery due to their illnesses getting worse. On average, patients are currently waiting around 3.5 years for an organ transplant.¹⁶

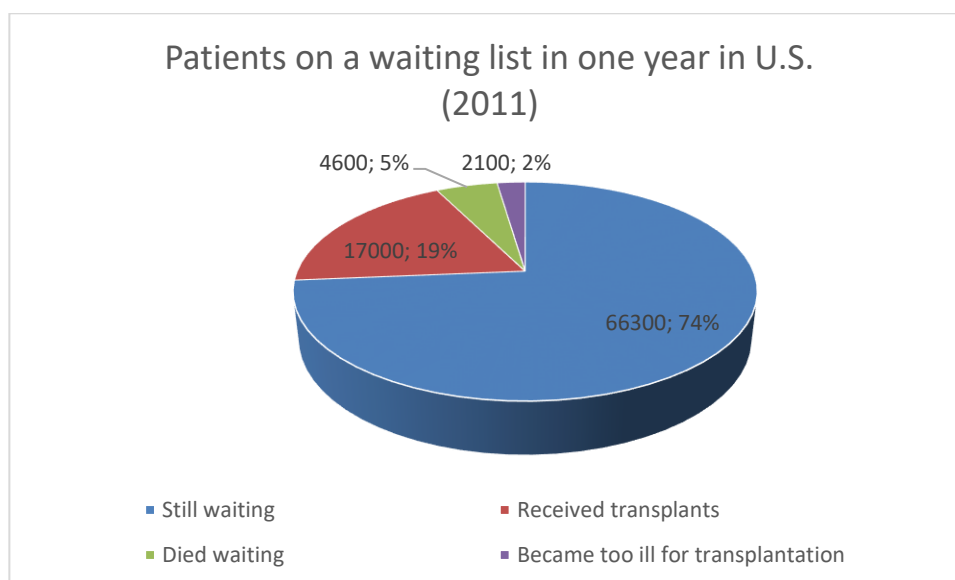


Figure 1. Patients on a waiting list in one year in U.S. (2011)

¹⁵ Steve P. Calandrillo, *Cash for kidneys? Utilizing incentives to end America's organ shortage* (2004)

¹⁶ See note 2

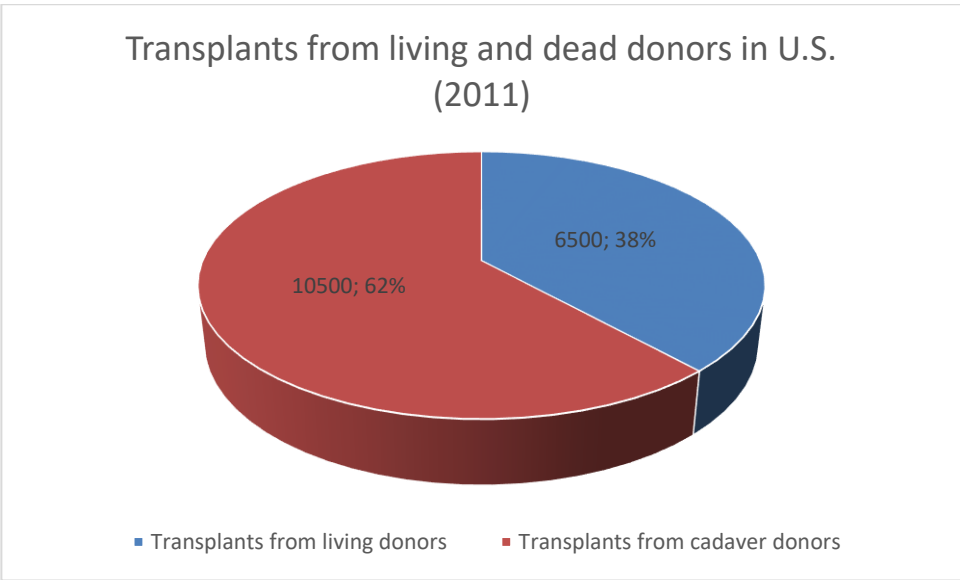


Figure 2. Transplants from living and dead donors in U.S. (2011)

Since then, the situation in United States became better: more transplants are being made and United Network for Organ Sharing now boasts a 19.8% increase in performed transplantations between 2012 and 2016. U.S. national record for total transplant surgeries made have been broken for 4 straight years now.¹⁷ Despite the increase in overall transplant figures, the total amount of transplants from the living donor remains about the same, which in turn means that the percentage of living organ donation transplants compared to total amount of annual transplants has decreased.¹⁸

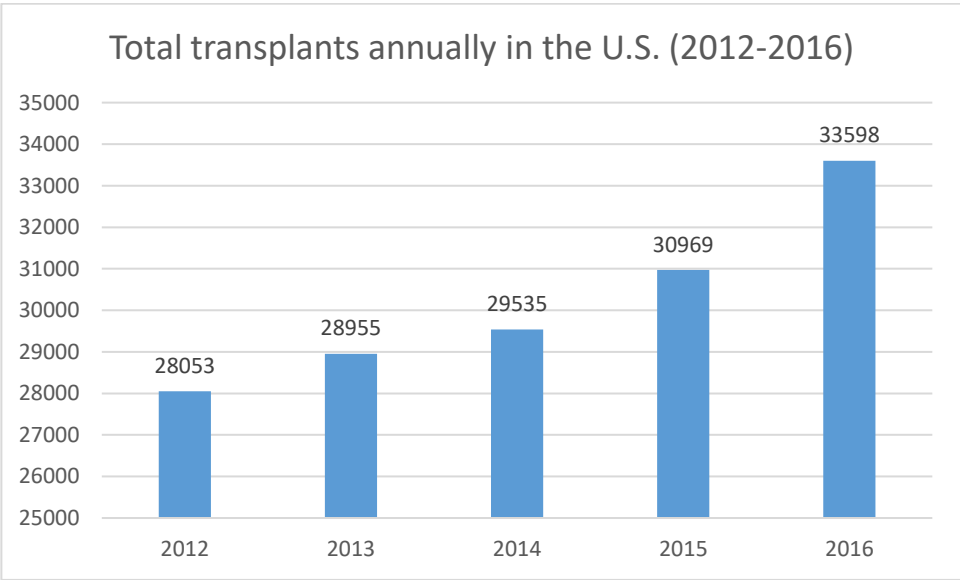


Figure 3. Total transplants annually in the U.S. (2012-2016)

¹⁷ <https://optn.transplant.hrsa.gov/data/view-data-reports/national-data/#> [Accessed on 2017 03 07]

¹⁸ https://www.unos.org/data/transplant-trends/#transplants_by_donor_type [Accessed on 2017 03 07]

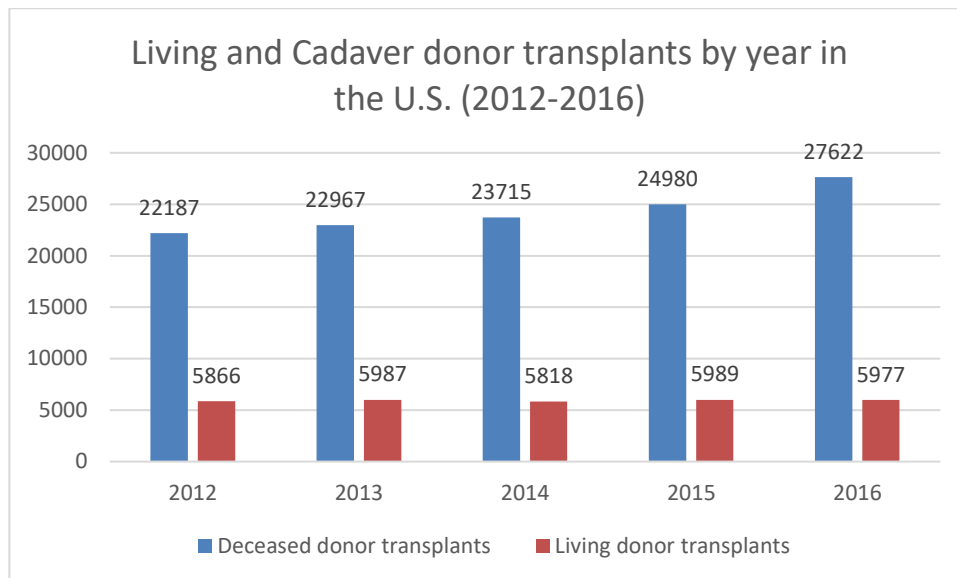


Figure 4. Living and Cadaver donor transplants by year in the U.S. (2012-2016)

Living and Cadaver donor transplants by year in the U.S. (2012-2016)

According to the U.S. National Kidney Center, living organ transplantation has several advantages over cadaver organ transplantation, as shown in the table.

	Living donor transplantation	Cadaver organ transplantation
Chances of rejection	Low, some transplants are done between genetically related persons which lessens the risk of rejection	Higher than on living donor transplantation, because donor and recipient are usually not matched genetically
Time needed for organ to start functioning	Usually starts functioning immediately	Some do not function immediately and require additional procedures
Compatibility and convenience of the procedure	Potential donors can be tested ahead of time to find the most compatible one, transplant can take place at a convenient time for both donor and the recipient.	Very limited ability to test donors ahead of time, transplant has to be scheduled as quickly as possible to avoid damage to donated organs

Table 1. Living organ donor transplantation vs. Cadaver organ transplantation comparison¹⁹

¹⁹ <https://www.kidney.org/transplantation/livingdonors/general-information-living-donation> [Accessed on 2017 03 08]

In terms of age, at which people are most likely to be in need of an organ transplant, UNOS data shows that at least in the U.S. persons who are 50 years old and older constitute 67% of all the patients on the waiting list, as of 2017 March 5th. If you add people aged between 35 and 49 years to this group, the total percentage would jump up to 90% of all people on the organ waiting list.²⁰

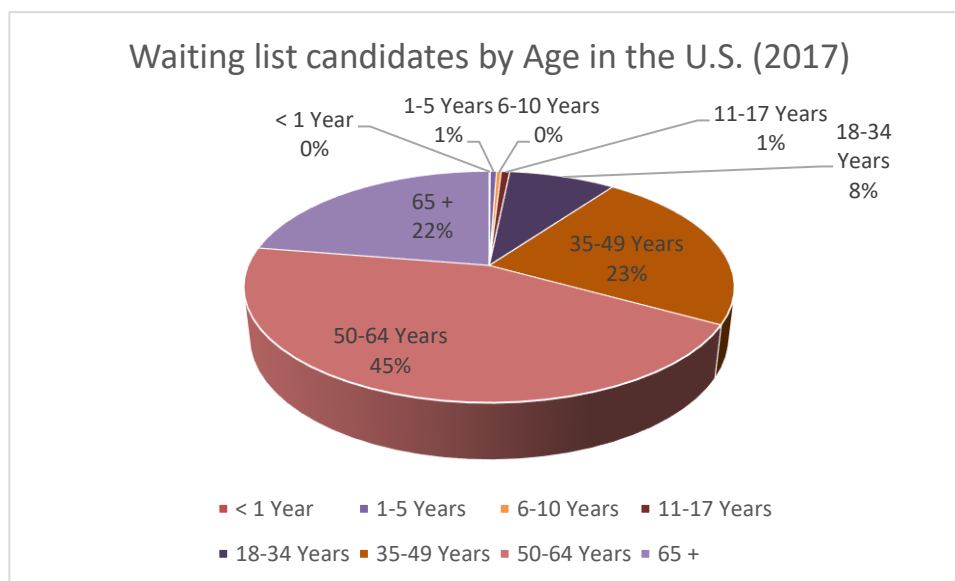


Figure 5. Waiting list candidates by Age in the U.S. (2017)

In some countries, the development of a deceased organ donation programme is hampered by sociocultural, legal and other factors. Even in developed countries, where rates of deceased organ donation tend to be higher than in other countries, organs from this source fail to meet the increasing demand. The use of live donors for kidney and liver transplantation is also practiced, but the purchase and sale of transplant organs from live donors are prohibited in many countries. This shortage of an indigenous “supply” of organs has led to the development of an international organ trade. Organ trade is the trade of human organs, tissues or other human parts with the intent of transplantation, where potential recipients sometimes even travel abroad to obtain organs through commercial transaction and through years as has been internationally recognized as a significant health policy issue in the international community mostly because of a lack of data and effort to use and integrate the currently available information.²¹

According to UNOS, in the United States most people on the donor waiting list are waiting for kidney donors. They constitute a massive 81% of all people waiting for organ donors. Far away second most sought after replacement organ is liver with 12%. All other organs consist only a small minority of needed human parts by sharing the remaining 7%.²²

²⁰ https://www.unos.org/data/transplant-trends/#waitlists_by_age [Accessed on 2017 03 10]

²¹ Yosuke Shimazono, *The state of the international organ trade: a provisional picture based on integration of available information*, *Bulletin of the World Health Organization* (December 2007)

²² https://www.unos.org/data/transplant-trends/#waitlists_by_organ [Accessed on 2017 03 10]

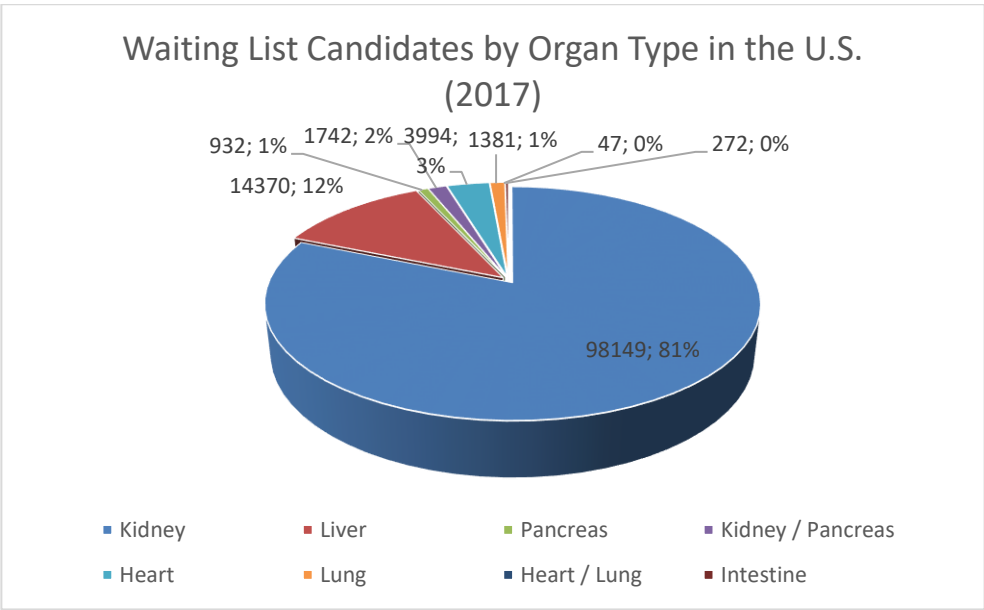


Figure 6. Waiting list candidates by organ type in the U.S. (2017)

Globally, trends appear to stay the same as in the U.S. According to Global Observatory on Donation and Transplantation (GODT) data from their Global Activity in Organ Transplantation reports from 2010 through 2014, total solid organ transplantation procedures have been increasing in number every year from 2010 to 2014. Most of the transplantation surgeries (67%) in 2014 were kidney transplantations while liver transplantations come in far-away second with 22%. Heart, lung, pancreas and small bowel transplantations together constituted only 11% of all solid organ transplants made. In all of the years from 2010 through 2014 the total amount of surgeries satisfied less than 10% of all of the global need.²³

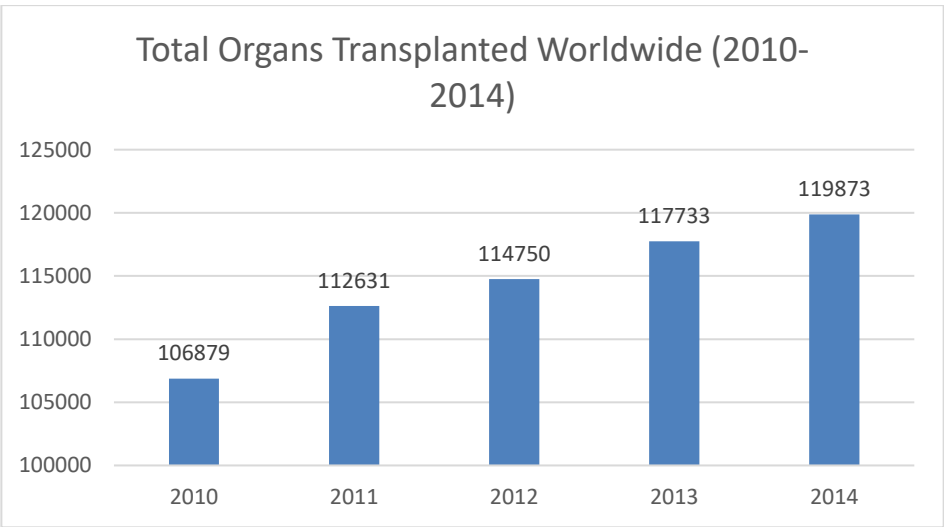


Figure 7. Total organs transplanted worldwide (2010-2014)

²³GODT Global Activity in Organ Transplantation reports 2010 through 2014

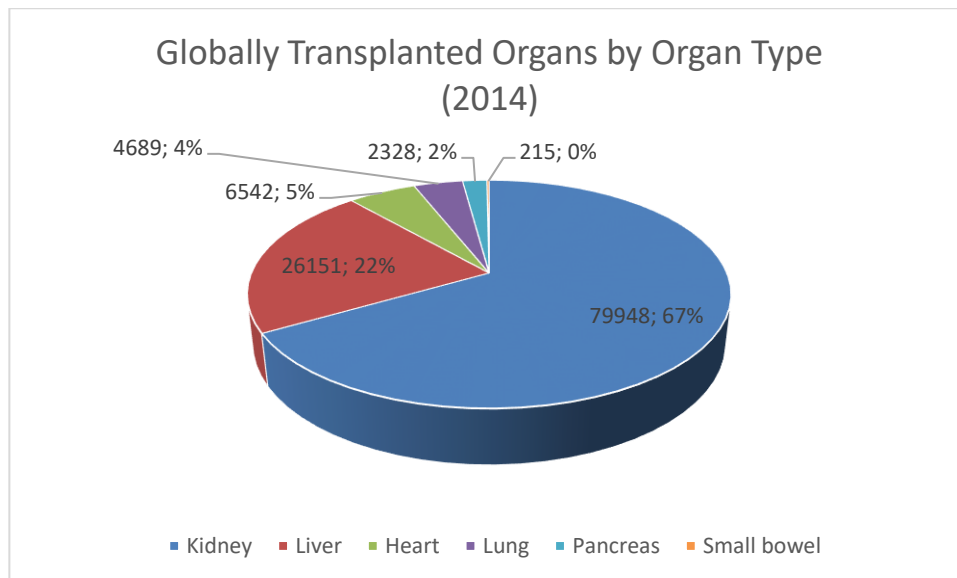


Figure 8. Globally transplanted organs by organ type

Organ demand hugely exceeds the organ supply creating big organ shortage problems all around the world and for people with a need for new replacement organs may resort to measures they would not normally take, even if it involves breaking the law. Individuals like these would often turn to underground markets. The underground market facilitates individuals who seek avoidance of laws that prohibit various commodities that in result are not available in the open market. It differs from black market in that it is not concerned with avoiding pricing regulations and deals in commodities otherwise not available to buy. However, participating in these underground markets is very risky: transactions often consist of inadequate information, it's also unfair where donor most of the time is left disadvantaged in comparison with a broker that makes the deal.²⁴ The first reports of commercial trade in human organs and tissues began in the 1980s and concerned citizens of India who were forced into selling their own kidneys because of their poor living and financial conditions that they had to live with. Most of their organs were sold and transplanted to patients from Middle East countries, as well as Malaysia and Singapore.²⁵ So even though human organ and tissue transplantation was a huge step for medical science and one of the pivotal moments in saving many lives in the future, it also opened up a legal hole which needed to be filled with new regulations on the human body.

Since kidney transplants started being possible and carried out about six decades ago, the Western approach to organ donation has been one of unpaid giving. This type of donation typically occurs for what is termed "altruistic" reasons, meaning that organ donors are not acting for any kind of material gain. It is an organ procurement method that uses expressed consent which means that cadaver and living donor organs are only received if there is an expressed consent of the donor or in case the donor is deceased, the consent of donor's family. This method is not something new in organ

²⁴ Erica D. Roberts, *When the Storehouse is Empty, Unconscionable Contracts Abound: Why Transplant Tourism Should not be Ignored*, *Howard Law Journal* (2009, vol. 52:747)

²⁵ See note 1

donation as it was already being used in as early as fourteenth century, long before the availability of organ transplantation procedures, when medical students were using deceased donor corpses to study human anatomy. As of late, the principled stand of intergovernmental and professional organizations has come much closer to making noncommercial organ donation the universal ethical norm. Some countries use this method of organ procurement exclusively while others allow other procurement methods in addition to altruistic method.²⁶²⁷

While the altruistic method of organ procurement is widely used by such countries as United States, England, Australia and Canada, several other nations, as well as some U.S. states, have adopted a completely opposite method – one of presumed consent, also known as non-altruistic method. Under this method and laws that regulate it, it is presumed that each adult person, regardless of their sex, is an organ donor at death. Only way to avoid your organ donation after death is an expressed refusal to donate. This method is also widely used worldwide, but was subject to both strong criticism and support from different arguing sides.²⁸

Nowadays, organ transplantation is being undertaken in more than 100 countries all around the world. Since the adoption of the Declaration of Istanbul on Organ Trafficking and Transplant Tourism, the quantity of transplants increased by 11.6% globally in just the first three years. The use of living donors grew even steeper with approximately 17.4% between 2008 and 2011. Despite World Health Organization's best efforts to increase technical capabilities of medical facilities to carry out advanced surgical procedures such as transplantation and developing medical and governmental infrastructure to support organ donation from deceased persons, living donation still remains the standard norm in many parts of the world.²⁹

²⁶ Alexander M. Capron, *Six decades of organ donation and the challenges that shifting the united states to a market system would create around the world*, *Law and Contemporary Problems* (2014, vol. 77:25, no. 3)

²⁷ See note 24

²⁸ See note 26

²⁹ Id

Transplant Tourism

Travel for transplantation occurs when organs, donors, transplant professionals or recipients are travelling across the borders of the countries. It transforms into **transplant tourism** as soon as it involves organ trafficking or transplant commercialism or if the countries that are providing transplantation procedures pay more attention to providing these services to patients from outside of the country consequently damaging their ability to treat their own citizens equally in terms of those procedures.³⁰ The World Health Organization Consultation Meeting on Transplantation with National Health Authorities in the Western Pacific Region gave a definition of transplant tourism calling it „the purchase of transplanted organ abroad, including access to an organ bypassing national laws, rules or processes of any or all countries involved“.³¹ Transplant tourism is a highly organized process. On the internet, there are more than a few sites that promote „transplant packages“ that include organ, travel, hotel stay, medical care and a transplant procedure which is usually performed in quality hospital environment by professional surgeons. Countries that allow these transplantations often facilitate the operations. Both parties – recipient and donor – most of the time choose a third country where the organ transplant is performed. Transplant tourism has several risks to it: there are reports of commutable diseases spreading through transplantation of organs bought in black market and also, the transplant tourism as a whole fosters criminal activity, which is exploiting many different individuals worldwide.³²

Because of inconsistent legislation processes and policies around the world, people can avoid the law and its consequences by purchasing body parts from foreign suppliers and make transplant operations in countries where said procedures are conducted without anyone questioning it. Although this usually helps to save recipient's life it also often leaves donor vulnerable and exploited.³³

Among the biggest organ exporting countries are Brazil, China, India³⁴, as well as Mexico, Kosovo, South Africa, Mozambique and etc. Among the biggest receiving (destination) countries are United States of America, Israel and etc.³⁵

³⁰ See note 24

³¹ World Health Organization Consultation Meeting on Transplantation with National Health Authorities in the Western Pacific Region, Manila Philippines (2005 11 07-09), Summary 18, (WP)HSD/ICP/HRF/6.4/001 (September 2006)

³² See note 26

³³ See note 24

³⁴ Id

³⁵ Jacqueline Bowden, *Feeling empty? Organ trafficking & trade: The black market for human organs*, *Intercultural Human Rights Law Review* (2013, vol. 8)

I. CASES OF HUMAN RIGHTS VIOLATIONS CONCERNING ORGAN TRADE

Meet Gursimran, a 30-year old homeless Indian street dweller. For him and his family, a small shack squeezed among similar dwellings in a narrow street of a big industrial city has for a long time been home. Gursimran and his five children has to share a same water pump with almost 100 other families of the similar fate and they have to take turns to use a public toilet. Also, they are forced to sleep, cook and wash on the streets. Gursimran dreams of a better life but he can't afford even the cheapest of housings. He would anything to get a paying job and buy at least any of the cheapest living places for him and his family to have a better life. One day he is approached by a foreign looking guy who offers him a job and designates a meeting place for job interview. Gursimran, happily and with a feeling of a new hope rushes to the meeting place at the prescribed time. Unfortunately, the offer turns out to be a scam. But not all hope is lost, as he is offered a satisfying amount of 2000 USD for one of his kidneys. Knowing that another chance to make that much money may never come to him, he accepts although he is not even sure what impact a loss of kidney even makes to a person. He is then transported to a safe-house, gets his organs removed, then after a short recovery period is transferred back to his street. People, who supervised the procedure said that he can only expect his 2000 dollars if he recruit another 3 people from the street. Even then, he can't be sure they will keep their word as well as he can't be sure about his own future, being left without one of his kidneys and without a proper medical supervision. Gursimran here is fictional, but his story, sadly, is not. Gursimran embodies hundreds of real-life Indian street dwellers who got exploited in Gurgaon trafficking network case. And even this case is not unique in the field of crimes associated with organ crimes which will be examined further.

Harvest of Falun Gong Practitioners' Organs

The People's Republic of China's law allows the organs that are taken from prisoners who are sentenced to death to be legally sold.³⁶ The corpses and human organs can be used if the bodies of those prisoners were not collected or were refused to be collected by relatives or if the convicted person gave a permission to use his body or organs for use by medical units or if the families, of those deceased prisoners have given consent. This 1984 act called "Provisional Regulations on the Use of Corpses or the Organs of Executed Prisoners" created a few loopholes that can be easily exploited. Firstly, according to it, bodies of deceased convicts can be used after their death even without permission of their families or themselves as long as their body was not collected and secondly,

³⁶ Id

regulations do not require that prisoners need to be sentenced to death and then executed in order for their organs to be eligible for use.³⁷

On August 21 of 2000, the Chinese Ministry of Public Security issued new orders that said that the practice of Falun Gong needed to be removed in three months' time. In 2003, it was reported that the Communist Party local office 610 which was responsible for repressing of Falun Gong practice, got orders that emphasized that there are no laws that regulate the treatment of the practitioners and also that death by beating of Falun Gong practitioners are just interpreted as a suicide and the bodies can be cremated without identifying them. Also, the high-ranking officials used 1984 regulations to prevent families from claiming practitioners' bodies which led to them being used for harvesting of organs and illegal commercial sales of them. Furthermore, the authorities do not inform the families of the imprisoned practitioners that they were put in labor camps and they themselves sometimes refuse to identify who they are in fears that their families are going to be followed and persecuted. All that in turn leads to authorities not even being able to inform the family members of prisoners because they do not know who they are. All of these circumstances let organs of Falun Gong practitioners to be harvested and sold without the consent or sentence to death and the high number of anonymous detained practitioners in labor camps suggest that this is a huge potential source for unlawful harvest and selling of prisoner organs.³⁸

The Falun Gong is a subsection of Qigong, which was a dominant religion of China and has many similarities with Buddhism. It was initiated in 1992 by Li Hongzhi and emphasizes truth, benevolence and compassion. Only rules to practicing Falun Gong is reading Master Li's teachings and also performing various meditative exercises. Falun Gong is classified by a lot of countries as a religious or spiritual group, but they themselves don't see it like that because they don't have any provisions for people to follow or any churches, temples or religious rituals and also people can come to learn and leave any time they want. There is said to be about 70 million practitioners right now, but there is no way to know the exact number for sure as there is no membership list available and also, nowadays, Falun Gong followers are practicing it in secret or imprisoned in labor camps. The Falun Gong diverged from other sections of Qigong, because Li, in addition to exercise, also made teachings on philosophies. Before Qigong became forbidden, Falun Gong was one of the most popular groups of it. In 1999, one of the professors from Chinese Academy of Sciences write an article calling the Qigong a false practice and also used Falun Gong as an example also emphasizing it's bad influence on young people. In response, around 15 to 30 thousand followers held peaceful protest in three Chinese cities. In July of the same year, the Chinese Ministry of Civil Affairs banned Falun Gong as an organization and as a result issued an arrest warrant for Li Hongzhi and started

³⁷ David Kilgour, Ethan Gutmann, David Matas, *Bloody Harvest/The Slaughter An Update* (2016)

³⁸ Jennifer L. Zegel, *Bloody Persecution: Plight of the Falun Gong* (2008)

putting practitioners into labor camps for “re-education through labor”, which is a form of detention in China which is forced on citizens without any kind of trial or judicial review. Falun Gong was seen by Chinese authorities as a threat that, because of its increasing numbers, could pose a problems for maintaining a social order. On the other hand, United States of America, among other countries, see it as nonviolent and peaceful belief and practice.³⁹

On June 10 of 1999, the “Central leading group to handle the Falun Gong issue” was created by Chinese Communist Party which established an „Office of the leading group to handle the Falun Gong issue was established. It is called the “610 Office” because of the date it was founded. The office has a far-reaching structure that extends through the Party, military and government as is empowered to command police and judicial organs. It is dedicated to eradicating the practice of Falun Gong in China. The 610 office has a big extralegal powers to achieve it. Later, the group changed the name into Central Leading Group on Dealing with Heretical Religions or Office of Maintaining Stability. As a result, the regime used the mobilization of the entire state apparatus to fight against the practice of Falun Gong and make it go extinct. Main tool that hey used was propaganda campaign when the country’s newspapers, radio and television stations, websites and rural area speakers were used to spread the propaganda against Falun Gong practitioners. In addition, the persecution and capturing of Falun Gong was one of the main focuses of Chinese domestic security. During all this process, the number of transplants that were done from Falun Gong practitioners as donors grew steadily. The organs of practitioners were sold to transplant centers by judicial systems and forensic hospitals were performing organ transplant procedures really actively. Also, some special institutions, created and regulated by Public Security Bureaus were massively conducting human body and organ transplantation experiments.⁴⁰

Reports in 2006 suggested that as many as 40000 Falun Gong practitioners got convicted to death and had their organs sold in the market. There have also been evidence of about three thousand additional practitioners being persecuted and killed in the following two years.⁴¹

On the other hand, Chinese literature suggest that all these regulations have achieved much support among the society and also, that it helps to unify people’s thinking, straighten out their understanding and maintain stability in society.⁴²

³⁹ See note 38

⁴⁰ See note 37

⁴¹ See note 38

⁴² *Laws Exist for the Banning of Falun Gong, Chinese Law and Government (2000, vol. 32, no. 5)*

Indian Gurgaon Organ Trafficking Network Case

Along with China, India gives a great example of massiveness and tragedy of organ trade issues. Both of these countries are having a rapid industrial growth, experience various environmental problems as a result of it and also have a prominent organ trafficking system. India shares many organ trafficking issues with other similar countries and is being plagued by them, which makes India an exemplary country in this regard.⁴³ However, India provides some quite unique perspectives since, unlike other countries, Indian people most times are actually willingly giving their organ away for compensation without a need of coercion or any other kind of use of force although many times they are not being compensated as promised when their organs are actually removed. Indian surgeons often do these illegal transplant procedures from home and sell these organs to rich Indians or people from abroad who travel to Indian for transplant procedures.⁴⁴

One of these examples is the Gurgaon trafficking case, which was one of the biggest scandals regarding organ trafficking all around the world. In January, 2008, the police arrested a few persons that were accused of recruiting of poor Indians in Moradabad and making illegal transplant procedures. Further investigating led to industrial city of Gurgaon where it became known that main figure in all these operations was Amit Kumar, who owned property such as a residential building and a guesthouse in the city. One of these building turned out to actually be a private clinic where organ transplant procedures took place. Police found several people there some of whom were recovering from organ transplant operations and a few foreigners from Greece and USA. Amit Kumar escaped from city after being warned by local police, but was arrested in February, 2008 in a wildlife of Nepal. He denied any involvement in criminal activities upon arrest.⁴⁵

Further investigations showed that Amit Kumar conducted and coordinated the operation from his house in Canada. People were being recruited in eight different Indian states, most of them were poor urban pavement dwellers or unemployed peasants from rural areas. All of them were men of 20-35 years old, but it was also reported that women from Nepal were also used as organ suppliers. Young, unemployed men were promised a job by being approached on the labor market. When it became apparent these job offers were fake, scouts offered these people between 1000 to 2500 US dollars for their kidneys and then medically examined them before putting them into safe-houses to wait until the transplant procedure is made. There were also many instances where supplier wasn't asked for consent and got his organs forcibly removed. Private hospitals were taking care of these suppliers and that means that many doctors were involved in the operations and got their slices of profits. Furthermore, many surprising facts became known during the trial of Amit Kumar and his

⁴³ Raneer Khooshie Lal Panjabi, *The Sum of a Human's Parts: Global Organ Trafficking in the Twenty-First Century*, *Pace Environmental Law Review* (2010, vol. 28, no. 1)

⁴⁴ See note 35

⁴⁵ See note 1

brother who was also involved in the organ trafficking operation. One of them was that, both of them never received any medical training but have performed hundreds of organ transplant and organ removal procedures. Also, their connections with corrupt local police as well as with the Indian urban mafia, to whom they paid extortion fee, became apparent. Both Amit and his brother were arrested four times in the past for accusation of taking part in illegal organ trade operations and every time they were released by paying the bail money. Trial also showed Khan's involvement in illegal organ transplants in town of Faridabad where three organ recipients from Turkey died because of incompetently done transplant procedures.⁴⁶

Police investigation showed that at least 400 to 500 organ transplant procedures were made in at least seven years of the operation. Most of the organ recipients were from India, but starting from 2005, there were an increasing number of foreign recipients getting transplant procedures in Amit private clinic. They were of Australian, Saudi Arabian, Canadian, British, American and Greek nationalities. The case showed many essential things for a organ trafficking network to work successfully. These include poverty, corruption in local police forces, lack of cooperation and contact between the Indian police in different states, rich patients desperate to find replacement organs and capabilities to conduct a transnational operation. It was also a very important case in that it was the first case of illegal organ trade in India where accused persons were actually tried and sentenced, because all of the previous similar cases didn't have that.⁴⁷

Organ Harvesting in Kosovo

Kosovo is another country, that is constantly plague by issues of organ trafficking. Ever since the beginning of Kosovo War back in 1999, several cases of organ harvesting in this country became known and brought up. Organ trafficking problems of Kosovo are quite unique, because cases involve the Kosovo Army.⁴⁸

After the war of Kosovo, American journalist obtained testimonies from eight eyewitnesses who, independently from each other, described details of a yellow house which as used as operating clinic to remove organs from prisoners of Serbian descent and later send them to be sold on illegal organ market. This house was in village of Rripe in Albania. Journalist then sent those testimonies to the Office of Missing Persons and Forensics at the United Nations Interim Administration Mission in Kosovo. In February of 2004, a team of UN and Hague War Crimes Tribunal investigators led by Matti Raatikainen came to the mentioned house to conduct investigation. The chemical spray, used to find traces of blood showed a few spots where there was blood in a downstairs room of the „yellow

⁴⁶ Id

⁴⁷ Id

⁴⁸ See note 35

house“ and the family living there provided contradictory explanations for it. Also, in the rubbish dump, the medical equipment which is used for surgical operations was found. There were many inconsistencies in explanations of family members of what happened in the house. They justified traces of blood by saying that woman was giving a birth there and that they are slaughtering animals there and all these syringes were there because of how remote the village is and that it called for the people living there to administer their own injections in case of emergency. Also, the even more obvious contradictions begin when talking about the color of the house. House, which all of the witnesses described as yellow is now paint in white. At, first family members said it always been like that, but when the investigators found traces of yellow paint of it, one of the family members remembered that it was in fact repainted for a wedding in 2001 to yellow before painting it back to its original color of white, but one UN investigator says that he possesses a photograph from 1999 in which the house is completely painted in yellow.⁴⁹⁵⁰

It didn't help either that the International Criminal Tribunal for the former Yugoslavia destroyed approximately 400 pieces of evidence in organ trafficking, that showed the possible involvement of KLA. However, despite all the found evidence the government officials kept denying the claims by calling them unsubstantiated.⁵¹ Also, later in 2010, Matti Raatikainen said of the case: “The fact is that there is no evidence whatsoever in this case. 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”. This came as a bit of surprise since colleagues knew as a person who doesn't like to give interviews to mass media and he was willingly giving one here.⁵² Furthermore, the original witnesses seem to have “disappeared from the face of the earth” so no further testimonies are likely.⁵³

The allegations came to light in 2008 when Carla Del Ponte, a former chief prosecutor for the International Criminal Tribunal for the former Yugoslavia, published her book in which she described how young Serbs were taken by truck from Kosovo to Northern Albania where they had their organs removed and were killed. Del Ponte also described that they first had their kidneys removed, sewn up, locked up in barracks and, already knowing their fate, killed for other vital body parts. This, according to her, made terrified Serbian convicts to plead to be killed immediately.⁵⁴

⁴⁹ Nick Thorpe, *End of the Road for Kosovo Organ Claims?*, <http://www.bbc.com/news/10166800> [Accessed on 2017 04 25]

⁵⁰ Renate Flottau, *Family Denies Organ Harvesting Allegations*, <http://www.spiegel.de/international/europe/albania-s-house-at-the-end-of-the-world-family-denies-organ-harvesting-allegations-a-580422.html> [Accessed on 2017 04 25]

⁵¹ See note 35

⁵² See note 49

⁵³ See note 50

⁵⁴ Harry de Quetteville, Malcolm Moore *Serb prisoners 'were stripped of their organs in Kosovo war'*, <http://www.telegraph.co.uk/news/worldnews/1584751/Serb-prisoners-were-stripped-of-their-organs-in-Kosovo-war.html> [Accessed on 2017 04 25]

After these allegations were published Vladan Batic, the former justice minister of Serbia said: "If her allegations are true, then this is the most monstrous crime since the times of Mengele, and it must be made a priority, not only of the domestic judiciary but also of the Hague Tribunal."⁵⁵

In 2011, EU established a Special Investigative Task Force to look into all these allegations and in 2014 it published a report which said that a few senior officials of former KLA will face indictments for crimes they committed after the Kosovo War. These persons were found responsible for persecution targeted at ethnic minorities living at Kosovo and also at Kosovo Albanians they thought were collaborating with Serbia or were just political opponents of KLA leaders. Investigators also noted that evidence is suggesting that this was not an act of solo individuals but rather were conducted in organized fashion and supervised by high ranking officials in KLA. Report also said that there were "compelling indications" of a number of individuals being killed for the purpose of extracting their organs, but added that there was not enough evidence to be able to start proceedings on grounds of organ trafficking. In addition, it stated that allegations of hundreds of prisoners being slaughtered for organs were "totally unsupported" and there were no indications that the practice of killing individuals for their organs was widespread. Leading prosecutor of the investigation also said that Kosovo made attempts to interfere with witnesses during the investigation.⁵⁶

In 2008, another case of organ trafficking came to light. In October of the said year the Kosovo police and the Immigration service got the attention of foreign citizens arriving at the airport with letters inviting them to treat various heart conditions at the Medicus Clinic which was not normally known for dealing in these kind of procedures. In November of 2008, an Israeli organ broke, organ supplier travelling to Istanbul and the brother of recipient that supplier gave his kidney to were stopped at the airport. The supplier was in a very poor health condition. After this incident, the Medicus Clinic was investigated. During the following investigation it was found that the owner of the clinic made contacts in Turkey back in 2005 to create a trafficking network. After that, the contract was made with a Turkish transplant surgeon. The surgeon, as well as a Medicus Clinic, got a license to perform transplant procedures from Kosovo's Ministry of Health even though the law in Kosovo prohibits the transplantation of organs. At least 24 organ suppliers were recruited in foreign countries during the 2008. The suppliers were made to sign a document saying they gave their organs altruistically to a stranger or relative without receiving any payment for it. These organ donors were promised a fee of about 30 000 US dollars but eventually only received only a part of it or no compensation at all and promised to get the remaining part of payment if they recruit other organ suppliers. Recipients agreed payments for transplant procedures with brokers for a total of 108 000

⁵⁵ Id

⁵⁶ Edona Peci, *Senior Kosovo Guerrillas Face Crimes Against Humanity Cases*, <http://www.balkaninsight.com/en/article/kosovo-liberation-army-organ-trafficking-report> [Accessed on 2017 04 26]

US dollars per operation. Most of them flew to Priština via Istanbul. They were given invitation letters for medical treatment at Medicus Clinic to show to immigration desk at the airport and some of them were instructed to tell that they were travelling to Kosovo for leisure. After transplant operations they were quickly discharged with information to give to the doctors in their home countries. In April of 2013, the defendants and owner of the clinic were found guilty of criminal activities. Sentences varied from 8 years in prison to fines of 10 000 euros.⁵⁷

In 2010, European Council, after 2 years of inquiry reported that Kosovo's then-prime minister (and a current president) Hashim Thaci is the head of a "mafia-like" group that deals in weapon, drug smuggling and organ trafficking. The group started operating in the years before Kosovo War in 1998-1999.⁵⁸

There were also allegations of this case coming within the scope of the International Criminal Court (ICC) jurisdiction, because it was claimed that conditions of all three crimes that are in court's jurisdiction (genocide, crimes against humanity, war crimes) are met here and in cases of organ trafficking generally. Unfortunately, it is unlikely and limitations of ICC persecutions to only grave offenses committee further make it less likely that organ trafficking may come within a scope of this Court. According to Rome Statute, genocide requires the intent to wholly or partly destroy ethnical, national or religious group. Related actions may include killing, bodily harm and forcible transfer all of which can be met in case of organ trafficking. What it lacks, however, is clear intent to destroy a certain group, because organ trafficking usually targets easily exploitable prey regardless of their group. However, in Kosovo's case, an argument regarding genocide could be made because the ethnic Serbs and Roma were transported to Albania for their body parts. In addition, under the same statute of Rome, the crimes against humanity also include many conditions that could apply in organ trafficking such as killing, extermination, forcible transfer, etc. However, these actions must be made in a systematic and widespread attack with the knowledge of the attack. Organ trafficking is more of a series of separate transactions and thus is unlikely to meet these conditions. Recent practice of ICC also makes it less likely that organ trafficking will fall within the scope of Court's jurisdiction in the future. Finally, war crimes under the same Statute is defined in terms of the Geneva Convention and is the least likely of crimes under ICC's jurisdiction to include organ trafficking someday.⁵⁹

⁵⁷ See note 35

⁵⁸ Paul Lewis, *Kosovo PM is head of human organ and arms ring, Council of Europe reports* <https://www.theguardian.com/world/2010/dec/14/kosovo-prime-minister-like-mafia-boss> [Accessed on 2017 04 26]

⁵⁹ Leslie P. Francis, John G. Francis, *Stateless Crimes, Legitimacy, and International Criminal Law: The Case of Organ Trafficking, Criminal Law and Philosophy* (2010)

Unlawful Removal of Human Tissue in Latvia

In 2015, the European Court of Human Rights (ECHR) ruled in a case involving Latvian citizen Ms. Elberte and Latvia state. The case showed how, without other international legislation in place, the European Convention on Human rights can be used to defend the rights of deceased and their family members in case of unlawful removal of human body parts and tissue.

On 19 May 2001 Mr. Egils Elberts, the husband of the applicant in the case, died on the way to that hospital after being involved in the car accident. His mother, who was working at the hospital he was being transported to leaned of his passing immediately and stayed next to his body at the hospital until it was transferred to the State Centre for Forensic Medical Examination in Riga. Next day, the body was delivered to this Centre to investigate causes of the death. The autopsy showed various injuries to head, chest, shoulders, thighs and legs and they were classified as serious enough to have caused fatal consequences. Latvian government alleges that after this it was verified that Elberts passport contained no stamp which would show that he is objecting to having his body parts removed for transplantation purposes and then the 10 x 10 centimeter area of the *dura mater* was removed from his body. The applicant objects to this saying that it was not possible to check whether the stamp was in place as the passport at the time was in their house in Sigulda. On 25 May 2001 one of the relatives retrieved the body of applicant's husband and on 26 May 2001 the funeral was held. It was at this time that Ms. Elberte noticed that her husband's legs were tied together, but she figured it was because of the injuries that he suffered in car crash. At the time of the funeral, the applicant was pregnant with the second child of the deceased. She only became aware of the removal of the tissue two years later when in March of 2003 a criminal inquiry was started by State Police in regards of this matter. Later, it became known that in 1994 the institution which later transformed into the Forensic Centre made an agreement with pharmaceutical company from Germany to cooperate for scientific research. Agreement stated that different types of tissues need to be removed from deceased bodies and then sent to the company to make bio-implants which were again sent to Latvia to help save lives by transplantation procedures. Any qualified staff member of Forensic Centre could remove the tissue by his own initiative and the leading officer of the Centre was responsible for supervising them. Agreement also allowed for experts to remove tissue from that were sent for forensic examination. They only needed to check their passports if they contained any stamps expressing their objection to having their tissue removed. Experts needed to make the removal of the tissue within 24 hours of person's biological death. Relatives could disagree with the removal of issues as stated in Latvia's domestic law called the Law on the Protection of the Bodies of Deceased Persons and the Use of Human Organs and Tissue (the Law), but staff members did not show initiative to contact relatives get to know their wishes before conducting tissue removal procedures. According to testimonies, not all of the staff member have even read the law regarding these procedures. The

criminal inquiry was discontinued in respect of the removal of tissue. In the following 3 years other criminal inquiries related to this case were discontinued because of expiry of the statutory limitation period of Latvia of 5 years.⁶⁰

Elberte put a complaint to the ECHR on 5 December 2008 against the state of Latvia claiming that it violated three Articles from the European Convention on Human Rights (the Convention). To begin with, she alleged a violation of Article 3 of the Convention as regard to her husband's legs being tied together during the funeral and with his tissues being illegally removed. Elberte alleged that this constituted inhuman or degrading treatment because it made her strongly suffer emotionally. The court eventually ruled that Ms. Elberte indeed suffered as a result of an uncertainty and distress because of the way and purpose her husband's tissue was removed and also because of undue delay as she had filed 13 complaints and 4 decision had been quashed. The key in Court's decision was making sure this suffering is distinguished and went beyond the suffering inflicted by a loss of a close family member. Even though, as ECHR has admitted, the court never dealt with assessment of the psychological impact on relatives of person who suffered a significant human rights violation, it ruled that the issue fell within the scope of Convention jurisprudence that is in favor with relatives that claim the serious emotional suffering because of the way their loved relatives were treated, more so if one of the most important factors is close familial bonds and authorities behavior as far as relative's enquiries were concerned.⁶¹

Furthermore, much more interesting and relevant is the applicant's claim of a violation of Article 8 of the Convention because, in her opinion, her right to respect for private life was violated as a result of a tissue removal from her husband's deceased body without his or one of the relative's expressed consent and consequently, her identity, dignity and integrity had been breached. The Article 8(1) states that every person should have a right to respect his private life and family life, while Article 8(2) lists a few exceptions to that that need to be in accordance with law and necessary for security and well-being of people.

She alleged that the removal of her husband's tissue constituted a breach in her private life under Article 8(1) and that these actions did not fall under any exception mentioned in Article 8(2) including the aim to save other people's lives which Latvian government saw as falling under the protection of health and rights of others' exceptions. According to Ms. Elberte, government officials should have waited for her consent before removing tissue belonging to her husband.⁶²

The Courts said that even though the Latvian Government contested that the applicant's claim applied to "family life" part of Article 8, it did not deny that it concerned the "private life"

⁶⁰ European Court of Human Rights case: *Elberte vs Latvia*, Eur. Ct. HR, Application no. 61243/08 (2015)

⁶¹ Edward S. Dove et al, *Elberte v. Latvia: whose tissue is it anyway – relational autonomy or the autonomy of relations?*, *Medical Law International* (2016: vol 15, no. 2-3)

⁶² *Id*

component of the article. By analyzing its previous practice, the ECHR found that the concept of private life was a really broad term which cannot be given an exhaustive definition. The court noted that neither party objected to a right of Ms. Elberte to object to a removal of Mr. Elberts body tissue to not come within a scope of Article 8 under the private life component and the Court saw “no reason to hold otherwise”.⁶³

Article 8 of the Convention is designed to defend a person from any kind of abuse from public authorities and paragraph 2 of the same article states that any kind of interference with individual’s private life must be made in accordance to the law. By analyzing another case, ECHR interpreted that it means that this interfering action must be based in a domestic law and it must conform to the rule of law meaning that it is necessary for domestic law to be clearly defined and formulated and give adequate defense against arbitrariness. Also, the level of discretion given to authorities must also be clearly stated in the law. As a result, main question in relation to claim concerning Article 8 is whether Latvian law ensured sufficient legal and practical conditions for Ms. Elberte to be capable of exercising her right to object to the removal of body parts from a relative after his death.⁶⁴

ECHR judged that the applicant was not informed of a need to object to a removal of tissue from her husband to prevent it from being taken from his deceased body and also noted that there it was not clear whether the authorities really checked if there was no stamp in Elberts passport that made an objection to his body parts being removed after death because the passport was at home at that time. Also, after analyzing Latvian authorities’ claims, the court said that it showed a lack of clarity in Latvian law. The Court found that “it remains unclear how the system of consent, as established in Latvian law at the material time, operated in practice in the circumstances in which the applicant found herself“. ECHR also noted that the situation required authorities to contact relatives to obtain the consent for removal of body parts, because in these circumstances the wishes of deceased weren’t clearly known.⁶⁵

Applicant also lodged a complained regarding Article 13 of the Convention which concerns individual’s right to remedy in case of unlawful action issued by state officials. Court noted that it has examined the lack of the domestic law under Article 8 of the Convention and did not find it necessary to examine the complaint separately.⁶⁶

In the end, the ECHR ruled that Latvian law was not able to create sufficient administrative or regulatory mechanisms and define how much discretion was left to the authorities to explain the rights to refuse the removal of deceased person’s body parts. As a result, Ms. Elberte did not know

⁶³ Id

⁶⁴ Id

⁶⁵ Id

⁶⁶ See note 60

how to exercise her right to object the tissue removal from her husband. Furthermore the ECHR judged that Latvian law was not precise enough and did not give sufficient tools to protect citizens against arbitrariness which led to a conclusion that interference with applicant's right to private life was not conducted in accordance to the law as defined in Article 8 (2). The Court upheld Ms. Elberte's claim in the end and awarded her EUR 16000 in non-pecuniary damage.⁶⁷

After the case, one of the judges, Wojtyczek issued a dissenting opinion which was attached to the case. In his view, the right that Ms. Elberte had to disagree with the removal of her husband's tissue is not an autonomous right as is only derived from her husband's right to decide freely on the transplantation of his organs and as a result applicant may only agree or disagree with the removal of the husband's tissue only to the capacity of expressing his own wish. This shows that the fact Elberte exercises her right to protect her husband's wish doesn't mean that her right has a same status as her husband's under the Convention and consequently, the protection under the Convention afforded to them may be different. Wojtyczek expresses a view that in this way, the right of objection the applicant had fell within the scope of family life as defined in Article 8. Judge also raises a question whether one's own right on decision of his body parts transplantation falls within scope of Article 8 of Convention. He argues that the application which was submitted on behalf of applicant's deceased husband (which was ruled inadmissible *ratione personae* by the court in the case) should have been inadmissible *ratione materiae* because he doesn't see enough arguments that the transplantation of person's own organs are covered by private life or family life in a way that treaties are interpreted traditionally in international law. Judge also noted that as of late the private life component of Article 8 has been interpreted broadly and is slowly being transformed into a general freedom of action.⁶⁸

What legal impact does this case make? Firstly, the ruling suggests legislators from Council of Europe's states to make their regulations regarding relative's rights to consent or object to the removal of deceased person's organs or tissues to be clear in their description of authorities or health professionals obligations to consult with the relatives before removal procedure, to sufficiently explain their rights for relatives to be able to make meaningful decisions and to obtain the consent or refusal. However, in case where countries do not give a right to relatives to decide on the removal of deceased human body parts, the Court's decision does not require the country to introduce that right into its law. What is important is that every right that is established in law must be given clear manner and means to give it proper effect in a way that is in accordance with the Convention and avoids arbitrariness. Thus, it can be argued that in this case Latvia created a problem for itself by allowing relatives to have say in this matter and failing to create proper means to exercise that right. Secondly, this decision links consent of a relative to the respect for private life and going forward that can

⁶⁷ See note 61

⁶⁸ See note 60

encourage action instead of inaction. That also raises a few questions of exactly how much should the laws be procedurally detailed to satisfy the respect of private life of relative's which now also means having a right to decide on possible interference with deceased's body? How this expanding link between individualist autonomy and human rights will impact the society?⁶⁹

The decision had a few issues, one in particular was that court only cited two documents from pre-2001 (the year the removal took place) years. One of these was 1978 Council of Europe "Resolution on harmonization of legislations of member states relating to removal, grafting and transplantation of human substances" which only recommended that states may decide that removal must not be affected if there is an apparent objection by the family of deceased and does not go into the relevant matter any further. The other document which is a 1998 Opinion from the European Group on Ethics in Science and New Technologies to the European Commission "On Ethical aspects of human tissue banking" only recommended that doctors as much as possible ensure that relatives get the opportunity to express the wishes of the deceased. To sum up, 1978 document only gives little detailed guidance and the 1998 Opinion mentions only the expressing of deceased wishes and not their own and that makes ECHR ruling look less legitimate.⁷⁰

This ECHR marks a new era of legal uncertainty for states of the Council of Europe. A decision like this could be used as a precedent in future claims even from applicants from countries with no mention of the right of relatives to consent to removal of deceased's body parts in their legislations. If some jurisdictions allow in practice relatives to, in some cases, override expressed wishes of the deceased can we expect in the near future for the Court to find that even in countries that do not express the right in their domestic law the states cannot deny relatives from exercising a standalone right to consent? Going forward, the matter of organ and tissue removal may even touch other Convention articles, particularly the right to life and freedom from discrimination.⁷¹

⁶⁹ See note 61

⁷⁰ Id

⁷¹ Id

II. EXISTING ORGAN TRADE LEGISLATION WORLDWIDE

After reviewing some of the most gruesome and important cases regarding human rights violations in relation to organ trade lets focus on analyzing the currently available legislation regarding organ trade and trafficking worldwide. In terms of organ trafficking, most countries either adopt a socialist or a capitalist ideology. Capitalist ideology perspective is the belief that people should have the right to choose freely what they want to do with their body and government should not be able to tell them what decisions to make in relation to that. However, this view would be against the law in the United States and other countries that already have laws in place which prevent a person from freely choosing to do as he pleases with his body in regards of organ part donation.⁷² Socialist ideology approach is the one where government regulates the limits of what persons can do with their bodies and organs by regulating an open market and making sure it is equally distributed.⁷³⁷⁴

The National Organ Transplant Act of 1984

In 1984, the United States enacted the National Organ Transplant Act (NOTA) to make guidelines for organ donation and transplantation. According to NOTA, it is unlawful for anyone to knowingly transfer or receive money for financial profit. The intent of this act was very noble and it said that life-saving organs shall never be bought and instead be a “gift” to the recipient.⁷⁵ Failing to cooperate with these norms may get a person a fine of 50 000 US dollars or less or prison time for 5 years or less, or both. However, people are allowed to choose if they want to donate their organs or not, but only if no compensation is provided for it.⁷⁶

The prohibition of financial transactions involving human organs in United States is based on NOTA. Any efforts to instill financial incentives to increase, for example, cadaveric donation have failed, because of Congress’ strong belief that any human organ shall not be a part of a commercial market.⁷⁷ Since the enactment of NOTA in 1984 there has been only one amendment made for it and it only was to expand the definition of a human organ.⁷⁸

⁷² See note 35

⁷³ <https://www.britannica.com/topic/socialism>

⁷⁴ See note 35

⁷⁵ See note 15

⁷⁶ See note 35

⁷⁷ See note 43

⁷⁸ Robert Ainley, *Organ Transplantation: A Model Law Approach to Combat Human Trafficking and Transplant Tourism*, *Oregon Review of International Law* (2011, vol. 13, 427)

The Declaration of Istanbul on Organ Trafficking and Transplant Tourism

In 2004 the World Health Organization expressed a view that member states should do all they can “to take measures to protect the poorest and vulnerable groups from transplant tourism and the sale of tissues and organs, including attention to the wider problem of international trafficking in human tissues and organs”.⁷⁹ The Declaration is built on principles expressed in the Universal Declaration of Human Rights. It serves to provide a professional and legal framework for countries to regulate organ donation and transplantation activities, as well as transparent oversight system that makes sure that donor and recipient are safe and ensures that standards and prohibitions on unethical practices are enforced.⁸⁰

The Declaration defines organ trafficking, transplant tourism and transplant commercialism. It distinguishes transplant tourism from travel for transportation. The Istanbul Declaration also states the requirements which make travel for transplantation ethical. For live donor transplantation travel for transplantation is ethical if the recipient has a dual citizenship and expresses a will to undergo a transplant surgery from a live donor that is his family member in a country they have a citizenship in but do not reside in, it is also ethical if genetically related donor and recipient willfully decide to undergo a transplantation in some country none of them resides in. For deceased donor transplantation there is only one way travel for transplantation could be ethical: if the bilateral or multilateral organ-sharing programs exist between or among jurisdictions that happen to be based on reciprocated organ-sharing programs among the jurisdictions.⁸¹

The Istanbul Declaration Summit meeting stressed that transplant tourism and organ trafficking should be banned because they constitute the violations of the principles of equity, justice and respect for human dignity. Also, Declaration is clear on consequences of transplant commercialism. Transplant commercialism focuses on vulnerable donors which leads to lack of justice and equity and that means it should also be forbidden. And for effectiveness, these prohibitions need to include bans on all kinds of advertising, soliciting or brokering that are related to transplant commercialism. The Declaration also describes various universal approaches on giving care to live organ donors and also stressed the need of effective practices that help the cadaver organ donation.⁸²

The Istanbul Declaration principles, definition and recommendation call for development of legal and professional framework for governing organ donation and transplant activities in each state and also the development of transparent regulatory oversight system.⁸³

⁷⁹ World Health Assembly Resolution 57.18. Human organ and tissue transplantation (2004)

⁸⁰ The Declaration of Istanbul on Organ Trafficking and Transplant Tourism (2008 04 30-05 02), Preamble

⁸¹ See note 43

⁸² Id

⁸³ Id

Israel's Brain-Respiratory Death law and the Organ Transplantation Law

Donation rate of cadaver donors in Israel has for a long time been one of the lowest among other Western countries, ranging from 7 to 8 donors per million of population.⁸⁴

Since 1997, all living organ donations in Israel are regulated by administrative guidelines. They require potential organ donors to pass psychosocial evaluation and an approval by a committee that evaluates their free will and an altruistic motive of donation. These guidelines in cooperation with low deceased donation numbers in Israel, created a motivation to seek transplantation procedures from paid donors outside of the country. Paid donors were usually not from Israel and were found by middle-men, but there were also some Israeli's that failed the committee evaluation process, so they travelled abroad with recipients to have procedures done in other countries. Consequently, in 2006, the Israel ministry of health took measures by instructing medical insurance companies to not reimburse patients for organ transplant procedures done abroad, unless organ trading was ruled out. In 2008, on top of these measures, Israeli parliament passed an organ transplantation law.⁸⁵ This law allowed organ donors to get some benefits from the government. For example, they can get exemption from fees for state parks, compensation for expenses attributed to psychological treatment and recovery leave. Furthermore, they receive a payment of \$5100 from government, in compensation. In addition, donors are given a preference over others if they are ever in need of an organ in the future.⁸⁶

The Israeli Organ Transplantation Law of 2008 criminalizes any involvement of a third party in organ trading which can be punished by imprisonment. It also strongly forbids any reimbursement of transplantation procedures that are done outside of the Israel if organ procurement and the transplant itself has been done contrary to the law of that country and if Israeli law regarding organ trade is contravened. The law also includes some clauses that aims to remove some disincentives to altruistic living donors that were approved by Israel's national ethics committees. Those removals include covering all of the donors and their relatives travel expenses associated with hospitalization and its follow-up period, reimbursement of the earning loss of 40 days based on living donor's average income of last 3 months (unemployed donors get reimbursed based on the minimum salary in the market on a date of donation) and also a reimbursement of seven days of recovery in recuperation facility. The Israeli Organ Transplantation Law came into effect in late 2008.⁸⁷

⁸⁴ J. Lavee et al., *Preliminary Marked Increase in the National Organ Donation Rate in Israel Following Implementation of a New Organ Transplantation Law*, *American Journal of Transplantation* (2013)

⁸⁵ H. Boas et al., *The Impact of the Israeli Transplantation Law on the Socio-Demographic Profile of Living Kidney Donors*, *American Journal of Transplantation* (2015)

⁸⁶ Same as 35

⁸⁷ See note 84

In order to combat ultraorthodox religious groups' views on brain death, Israeli Ministry of Health prepared and Israeli Parliament accepted and passed the Brain-Respiratory Death Law. The law mandates various medical tests, such as a performance of an apnea test and some other additional ancillary brain imaging testing. Also, the law gives requirements on qualifications that physicians need to have to be certified as members of brain death committees and creates a mechanism that supervises these committees. It also gives relatives of the patient a right to request that the person would not be disconnected from the mechanical ventilator when all other therapy procedures, bar hydration, are discontinued if said relatives are objecting to the determination of a brain death. The Brain-Respiratory Death Law came into effect in August of 2009.⁸⁸

Relevant European Union Legislations

Every EU member country has ratified the European Convention on Human Rights and Fundamental Freedoms. While organ trade engages the right to respect for private and family life which is protected by Article 8(1) of that Convention, there can be exceptions under Article 8(2) when it is in accordance with the law and is necessary for health and moral protection or the protection of other people's rights and freedoms. That means that any prohibition on organ trading is not compatible with this Convention and any doubts on this view is supported by the European Court of Human Rights' interpretation. Also, it is established that the Convention is to be interpreted in accordance to evolving condition and social standards.⁸⁹

In 2015, the Council of Europe Convention against Trafficking in Human Organs was signed.⁹⁰ This Convention is the first ever international treaty on human organ trafficking.⁹¹ The treaty identifies the activities that constitute trafficking in human organs and countries, which ratify this Convention must criminalize them. It forbids all the cases of human organ procurement, both living and cadaver, if the donor or some other third party gets any kind of financial gain or other equal advantage as a result of it. The treaty also criminalizes preparation, storage, use, transportation, import and export, transfer of illicitly removed organs or any hiring of donors or recipients if they are carried out for financial gain or some other equal advantages. This Council of Europe Convention intends to complement other international documents that are fighting against and prohibit human trafficking for organs.⁹² As of May 10th of 2017, 18 countries have signed this treaty in all and only Albania has

⁸⁸ Id

⁸⁹ Shaun D. Pattinson, *Organ trading, tourism and trafficking within Europe, Medicine and Law* (2008)

⁹⁰ See note 6

⁹¹ *Spain signs world's first organ trafficking treaty*, <https://www.thelocal.es/20150326/european-nations-sign-worlds-first-organ-trafficking-treaty> [Accessed on 2017 04 30]

⁹² Marta Lopez-Fraga et al., *A needed Convention against trafficking in human organs* (2014)

ratified it as of yet. That means the Convention is has not yet came into power as it requires 5 ratifications (3 of which need to be from Council of Europe member states) for that to happen.⁹³

Legal Protection for the Minors

One of the existing sources of regulation of children organ trade is the Convention on the Rights of the Child. It was adopted by the United Nations General Assembly on November 20th, 1989. This made the principles declared in the Geneva Declaration of the Rights of the Child and the 1959 United Nation Declaration of the Rights of the Child legally binding on the states that have signed it. The treaty essentially states many of the political, humanitarian, civil, economic and legal rights that were already established by other international agreements, but imports them to children. There are no specific articles or mentions of sale of minors for transplantation of organs, Articles 11, 21, 23 and 35 are connected to this trade in a way and in principle ensures a more thorough protection. Article 11 protects children from being illicitly transferred to foreign countries. Article 23 makes sure that both physically and mentally disabled minors are guaranteed „a full and decent life“. Obviously, the dismemberment of disabled children for organ transplantation and their usage as a source of organs deprive them of full and decent life. Article 21 prohibits illegal children adoptions that have a possibility of creating bodily harm to them. Article 35 criminalizes any kind of trafficking, abduction or sale of minors regardless of purpose or form.⁹⁴

Articles 11, 21 and 35 also address the problem in terms of international movement of minors, if abductors transport alive children abroad, through „illicit transfer“⁹⁵, sale or adoption. However, if physicians remove the children’s body parts in a domestic facility and only harvested organs are being shipped abroad instead of minors themselves being sent out of state a problem of all of these articles, except for Article 35, being inapplicable, arises. Article 35, on the other hand, states that “[child] shall not be the subject of traffic in any form”.⁹⁶ That last clause “in any form” ultimately prohibits even the domestic removal of children’s body parts and sale of them abroad.⁹⁷

Other existing legislation that is protecting the minors is World Health Organization’s Guiding Principles on Human Organ Transplantation. Although it is not legally binding on members it still provides guidance for governments and health professionals worldwide. It was developed by WHO in 1991 after seeing that angst was growing about trafficking in organs.⁹⁸

⁹³ https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/216/signatures?p_auth=x5R77x1V [Accessed on 2017 05 10]

⁹⁴ Maria N. Morelli, *Organ trafficking: legislative proposals to protect minors* (1995)

⁹⁵ Convention on the Rights of the Child (1989 11 20), article 11

⁹⁶ Convention on the Rights of the Child (1989 11 20), article 35

⁹⁷ See note 35

⁹⁸ Id

Other Notable Country Legislations

Australian government on 1st July of 2013 started a Supporting Leave for Living Organs Donors scheme.⁹⁹ In order to increase living organ donation, Australian government created the scheme which guarantees a payment to employers, including donors that are self-employed for up to six weeks based on Australian 38 hour week at up to the National Minimum Wage.¹⁰⁰ In 2015 it was announced that the programme is being renewed for two years until 30th June of 2017.¹⁰¹

Since 2009, Singapore also allows reimbursements for living kidney donors for all their direct and indirect costs that appeared as a result of donation procedures. Article 14 of Singapore's Human Organ Transplant Act clearly states that any financial gain or other equal advantage is still forbidden, but donors could be compensated any expenses that were incurred as a result of „the removal, transportation, preparation, preservation, quality control or storage of any organ“¹⁰², costs that are directly attributable to person „supplying any organ from his body“¹⁰³ or medical care of any length or insurance protection „which is or may reasonably be necessary as a consequence of his supplying any organ from his body“¹⁰⁴. It also allows for any other government issued scheme that gives donor some medical benefits and privileges to be present.¹⁰⁵

In 1984, People's Republic of China passed their own order regulating corpses of executed prisoners. It made China's legislation regarding organ transplantation unique because it allowed sale of organs taken from prisoners who were sentenced to death. Prisoners get their organs removed immediately to ensure organ freshness, even if they don't die instantly from the bullet. Order was amended in 2006 in hope of forbidding organ trafficking. This amendment still fails to protect prisoners and also fails to address or regulate the organ removal procedures. In 2007, the Regulation on Human Organ Transplantation which created a voluntary organ donation system as well as banned any commercial transplantations. However, the removal of organs from prisoners sentenced to death is still legal.¹⁰⁶

⁹⁹ *Supporting Leave for Living Organ Donors scheme starts July 01, 2013*, <http://www.hlthv.org.au/press-releases/press-release-1> [Accessed on 2014 04 27]

¹⁰⁰ NSW Government Public Service Commission Circular *PSCC2014-02 Supporting Leave for Living Organ Donors Scheme* (2014 02 07)

¹⁰¹ <http://www.health.gov.au/internet/main/publishing.nsf/content/leave-for-living-organ-donors> [Accessed on 2017 04 27]

¹⁰² Human Organ Transplant Act (Revised Edition 2012 07 31), Article 14 (3)

¹⁰³ Id

¹⁰⁴ Id

¹⁰⁵ Id

¹⁰⁶ See note 35

CONCLUSIONS AND RECOMMENDATIONS

The Organ Trade remains a vast and unexplored field of law. Most countries have domestic laws in place that ban any commercialization of organ donation and there is a trend in allowing indirect compensation in a form of reimbursements for any expenses they have in relation to organ donation procedure as well as some additional benefits for organ donors. While some countries are strict in their regulation and enforcement of these laws, others are struggling to enforce legislations because of corruption in government, police or healthcare systems as well as because of infrastructural inefficiencies and exploitative loopholes in the law. In addition, the issue of transplant tourism makes the effort of countries that are successfully enforcing organ trade laws worthless because people can just go out of country to get transplantation and don't face any legal consequences. As a result, there have been many cases of criminals, sometimes even with the help of high ranking state officials, exploiting the vulnerable social classes or making other violations to fundamental human rights with Chinese, Indian and Kosovar cases being only a few of a huge amount of examples of criminal activity in relation with organ trafficking. The Falun Gong case shows necessity to protect religious groups, Kosovar case shows the need to protect ethnical groups and the Indian case showed that the lowest social classes need protecting, because as a result of organ shortage around the world they and similar other groups are being exploited in ways that violate their human rights. Even though the countries discussed quite a few amendments to Rome statute to include some crimes citing their transboundary nature and problems of law enforcement, organ trafficking, which shares these aspects, is not included among them. This may be a mistake as organ trafficking results in various forms of human misery on the scale of crimes against humanity and is very problematic to address at the level of individual states. As of now, the pressures on domestic law may be too big. Although states are regulating organ transplantation differently, there is general condemnation of organ trafficking among them. Also, there is a general agreement organ trafficking is a huge international problem that is too underdeveloped and under-regulated by international organizations and domestic laws.¹⁰⁷ All of this calls for an international legally binding document regarding organ trade.

Since most of the illegal organ trading is happening because of a shortage of vital human body parts required for transplantation and because the exciting possibility of growing human organs in other animals like pigs are a long way to becoming a reality because of scientific, biological, ethical and political issues and reasons¹⁰⁸ the new legislative document should focus on trying to increase the number of donors and a general willingness of people to donate. As Israeli example has shown, giving people who agree to be donors compensation for their expenses related to transplant procedure

¹⁰⁷ See note 61

¹⁰⁸ Gretchen Vogel, *Human organs grown in pigs? Not so fast*, <http://www.sciencemag.org/news/2017/01/human-organs-grown-pigs-not-so-fast> [Accessed on 2017 04 21]

as well as some other benefits can successfully increase the amount of live organ donation, people willing to be organ donors and help battle the transplant tourism.¹⁰⁹ Also, the study from 2014 showed that direct financial compensation for organ donation does not generally increase a willingness to be a donor and that a compensation related to expenses of transplant procedure is second favored type of compensation.¹¹⁰ This means that the new model legislation should stick to current practice and ban any direct financial compensation and stick to Australian, Singapore and Israeli type of reimbursement for expenses in relation to donation procedures. It would also be beneficial to have a one singular law for all kinds of trafficking, because no matter if people are forced to work without payment, getting sold in sex industry or sell their organs for miserable amounts of money, the end result is the same. Separate laws that deal in prostitution, organ trafficking or forced labor failed to do their job around the world and the focus should be redirected from the end result to the purpose of trafficking which is exploitation. One universal definition of trafficking internationally would help to stop trafficking in all forms, enable countries to prosecute those dealing in it by cooperation between countries and would allow meaningful punishments for criminal activity. After all, organ trafficking could be seen as a form of slavery and it deserves international attention as much as other serious issues.¹¹¹

In the meantime, as *Elberte v. Latvia* case has shown, human rights relating to unlawful body part removal for transplantation may be defended under Articles 3 and 8 of European Convention on Human Rights in the European Court of the Human Rights. However, as dissenting opinion of judge Wojtyczek and works by scholars have pointed out, it often requires expanding the scope of these articles and sometimes lacks clarity on some important questions that may even lead to questioning the whole legitimacy of Courts interpretation of these Convention articles.

All in all, the current situation and exemplary cases of cruel criminal activity around the world shows that organ trade results in many exploitations of most vulnerable persons and leads to many violations of fundamental human rights that involve even the highest ranking officials of states. As a result, the hypothesis that organ trade should constitute a fundamental human rights violation is confirmed.

¹⁰⁹ See note 85

¹¹⁰ E. J. Gordon et al., *Does Financial Compensation for Living Kidney Donation Change Willingness to Donate?*, *American Journal of Transplantation* (2015; no. 15)

¹¹¹ Elizabeth Pugliese, *Organ Trafficking and the TVPA: Why One Word Makes a Difference in International Enforcement Efforts*, *Journal of Contemporary Health Law and Policy* (2007)

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ANNEX

ANNEX 1. LIST OF FUNDAMENTAL HUMAN RIGHTS

Fundamental Human Rights (Universal Declaration of Human rights)	
Article	Fundamental human right
Article 1	Every human is born free and equal and should use reason and conscience to act toward one another in good spirit.
Article 2	Everyone is entitled to all the rights and freedoms from the Declaration and should not be deprived of them based on any kind of discrimination or the territory that he is from.
Article 3	Right to life, liberty and security of person
Article 4	Slavery is prohibited
Article 5	No one can be tortured, or be subjected to cruel, inhuman treatment or punishment
Article 6	Everyone has an equal right to use the law
Article 7	Equality before the law and entitlement to protection of the law
Article 8	Right to remedy after your fundamental rights were violated
Article 9	No one can be subjected to arbitrary arrest, detention or exile
Article 10	Right to a public and fair trial
Article 11	Presumption of Innocence
Article 12	The right to privacy and protection from slander
Article 13	Freedom of movement inside and outside of countries
Article 14	The right to asylum
Article 15	Right to a nationality
Article 16	Right to a marriage and a family
Article 17	Right to own a property
Article 18	Right to freedom of thought, conscience and religion
Article 19	Right to freedom of opinion and expression
Article 20	Right to peaceful assembly and association
Article 21	Right to take part in the government of your country through democracy
Article 22	Right to social security
Article 23	Right to work and free choice of employment
Article 24	Right to rest and leisure
Article 25	Right to good and comfortable life
Article 26	Right to education

Article 27	Right to make and enjoy arts and have copyrights
Article 28	Right to social and international order that lets you realize your rights
Article 29	Duty to protect other people's rights and freedoms
Article 30	No one can take away any of the rights and freedoms from a person