

LETTER TO THE EDITORS

# Re-conceptualizing the organ trade: separating “trafficking” from “trade” and the implications for law and policy

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This article is based on a previous publication, ‘Columb S. Beneath the organ trade: a critical analysis of the organ trafficking discourse. *Crime, Law and Social Change*. 2015;63(1-2):21–47’ that has been adapted for the audience of *Transplant International*

## Introduction

The trade in human organs is considered a major international concern. In 2007, the World Health Organization (WHO) estimated that approximately 6000 kidney transplants are performed illegally each year [1]. More recently, the Council of Europe declared that organ trade constitutes a “major threat to public health” and that it is growing worldwide due to the “greed of unscrupulous traffickers” [2].

The organ trade consists of different practices, nominally defined in the literature as “organ trafficking” [3], “trafficking in persons for organ removal” [4], “organ sales” [5], “transplant commercialism” [6], and “transplant tourism” [7]. Although there can be some overlap between these practices, the official and popular discourse predominantly applies the term, “organ trafficking” without distinction as to the variable aspects involved. As a result, the organ trade as a whole is presented as a serious organized crime that can only be tackled by a punitive response [2,3,8,9]. This approach however, as we will

explain below, is potentially counterproductive. Before discussing the possible implications and offering suggestions to improve the response, we first describe the origin of the organ trafficking discourse and address the conflation of organ trafficking with trade.

## The origin of the organ trafficking discourse

The WHO first condemned organ trade in its 1987 World Health Assembly Resolution [10]. Organ trade became associated with trafficking in the 2000 United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons (henceforth, the Trafficking Protocol). The Trafficking Protocol presents a definition of what is generally referred to as “trafficking in persons for the purpose of organ removal”:

“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the removal of organs” [11].

When the phrase, “the removal of organs,” was introduced, there was little empirical data or case law demonstrating that criminal networks were involved in trafficking persons for their organs [4]. Thus, the concept was introduced despite it not being well studied, discussed, or defined [12]. Nevertheless, the definition has been reaffirmed by other legal instruments and is now prohibited worldwide [13–15].

The definition in the Trafficking Protocol only extends to “trafficking in persons.” It does not cover the sale or purchase of organs.

Notably, this definition is the only legally accepted definition of “trafficking,” or more specifically, “trafficking in persons.” Although in the popular discourse trafficking is occasionally associated with other forbidden activities such as “drug trafficking” and “arms trafficking,” these activities are connected to an illicit *trade*. Trafficking on the other hand is legally associated with exploiting persons for various purposes through different means. Hence, when one speaks about “organ trafficking,” the distinction between what is considered “trafficking in persons for the purpose of organ removal” and “trafficking of organs,” independent of the body, is not clear. Below we discuss the implications of conflating organ trafficking with trade.

### Conflating organ trafficking with trade

Attempts after the Trafficking Protocol to establish universal principles in organ transplantation have added confusion to the conceptualization of organ trade. The explanatory report to the 2006 Additional Protocol on Transplantation of Organs and Tissues that supplements the Council of Europe Convention on Human Rights and Biomedicine for example declares that “Organ trafficking [...] are important examples of such illegal trading and of direct financial gain” [16].

The conflation of trafficking with trade or commercialism is also demonstrated in the 2008 Declaration of Istanbul on Organ Trafficking and Transplant Tourism (henceforth, the Declaration of Istanbul). Adopting the terminology from the Trafficking Protocol and adding new vocabulary, the Declaration of Istanbul presents a rather broad definition of organ trafficking:

“Organ trafficking is the recruitment, transport, transfer, harboring or receipt of living or deceased persons or their organs by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving to, or the receiving by, a third party of payments or benefits to achieve the transfer of control over the potential donor, for the purpose of exploitation by the removal of organs for transplantation” [17].

The most recent convention, the 2014 Council of Europe Convention against Trafficking in Human Organs (henceforth, the Council of Europe Convention), calls for a similarly broad prohibition of commercial dealings in organs. It defines “trafficking in organs” as the “illicit removal of human organs” [18]. Accordingly, even sales that occur with the consent of donors

are considered to be “trafficking,” regardless of the circumstances involved.

The conflation of trafficking with trade is premised on the assumption that organ sales only involve organs that are harvested from trafficked persons [19–21]. Therefore, it would be immoral to permit the commercial exchange of organs. The reasoning is that organ donation should occur altruistically as this would rule out financial motivation for organ donation, hence, protecting vulnerable individuals from exploitation.

The issue with this line of reasoning however is that it lacks an empirical and normative foundation [22–24]. Arguments against an all-encompassing prohibition of organ sales have been presented by scholars worldwide [22,23,25–27]. Hence, we will not reiterate these arguments here. Instead, we address the emerging body of empirical research which demonstrates that trade does not always constitute trafficking.

### Evidence-based research on trafficking and commercialism

The claim that organ trade is (or leads to) human trafficking is not supported by the majority of empirical studies that position organ sellers as “victims of trafficking” [28–31]. While a number of studies reveal the financial difficulties that lead vulnerable people into selling their organs and the negative consequences that follow [28,32,33], there is little or no information to suggest that these cases involve (all elements of) human trafficking [34,35]. Rather, these studies show that the experiences and outcomes of organs sellers/selling can vary extensively [34–36]. Yea, who interviewed organ sellers in a slum in the Philippines notes that “trafficking is generally assumed rather than rigorously established” [34]. She points out that organ sellers present “degrees of trafficking” as many prospective sellers actively seek out brokers [34]. Recruiters or brokers are sometimes reported to be the neighbors, relatives, or friends of organ sellers [34,37]. Moreover, some sellers subsequently become brokers themselves [4]. Although some authors present incidents where victims report to have been (physically) harmed by brokers and patients, these findings appear to be the exception rather than the norm [22,38,39].

Research among other participants in the trade is scarce and poorly developed, in particular research among patients, brokers, and transplant professionals. For instance, only five studies describe why and how patients buy organs [38,40–43]. Also, relatively few

organ trade cases appear at the judicial level. In the absence of a larger number of criminal investigations and case law research, much remains unknown about the organization of the “mafia-like” organ trafficking networks that are reported to dominate the organ trade arena [2,4,8,44].

### Consequences of conflation and the implications for law and policy

The Council of Europe Convention encourages states to introduce new punitive measures against all commercial dealings in organs or to strengthen existing ones, regardless of whether or not trafficking in persons has occurred [45]. Because it does not distinguish between organ sales and trafficking in persons, the situation then arises that unless an organ seller is considered a victim of trafficking, he or she can be held criminally liable. As a result, individuals who have sold an organ may be reluctant to come forward and report instances of abuse to authorities when such violations that would amount to “trafficking in persons” have actually occurred. Furthermore, extending liability to organ sellers may push the trade further underground and expose them to greater harm [46]. Indeed, we have found that the reluctance of both sellers and buyers to provide information and to testify in criminal cases is one of the reported difficulties of police and prosecutors in attempting to successfully prosecute cases involving trafficking in persons for organ removal [39,47].

Although criminal prosecution is important insofar as it represents society’s intolerance for particular crimes and may act as a deterrent for future offenses, punishment does little to alleviate the conditions that produce crime. This equally applies to organ trade [48]. Furthermore, taking into account the poor non-legislative response to even the most exploitative form of organ trade, a punitive response against *all* commercial dealings in organs may place an unrealistic burden on the criminal justice system. Law enforcers’ decisions over which activities to prioritize are often based on chances of securing successful convictions. Prohibition may not then always be accompanied by rigorous enforcement when the police face both the challenges of international investigations and difficulties in proving that an organ was illegally bought [49]. Already in its 1980 Report on Decriminalization, the Council of Europe acknowledged that the social costs of criminalizing some activities can outweigh the benefits [50]. Thus, it may be more effective to bring only the trafficking in persons offenses into the realm

of the criminal justice system. Less harmful cases (for instance organ sales and purchases not involving traffickers or other middlemen) could perhaps better be approached through alternative policies, which we discuss below.

### Improving the response to organ trade

To improve the response to organ trade, the international (transplant) community may wish to change its approach. First, organizations such as the Council of Europe, the WHO, and the Declaration of Istanbul Custodian Group may wish to clarify the distinction between transplant commercialism and trafficking in persons. Their instruments should explain that purchasing or selling an organ for material or financial gain is not the same as trafficking a person for his or her organs.

Second, the Council of Europe Convention could consider including a provision which explicitly states that organ sellers will not be considered complicit in any criminal offense(s) involving the sale of an organ. From a law enforcement perspective, resources would be better served by targeting the brokers, recruiters, and intermediaries, as well as the transplant centers and staff that perform illegal transplants [51].

Relatedly, it should be recognized that the exploitation that organ sellers experience cannot be reduced to a singular criminal act. Organ sellers are invariably exploited, insofar as their economic position is taken advantage of. As a consequence of their poor bargaining position, organ sellers stand to gain significantly less from a commercial kidney exchange than the intermediaries who facilitate the trade. Yet under current legislation, their exploitation is only recognized in the context of trafficking in persons. As the empirical body of research suggests, the reasons why people are compelled to sell an organ extend beyond the narrow parameters of trafficking legislation. Efforts aimed at reducing the level of exploitation of organ sellers necessitate measures that look beyond the boundaries of criminal intervention, taking into consideration the wider political, social, cultural, and economic factors that leave people vulnerable to exploitation of various kinds.

Third, the international (transplant) community could offer guidance to governments in addressing other aspects of the organ trade (i.e., commercialism). Countries differ in their local, cultural, and socio-political circumstances which can inhibit the adoption of a “one size fits all” punitive response imposed through a Western design [52]. Examples of alternative, harm-reductionist strategies could involve not only the

removal of punishments for sellers, but also of buyers and whistle-blowers, and enhancing their protection. This, in turn, may have the added benefit of potentially increasing their willingness to testify in criminal cases against trafficking networks.

Finally, the relatively low number of convictions involving trafficking in persons for organ removal suggests that a stronger nonlegislative response to those who exploit vulnerable sellers and buyers is warranted. Organizations such as the Council of Europe and United Nations could encourage national law enforcement agencies to prioritize prosecution of international organ trafficking networks and facilitate more effective cross-border collaborations to detect and prosecute the crime [53].

In conclusion, more and stricter laws against the organ trade are unlikely to eliminate this practice and may even be potentially counterproductive. Rather, the international (transplant) community needs to reconsider its approach to organ trade by separating trade from trafficking and introducing harm-reductionist policies.

### Conflict of interest

The authors have no conflict of interest to disclose.

### Acknowledgments

The authors would like to thank Dr Ana Manzano-Santaella for her comments on an earlier draft.

## REFERENCES

- Shimazono Y. The state of the international organ trade: a provisional picture based on integration of available information. *Bull World Health Organ* 2007; **85**: 955.
- Council of Europe. A new Convention to combat trafficking in human organs. Factsheet 51 2014.
- Budiani-Saberi DA, Delmonico FL. Organ trafficking and transplant tourism: a commentary on the global realities. *Am J Transplant* 2008; **8**: 925.
- Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings. Trafficking in human beings for the purpose of organ removal in the OSCE region: analysis and findings. Vienna Organization for Security and Co-operation in Europe, 2013.
- Radcliffe-Richards J, Daar AS, Guttman RD, et al. The case for allowing kidney sales. *Lancet* 1998; **351**: 1950.
- Epstein M. Sociological and ethical issues in transplant commercialism. *Curr Opin Organ Transplant* 2009; **14**: 134.
- Ivanovski N, Masin J, Rambabova-Busljetic I, et al. The outcome of commercial kidney transplant tourism in Pakistan. *Clin Transplant* 2011; **25**: 171.
- Caplan AL, Domínguez-Gil B, Matesanz R, Prior C. Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs. Council of Europe, 2009. [https://www.coe.int/t/dghl/monitoring/trafficking/Docs/News/OrganTrafficking\\_study.pdf](https://www.coe.int/t/dghl/monitoring/trafficking/Docs/News/OrganTrafficking_study.pdf) (accessed 15 March 2016).
- Danovitch GM, Chapman J, Capron AM, et al. Organ trafficking and transplant tourism: the role of global professional ethical standards – the 2008 Declaration of Istanbul. *Transplantation* 2013; **95**: 1306.
- World Health Assembly Resolution WHA40.13. Development of Guiding Principles for Human Organ Transplants, 1987.
- United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, United Nations Office on Drugs and Crime. Vienna. Treaty Series, vol. 2237. Sect. A/55/383, 2000.
- Efrat A. Global efforts against human trafficking: the misguided conflation of sex, labor, and organ trafficking. *Int Stud Perspect* 2016; **17**: 34.
- Council of Europe Convention on Action Against Trafficking in Human Beings Warsaw, 16.V.2005. CETS 197, 2005.
- The European Parliament and the Council. Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, 2011. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32011L0036> (accessed 3 April 2016).
- United Nations Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, United Nations, Treaty Series, vol. 2171, p. 227 Sect. Doc. A/RES/54/263, 2000.
- Council of Europe. Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin. Oviedo, 1997. <http://conventions.coe.int/Treaty/en/Treaties/html/186.htm> (accessed 2nd August 2016).
- Steering Committee of the Istanbul Summit. The declaration of Istanbul on organ trafficking and transplant tourism. *Transplantation* 2008; **86**: 1013.
- European Committee on Crime Problems. *Council of Europe Convention Against Trafficking in Human Organs*. Santiago de Compostela: Council of Europe, 2015.
- World Health Organization. Guiding Principles on Human Cell, Tissue and Organ Transplantation, as endorsed by the sixty-third World Health Assembly in May 2010, in Resolution WHA63.22, 2010. [www.who.int](http://www.who.int) (accessed 8 March 2016).
- Scheper-Hughes N. The global traffic in human organs. *Curr Anthropol* 2000; **41**: 191.
- Capron AM, Delmonico FL. Preventing trafficking in organs for transplantation: an important facet of the fight against human trafficking. *J Hum Trafficking* 2015; **1**: 56.
- Radcliffe Richards J. *The Ethics of Transplants. Why Careless thought Costs Lives*. Oxford: Oxford University Press, 2012.
- Friedlaender MM. Buying and selling kidneys: are we failing our patients?, Ethical, Legal, and Social Issues in Organ. *Transplantation*, 2004: 288.

24. Matas AJ. The case for living kidney sales: rationale, objections and concerns. *Am J Transplant* 2004; **4**: 2007.
25. de Castro LD. Commodification and exploitation: arguments in favour of compensated organ donation. *J Med Ethics* 2003; **29**: 142.
26. Hillhorst MT, Van Dijk G. Financial incentives for organ donation. An investigation of the ethical issues. The Hague: Centre for Ethics and Health, 2007. <http://hottproject.com/userfiles/Publicaties/FinancialIncentivesVanDijkHilhorst.pdf> (accessed 17 June 2016).
27. Matas AJ, Hippen B, Satel S. In defense of a regulated system of compensation for living donation. *Curr Opin Organ Transplant* 2008; **13**: 379.
28. Goyal M, Mehta RL, Schneiderman LJ, Sehgal AR. Economic and health consequences of selling a kidney in India. *J Am Med Assoc* 2002; **288**: 1589.
29. Lundin S. Organ economy: organ trafficking in Moldova and Israel. *Public Underst Sci* 2012; **21**: 226.
30. Moniruzzaman M. "Living Cadavers" in Bangladesh: bioviolence in the human organ bazaar. *Med Anthropol Q* 2012; **26**: 69.
31. Moazam F, Zaman RM, Jafarey AM. Conversations with kidney vendors in Pakistan: an ethnographic study. *Hastings Cent Rep* 2009; **39**: 29.
32. Naqvi SAA, Ali B, Mazhar F, Zafar MN, Rizvi SAH. A socioeconomic survey of kidney vendors in Pakistan. *Transpl Int* 2007; **20**: 934.
33. Budiani-Saberi D, Mostafa A. Care for commercial living donors: the experience of an NGO's outreach in Egypt. *Transpl Int* 2011; **24**: 317.
34. Yea S. Trafficking in part(s): the commercial kidney market in a Manila slum, Philippines. *Glob Soc Policy* 2010; **10**: 358.
35. Fry-Revere S. *The Kidney Sellers. A Journey of Discovery in Iran*. Durham, NC: Carolina Academic Press, 2014.
36. Malakoutian T, Hakemi MS, Nassiri AA, et al. Socioeconomic status of Iranian living unrelated kidney donors: a multicenter study. *Transplant Proc* 2007; **39**: 824.
37. Meyer S. Trafficking in human organs in Europe: a myth or an actual threat? *Eur J Crime Crim Law Crim Just* 2006; **14**: 208.
38. Berglund S, Lundin S. 'I had to leave': making sense of buying a kidney abroad. In: Gunnarson M, Svenaeus F, eds. *The Body as a Gift, Resource, and Commodity: Exchanges Organs, Tissues and Cells in the 21st Century*. Huddinge: Södertörn Studies in Practical Knowledge, 2012: 321–342.
39. De Jong J. The trade in human organs and human trafficking for the purpose of organ removal. An explanatory study into the involvement of the Netherlands and Europe. Woerden: Police Central Intelligence Division. <http://hottproject.com/userfiles/Reports/DeJong2015TradeinhumanorgansandtraffickinginhumanbeingsanexploratorystudyintotheinvolvementoftheNetherlandsandEurope.pdf> 2015 (accessed 4 March 2016).
40. Scheper-Hughes N. Mr Tati's holiday and João's safari – seeing the world through transplant tourism. *Body Soc* 2011; **17**: 55.
41. Leung SSH, Shiu ATY. Experience of Hong Kong patients awaiting kidney transplantation in mainland China. *J Clin Nurs* 2007; **16**: 341.
42. Huang CH, Hu RH, Shih FJ, Chen HM, Shih FJ. Motivations and decision-making dilemmas of overseas liver transplantation: Taiwan recipients' perspectives. *Transplant Proc* 2011; **43** (5): 1754.
43. Van Balen LJ, Ambagtsheer F, Ivanovski N, Weimar W. Interviews with patients who traveled from Macedonia/Kosovo, The Netherlands, and Sweden for Paid kidney transplantations. *Prog Transplant* 2016; **26**: 328.
44. Francis LP, Francis JG. Stateless crimes, legitimacy, and international criminal law: the case of organ trafficking. *Crim Law Philos* 2010; **4**: 283.
45. Watson R. Anyone linked with trafficking human organs will be punishable under new convention. *BMJ* 2015; **350**:h1756.
46. Columb S. Excavating the organ trade: an empirical study on organ trading networks in Cairo, Egypt. *Br J Criminol* 2016; (Epub ahead of print).
47. Ambagtsheer F, Gunnarson M, De Jong J, et al. Trafficking in human beings for the purpose of organ removal: a case study report. In: Ambagtsheer F, Weimar W, eds. *Trafficking in Human Beings for the Purpose of Organ Removal: Results and Recommendations*. Lengerich: Pabst, 2016: 91–116.
48. Columb S. Beneath the organ trade: a critical analysis of the organ trafficking discourse. *Crime Law Soc Change* 2015; **63**: 21.
49. Manzano A, Monaghan M, Potrata B, Clayton M. The invisible issue of organ laundering. *Transplantation* 2014; **98**: 600.
50. European Committee on Crime Problems. Report on Decriminalization Strasbourg (available on request). Council of Europe, 1980.
51. Martin D, Van Assche K, Domínguez-Gil B, et al. Prevention of transnational transplant-related crimes-what more can be done? *Transplantation* 2015; **100**(8): 1776.
52. Evans RW. Ethnocentrism is an unacceptable rationale for health care policy: a critique of transplant tourism position statements. *Am J Transplant* 2008; **8**: 1089.
53. Holmes P, Rijken C, D'Orsi S, et al. Establishing trafficking in human beings for the purpose of organ removal and improving cross-border collaboration in criminal cases. *Transplant Direct* 2016; **2**: e58.
54. Haken J. Transnational crime in the developing world. Washington: *Glob Finan Integr* 2011.