

The Vienna Forum to fight Human Trafficking
13-15 February 2008, Austria Center Vienna
Background Paper

**011 Workshop: Human Trafficking
for the Removal of Organs and Body
Parts**

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**THE VIENNA FORUM TO FIGHT HUMAN TRAFFICKING
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BACKGROUND PAPER

**WORKSHOP 011
TRAFFICKING IN PERSONS FOR THE PURPOSE OF ORGAN
REMOVAL**

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INTRODUCTION

As with human trafficking for other exploitative purposes, victims of trafficking for the purpose of organ removal are often recruited from vulnerable groups (for instance, those who live in extreme poverty) and traffickers are often part of transnational organised crime groups. Organized crime groups lure people abroad under false promises and convince or force them to sell their organs. Recipients of the organs must pay a much higher price than donors receive, part of which benefits brokers, surgeons and hospital directors, who have been reported to be involved in the organized criminal network. The commission of this crime can be distinguished from other form of trafficking in persons in terms of the sectors from which traffickers and organ 'brokers' derive; doctors and other health-care practitioners, ambulance drivers and mortuary workers are often involved in organ trafficking in addition to those involved in other human trafficking networks.

Trafficking in persons for the purpose of removal of organs is addressed by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime. The inclusion of this form of exploitation into the Protocol is intended to cover those situations where a person is exploited for the purposes of a trafficker obtaining profit in the 'organ market', and situations where a person is trafficked for the purpose of the removal of their organs and/or body parts for purposes of witchcraft and traditional medicine. In the former situation, market forces drive supply and demand; those in desperate of need of an organ transplant will purchase an organ from those who are desperately poor, or from 'brokers' who forcibly or deceptively obtained the organ. In the latter situation (not the focus of this background paper), "muti" (magical medicines used in some parts of Africa) involves the removal of body parts including skulls, hearts, eyes and genitals which are sold and used by deviant practitioners to increase wealth, influence, health or fertility.¹

Supply and demand factors with respect to kidney transplants illustrate the particular challenges in both meeting demand for organs and reducing illicit supply thereof. In the United States for instance, kidney donations between 1990 and 2003 increased by only 33% while the number of patients waiting for kidneys grew by 236%.² Kidneys are generally supplied by live 'donors' in underdeveloped countries to developed ones; *"...the circulation of kidneys followed established routes of capital from South to North, from East to West, from poorer to more affluent bodies, from black and brown bodies to white ones and from female to male or from poor, low status men to more affluent men. Women are rarely the recipients of purchased organs anywhere in the world."*³

¹ Scheper-Hughes, Nancy., "Bodies of Apartheid: the ethics and economics of Organ Transplantation in South Africa", Center for African Studies, September 28, 1999, available at

<http://sunsite.berkeley.edu/biotech/organswatch/pages/bodiesapart.html>

² Scheper-Hughes, Nancy, 'Illegal Organ Trade: Global Justice and the Traffic in Human Organs' (forthcoming). One factor at play here is the increasing life expectancies in developed countries.

³ Scheper-Hughes, Nancy., 'Keeping an eye on the global traffic in human organs', The Lancet, Vol. 361, 10 May 2003, p.1645

Professor Scheper-Hughes has proposed the “four C’s” method of conceptualizing the bioethical challenges involved in transplants:

- **Consumption:** under what conditions is the compassionate ‘consumption’ of the ‘body of the other’ permissible?
- **Consent:** use of vulnerable populations (the sick, dying, prisoners, poor, socially fragile) – as organ donors where fully informed consent is difficult to achieve?
- **Coercion:** the demand for sacrificial violence – body self-sacrifice to fulfill altruistic, kin-based or economic survivalist needs
- **Commodification:** the fragmentation of the body and its parts as special objects of manipulation for sale and distribution.⁴

TRAFFICKING IN PERSONS FOR THE PURPOSE OF ORGAN REMOVAL Versus TRAFFICKING IN ORGANS

Trafficking of persons for organ removal is a criminal act under the Trafficking in Persons Protocol. The Protocol does not take into full consideration trafficking in human organs, as it does not cover the transfer of organs (for profit) alone; trafficking in organs, under the Protocol, only occurs if an individual is trafficked for the purpose of organ removal.⁵

Article 3 (a) “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 exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

In resolution 59/156 of 20 December 2004, entitled ‘Prevention, combating and punishing trafficking in human organs, the General Assembly required the Secretary-General to prepare a study on the extent of the phenomenon for submission to the Commission on Crime Prevention and Criminal Justice at its fifteenth session.

This report, on preventing, combating and punishing trafficking in human organs, states that “the extent of the relationship between trafficking in organs and trafficking in persons (and other forms of organized crime) is unclear.”⁶ The report does however, highlight the nexus between vulnerability to such crimes and social factors, such as

⁴ Nancy Scheper-Hughes, ‘Illegal Organ Trade: Global Justice and the Traffic in Human Organs’ (forthcoming)

⁵ E/CN.15/2006/10, 21 February 2006, International Cooperation in combating transnational crime: preventing, combating and punishing trafficking in human organs

⁶ Report of the Secretary-General to the Commission on Crime Prevention and Criminal Justice, on Preventing, combating and punishing trafficking in human organs, 21 February 2006, E/CN.15/2006/10, paragraph 81. The full report is available at: <http://www.unodc.org/unodc/en/commissions/CCPCJ/session/15.html>

unemployment, lack of education and poverty, but states that cases of persons trafficked for the purpose of organ removal are not common, though some have been reported. The report also touches upon the issue of trafficking in children for the purpose of organ removal. While there is no conclusive evidence regarding such trafficking, it is noted that many abducted or missing children have subsequently been found dead with certain organs removed. The report notes here that it is medically possible to transplant a child's organ into an adult's body.⁷

Discussion:

The trafficking of organs alone, separate from the donor, is not addressed by the Protocol, given that the removal of organs does not always entail coercive elements; to constitute the crime of trafficking in persons for the purposes of organ removal, the actual person has to be transported for the purpose of removing their organs.

- *How can a clear distinction be made between trafficking in persons for the purpose of organ removal and trafficking in organs, when a person is trafficked for the purpose of organ removal and their organ continues to be trafficked independently of the person?*

The removal of a child's organs for legitimate medical or therapeutic reasons cannot be considered to have fulfilled the exploitative element of trafficking if a parent or guardian has validly consented.⁸

- *What comprises legitimate medical or therapeutic reasons? Do issues of cultural sensitivity arise where parents or guardians give their consent for the removal of their child's organs and/or body parts for witchcraft, traditional medicine or other culturally important reasons?*

The European Convention on Human Rights and Biomedicine (1997) states that the human body and its parts shall not, as such, give rise to financial gain (Article 21). The Convention further sets out that removal of organs can only take place with appropriate information and consent (Article 22).

- *Is this an appropriate legislative model for all domestic contexts?*

THE ISSUE OF CONSENT

Issues of consent and exploitation related to organ removal are complicated by the fact that often victims consent to the removal of their organs, and may even receive the agreed payment for them. However, as is common in situations of trafficking for any exploitative purpose, the provision of the 'service' is driven by extreme poverty.

⁷ Report of the Security-General to the Commission on Crime Prevention and Criminal Justice, on Preventing, combating and punishing trafficking in human organs, 21 February 2006, E/CN.15/2006/10, paragraph 82. The full report is available at: <http://www.unodc.org/unodc/en/commissions/CCPCJ/session/15.html>

⁸ A/55/383/Add.1, para 65.

Article 3(b) of the Protocol refers to the issue of consent.

“The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forward in subparagraph (a) have been used.”

It is legally impossible to consent to being exploited when the consent has been obtained through improper means, as outlined in the Protocol in Article 3(a).

ACT (what is done)	MEANS (how it is done)	PURPOSE (why it is done)	
Recruitment	+	Threat or use of force	+
Transport		Coercion	+
Transfer		Abduction	+
Harbouring		Fraud	+
Receipt		Deception	+
		Abuse of power or vulnerability	+
		Giving payments or benefits	+
		Exploitation, including Prostitution of others	+
		Sexual exploitation	+
		Forced labour	+
		Slavery or similar practices	+
		Removal of organs	+
		...other types of exploitation	+
			=
			TRAFFICKING
			Under the Protocol

Consent of the victim can be a defence in the domestic law of some countries, but as soon as any of the means of trafficking are established, consent becomes irrelevant and consent-based defences cannot be raised. Trafficking occurs if one of the acts and one of the means listed in Article 3(a) have been used for an exploitative purpose. What might appear to be consent by a victim is nullified or vitiated by the application of any improper means by the trafficker. In other words – *consent of the victim at one stage of the process cannot be taken as consent at all stages of the process* and without consent at every stage of the process, trafficking has taken place.

In the situation of organ removal, many people consent to the removal of their organ, but there may be deception as to the amount of payment for the organ or there will be no payment at all. They also may not be fully informed as to the nature of the procedure, recovery and the impact of the organ removal on their health. Alternatively, consent may be obtained through varying degrees of coercion or abuse of vulnerability.

⁹ Pearson, Elaine, ‘Coercion in the Kidney Trade? A background study on trafficking in human organs worldwide’ Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH, April 2004, p.5 available at www.gtz.de/de/dokumente/en-svbf-organ-trafficking-e.pdf

The term "abuse of a position of vulnerability" is understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.

Another legal question which will arise is whether, under national law, the subject had the capacity to consent to recruitment or subsequent treatment. Article 3(c) of the Trafficking in Persons Protocol makes the consent of a child irrelevant, and the capacity to consent may be further restricted under the national laws of a particular State.

3(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;

Consent and cadavers

There are two main systems for retrieving organs from cadavers:

- Presumed consent (opting out): an organ can be removed from a deceased person for the purpose of transplantation unless the person has registered objections
- Express consent (opting in): organs are only removed for the purpose of transplantation where the person has expressed a will to donate organs.

The former system of presumed consent is widely applied. In both systems, where there is no indication as to the person's wishes, the family of the deceased person could be asked to authorize the removal of organs.¹⁰

Discussion

- *What means have been used in cases of organ trafficking?*
 - *Does poverty create a situation of vulnerability that can be abused by traffickers?*
- *How might one measure or determine whether consent is 'fully informed'?*
- *Does the presumed consent system expose vulnerable persons to additional risks?*
- *Does the express consent system work against economically disadvantaged people?*
- *How does the requirement of 'fully informed consent' operate with respect to presumed or express consent systems relating to the removal of cadavers?*

¹⁰ E/CN.15/2006/10, paragraph 27-28., 21 February 2006, International Cooperation in combating transnational crime: preventing, combating and punishing trafficking in human organs

ACTORS INVOLVED IN TRAFFICKING IN PERSONS FOR ORGAN REMOVAL

The commission of this crime can be distinguished from other forms of trafficking in persons in terms of the sectors from which traffickers and organ 'brokers' derive; doctors and other health-care practitioners, ambulance drivers and mortuary workers are often involved in organ trafficking in addition to those involved in other criminal trafficking networks.

Given the complex nature of transplant transactions, a range of skills from various sectors of society is required including, but by no means limited, to the following:

- Medical directors of transplant units
- Hospital and medical staff
- Technicians in blood and tissue laboratories
- Dual surgical teams working in tandem
- Nephrologists
- Postoperative nurses
- Travel agents and tour operators to organize travel, passports and visas
- Medical insurance agents
- 'Kidney hunters (to recruit 'donors' locally or internationally from among vulnerable and marginalized populations)
- Religious organizations and charitable trusts, which sometimes call upon organ brokers
- Patient advocacy organizations, which sometimes call upon organ brokers

Discussion

- *What role does the corruption of medical staff, police and government officials play with respect to organ-related trafficking?*
- *How can organ-related corruption be identified and addressed?*

MODUS OPERANDI OF TRAFFICKERS

Trafficking in persons for organ removal vs. 'Transplant Tourism'

Transplant tourism depends on four populations: desperate patients willing to travel great distances and face considerable insecurity to obtain the transplants they need; equally desperate and mobile organ sellers; outlaw surgeons willing to break the law or ignore regulations and longstanding medical norms; and organs brokers and other intermediaries with established connections to the key players in the shadowy underworld of transplant tourism. In some developing countries, transplant tourism is vital to the medical economies of rapidly privatizing clinical and hospital services in poorer countries that are struggling to stay afloat.¹¹

Discussion

¹¹ Nancy Scheper-Hughes, 'Illegal Organ Trade: Global Justice and the Traffic in Human Organs' (forthcoming)

- *Should medical staff who encourage and provide information on 'transplant tourism' be liable?*
- *Should medical staff involved in follow-up care of patients who have purchased organs be accountable if they fail to alert health authorities?*
- *Should recipients of illegal transplants abroad be entitled to national medical insurance payments or reimbursements?*
- *Is enough being done to address the involvement of the travel industry in this crime?*
- *Do carrier sanctions come into play in addressing this?*

Recruiting organ 'donors' or 'sellers'

In the context of trafficking for the purpose of organ removal, there are various ways that organs can be procured, including the following modus operandi;¹²

- Kidnap, killing and sale of people, especially children, for organs.
- Removal of kidneys through deception or coercion. There have been cases where a victim will go to a doctor or hospital for an unrelated illness or accident, but in the hospital, the person's kidney is removed without their knowledge or consent.
- Victim is recruited and taken abroad for an unspecified job that then fails to materialize.
 - Such persons may be kept in 'safehouses' and are psychologically coerced into remaining there.
 - In some cases, victims may be put under anaesthetic and wake to find their kidney has been removed.
 - Person may be given 'option' to sell a kidney or heavily threatened or coerced into doing so through violence.
 - Person may be deceived by surgeon or broker as to the procedures and consequences of the organ removal (e.g. they may tell the victim that the operation is minor, that they can return to work immediately and/or that they will not suffer adverse affects from the removal of one 'dormant' kidney.
- Victims may agree to sell their organ and enter into a formal or informal contract to do so, but they are not paid at all or in full.
- Organs are removed from bodies of people who have been declared brain-dead prematurely. Medical norms will not have been adhered to and/or drugs have been administered to simulate brain death in comatose patients. In some

¹² Pearson, Elaine, 'Coercion in the Kidney Trade? A background study on trafficking in human organs worldwide' Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH, April 2004, pp.10-11, available at www.gtz.de/de/dokumente/en-svbf-organ-trafficking-e.pdf

countries, medical professionals are reluctant to get involved in such cases because of the involvement of organized crime.

Discussion:

- *Which of the above situations would constitute trafficking in organs and which amount to trafficking in persons for the purpose of organ removal?*
- *Which of the above modus operandi are relevant to your domestic context?*

COOPERATIVE LAW ENFORCEMENT AND CRIMINAL JUSTICE RESPONSE

Investigation and Detection

Financial gain from human organs is illegal in the legislation of most countries. However, surgeons, organ brokers and kidney buyers or sellers are rarely pursued by law enforcement.¹³

Law enforcers are at the frontline of identifying both trafficking victims and traffickers. Police officers, customs and border officials should be provided with **training that enables law enforcers to identify** potential and actual victims and perpetrators of organ trafficking and trafficking for the purposes of organ removal. Indicators of trafficking for the purpose of organ removal (and indicators of organ trafficking) should be well-known at borders. Border officials should be trained and equipped to identify indicators that should warrant further investigation as to whether persons may be traffickers or victims of trafficking.

At its 59th Session, the General Assembly discussed the trafficking of human organs in the context of transnational organized crime. Within the resolution that emerged from discussions, the General Assembly “encouraged Member States to exchange experience in and information on preventing, combating and punishing the illicit removal of and trafficking in human organs.”¹⁴

Investigations into trafficking in persons for the purpose of organ removal intersect with the crime of trafficking in organs. Therefore, there must be **greater collaboration and cooperation** between actors involved in combating organ-related crimes. This should include law enforcers who are trained in both trafficking in persons and crimes relating to the health and medical sectors. It also involves the intersection of criminal justice sectors with active parties in health organisations and survivor support services.

Given that organ-related trafficking can be a transnational crime, with suppliers of organs sometimes originating in different continents to the recipients of those organs, and that organs traffickers often locate their operation bases in third countries so as to avoid detection from law enforcement, it is evident that

¹³ Nancy Scheper-Hughes, ‘Illegal Organ Trade: Global Justice and the Traffic in Human Organs’ (forthcoming)

¹⁴ The full Resolution is available at <http://www.un.org/Depts/dhl/resguide/r59.htm>

international law enforcers must cooperate across borders in order to address organ-related crimes.

Discussion:

- *Trafficking in persons for the purpose of organ removal is very closely related to trafficking in organs. How might we ensure that those working to combat one are assisting the other?*
- *Trafficking in persons for the purpose of organ removal can become a crime of organ trafficking alone. How might the law enforcement response be streamlined so that efforts to address, for instance, trafficking in persons, are coordinated with efforts to address trafficking in organs?*
- *Is law enforcement action hampered by a lack of public support to pursue organ-related criminals? Are their acts perceived as 'compassionate' rather than criminal?*

Prosecutions

As with any criminal offence, trafficking in persons for any exploitative purpose, prosecutions have been relatively low and weak in scope. In prosecutions relating to trafficking in persons for organ removal or trafficking in organs, the focus has been on low-level brokers rather than the higher-level medical staff. Sentences have also tended to be light. This hails a need for legislation to clarify who is criminally liable for trafficking for the purposes of trafficking and trafficking in organs.¹⁵

The transplant surgeons who operate in well-resourced and renowned hospitals in the developed world, and those who work in makeshift clinics in developing countries are rarely censured by their own professional colleagues. This impunity of transplant surgeons may be exacerbated by the fact that in many countries and cultures, surgeons are revered for their education, skill, status and enormous power over peoples' lives and deaths.¹⁶

Often victims of organ removal are not encouraged to or supported in taking action against traffickers. Many are precluded from filing criminal complaints because they have unknowingly signed affidavits stating that they had donated their organs.¹⁷

¹⁵ Pearson, Elaine, 'Coercion in the Kidney Trade? A background study on trafficking in human organs worldwide' Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH, April 2004, p.14 available at

www.gtz.de/de/dokumente/en-svbf-organ-trafficking-e.pdf

¹⁶ Nancy Scheper-Hughes, 'Illegal Organ Trade: Global Justice and the Traffic in Human Organs' (forthcoming)

¹⁷ Pearson, Elaine, 'Coercion in the Kidney Trade? A background study on trafficking in human organs worldwide' Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH, April 2004, p.5 available at www.gtz.de/de/dokumente/en-svbf-organ-trafficking-e.pdf

Discussion:

- *Often surgeons who are performing illicit transplants are well-known among professional colleagues. Why are their illegal activities rarely reported to authorities?*
- *Can the illegal transplant of organs involving a transaction between a paying recipient and a seller of organs be considered a 'victimless' crime? What if a broker is involved?*
- *To what extent should the following actors be criminally responsible?*
- *Medical professionals involved in transplant procedures; can knowledge alone make them liable?*
- *Medical professionals involved in follow-up care of organ recipients, who behave contrary to medical ethics by failing to report to authorities?*
- *Medical professionals who counsel clients to participate in transplant tourism?*
- *Recipients of trafficked or illegally procured organs?*

Data Collection

Responses to organ-related trafficking are hampered by a lack of information about these phenomena. This hails a need for increased data collection and research. **Organs Watch** at the University of California, Berkeley, was launched partly in response to the work of the Bellagio Task Force on Security Bodily Integrity for the Socially Disadvantaged in Transplant Surgery (1994-1996). Organs Watch is an independent documentation centre, which follows up on global rumours on organs, reports to the media and medical societies, and investigates individual complaints and allegations. Organs Watch brings together anthropologists, human rights activists, physicians and social medicine specialists to organ transplantation, focusing on the human rights implications of organ-related trafficking. The Organs Watch website allows access to extensive research and a range of publications.¹⁸

Another response to the lack of information about organ-related trafficking is the **Initiative on Global Organ Trafficking** (IGOT) which provides a range of information and materials about organ trafficking, intending to serve as a clearing house of information about illicit organ trade. IGOT also conducts research into transplant trafficking and aims to raise awareness of the issue.¹⁹

¹⁸ More information about Organs Watch can be found at: <http://sunsite.berkeley.edu/biotech/organswatch/>

¹⁹ The Initiative on Global Organ Trafficking (IGOT) can be found at <http://www.organtrafficking.org/index.html>

PREVENTION STRATEGIES

Addressing Demand

The key challenge in reducing the demand for trafficked organs and trafficking of persons for the purpose of organ removal, is balancing the interests of organ recipients with those of organ donors.

Reducing demand for organs through trafficking necessitates the involvement of a range of actors. Members of the medical and health care sector must act to ensure the organs are not procured through financial transactions. Tourist operators must ensure that they do not support 'transplant tourism' which exploits economically-desperate people. Tribal, cultural and community leaders must act to make sure that cultural and traditional medical practices are not interpreted in a way that manifests in interference with people's bodily integrity.

Fundamental to the need to reduce demand for organs, which fuels their exploitative procurement, is the need to:

- Address the health deterioration which leads to organ failure;
- Increase the supply of organs donated through legal channels.

The Coalition for Organ-Failure Solutions (COFS)²⁰ is an international health and human rights organization committed to ending the exploitation of vulnerable people as a source of organ and tissue supplies. COFS combines prevention, policy advocacy, and survivor support:

- In its policy reform efforts, COFS seeks to enhance alternative organ supplies for patients in need and to protect individuals from exploitative practices of commercialize organ donation.
- COFS undertakes target-group and public awareness campaigns and calls to action.
- COFS engages decision-makers and key stakeholders in COFS Mission.
- COFS undertakes grassroots advocacy with potential commercial living donors.

Addressing Supply

Poverty seems to be a prevailing feature in trafficking in persons for the purpose of organ removal. Thus, the poverty-organs trafficking nexus needs to be addressed through sustainable and empowering poverty-alleviation programmes targeted at the potential donor-seller communities.

The Bellagio Task Force Report was an outcome of a pioneering meeting in 1997 involving transplant surgeons, organ procurement specialists, human rights activists

²⁰ For more information on the work of COFS, visit www.cofs.org/index.htm

and social scientists to address issues of transplantation, bodily integrity and the international traffic in organs. The Task Force Report considered arguments for and against sale of organs and found that commercialization of organs from living donors should be prohibited because legitimizing sale of organs would put poor and vulnerable people at greater risk. However, it concluded that the sale of organs from cadavers could be considered.

This controversial issue of legitimizing sale of organs has been considered at global, regional and national levels.

World Health Assembly

The World Health Assembly urged Member States to respond to the insufficient number of organs to meet the needs of patients by extending “the use of living kidney donations when possible, in addition to donations from deceased donors.” Mindful of the risk this posed to pushing the trade in organs underground, the World Health Assembly further urged governments to “take measures to protect the poorest and most 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.”²¹

Council of Europe Convention on Human Rights and Biomedicine

Chapter VI of the Council of Europe Convention on Human Rights and Biomedicine²² concerns organ and tissue removal from living donors for transplantation purposes. The Additional Protocol supplements the Council of Europe Convention on Human Rights and Biomedicine.²³ The preamble of the Council of Europe’s Additional Protocol to the Convention on Human Rights and Biomedicine, acknowledges the risks posed to vulnerable persons by the shortage of organs and tissues available to those who demand them, states that:

- “ ...organ and tissue transplantation should take place under conditions protecting the rights and freedoms of donors, potential donors and recipients of organs and tissues and that institutions must be instrumental in ensuring such conditions...” and that
- “... there is a need to protect individual rights and freedoms and to prevent the commercialisation of parts of the human body involved in organ and tissue procurement, exchange and allocation activities”

Chapter VI of the Additional Protocol prohibits financial gain. Article 21 states that:

1. The human body and its parts shall not, as such, give rise to a financial gain or comparable advantage (and clarifies that this provision does not prevent payments which do not constitute financial gain such as compensation,

²¹ Resolution adopted by the 57th World Health Assembly (22 May 2004) WHA57/18. The full World Health Assembly Resolution is available at: www.who.int/ethics/en More information on the ethics of organ and tissue transplantation is available from the World Health Organisation at

http://www.who.int/ethics/topics/human_transplant/en/

²² Convention on Human Rights and Biomedicine, Council of Europe, Oviedo, 4., IV. 1997, available at

<http://conventions.coe.int/treaty/en/treaties/html/164.htm>

²³ The Addition Protocol to the Convention can be found at:

<http://conventions.coe.int/treaty/en/treaties/html/186.htm>

payments for legitimate medical or technical services rendered and compensation in situations resulting in damage).

2. Advertising the need for, or availability of, organs or tissues, with a view to offering or seeking financial gain or comparable advantage, shall be prohibited.

Article 22 of the Additional Protocol clearly prohibits the trafficking of organs and tissues.

Initiative of the Hellenic Republic

With a view to adopting the Council Framework Decision concerning the prevention and control of trafficking in human organs and tissues of the Council of the European Union (2003/C 100/13),²⁴ the Hellenic Republic (Greece) proposed the adoption of the *Framework Decision on the prevention and control of trafficking in human organs and tissues*. This Proposal has been formulated on the basis of Article 29, 31 (e) and 34(2)(b) of the Treaty on European Union, emphasizing cooperation to prevent organized crime. The Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision concerning the prevention and control of trafficking in human organs and tissues, states at the outset that:

"Trafficking in human organs and tissues is a form of trafficking in human beings, which comprises serious violations of fundamental human rights and, in particular, human dignity and physical integrity. Such trafficking is an area of activity of organised criminal groups who often have recourse to inadmissible practices such as the abuse of vulnerable persons and the use of violence and threats. In addition, it gives rise to serious risks to public health and infringes on the right of citizens to equal access to health services. Finally, it undermines citizens' confidence in the legitimate transplantation system."

This Council Framework Decision provides a more detailed definition than the Trafficking in Persons Protocol, which provides an open definition of trafficking in persons, which indicates some, but does not specify all exploitative purpose. In this regard, the Trafficking in Persons Protocol does not specifically enumerate the removal of tissues, such as skin, bones, cartilage, ligaments and corneas. In so doing, this initiative fills gaps left by the lack of reference to Trafficking in human organs and tissues in the *Council Framework Decision 2002/629/JHA on Combating Trafficking in Human beings* adopted in 2002.

The European Parliament approved the Hellenic Initiative (with some amendments) in legislative resolution of 23 October 2003, in Strasbourg.

²⁴ Both the original initiative of the Hellenic Republic and the amended text adopted by Parliament are available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P5-TA-2003-0457+0+DOC+XML+V0//EN&language=LV>

Recommended actions to prevent organ-related trafficking²⁵

Governments

- Sign and ratify relevant international instruments, including the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the United Nations Convention against Transnational Organized Crime (2000).
- Amend domestic legislation to prevent abuse of organ transplantation.
- Prevent illegal organ sales by considering alternative measures such as increasing the supply of cadaver donations.
- Monitor live, unrelated kidney transplantation processes.
- Ensure independent and comprehensive pre-operative counselling.
- Carry out further research to clarify the relationship between the commercialization of organs and trafficking in persons for organ removal.

Non-Governmental Organizations (working on trafficking in persons and health issues)

- Undertake needs assessments in the area of organ trafficking.
- Identify the nature and specific issues of organ trafficking in order to be able to provide specialized services to such victims, if it is deemed to be a significant problem.

Donors (providers of funding)

- Fund research to support effective legislative action.
- Involve key stakeholders such as medical professionals, NGOs and IGOs in the discussion of the issue of organ trafficking and organ sale.
- Support pilot activities in countries where organ trafficking is known to be a significant problem.

Discussion:

- *Should the commercialisation of organs be prohibited in order to facilitate the fight against trafficking in organs?*
- *How can trafficking in persons for the purpose of organ removal be prevented while not compromising the lives of people who require an organ transplant?*
- *What are alternative solutions to the problem of organ scarcity?*

²⁵ Pearson, Elaine, 'Coercion in the Kidney Trade? A background study on trafficking in human organs worldwide' Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH, April 2004, p.7 available at www.gtz.de/de/dokumente/en-svbf-organ-trafficking-e.pdf

VICTIM SUPPORT AND ASSISTANCE

As with all measures which go towards combating trafficking in persons, victim protection and assistance is paramount. In assisting victims of trafficking, Article 6(4) of the Trafficking in Persons Protocol states that,

“Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care.”²⁶

This highlights the need for specialized understanding of the particular challenges faced by victims of trafficking for the purpose of organ removal (and survivors of ‘organ selling’). A range of service providers should work cooperatively in the provision of support and assistance to cater for the specialized needs of persons who are both victims of trafficking in persons and also survivors of organ removal.

Consequences of supplying organs

Service providers should be aware of the particular challenges faced by survivors of trafficking for organ removal.

Though they may not be informed or aware of the repercussions before they are forced, coerced or deceived into providing an organ, there are several health, social and economic consequences for survivors of organ removal.

Health Consequences

- Health and medical complications, exacerbated by poor information, nutrition and lack of access to adequate health care.
- Lack of resources for follow-up medical checks.
- Psychological consequences from dealing with stigma and discrimination.

Social consequences

- Stigma and discrimination.
- In some rural villages, selling kidneys is viewed as ‘male prostitution’ – selling one’s body and a sign of moral degeneration and criminal tendency.²⁷
- Pressure to sell organ to provide for family.
- Reduced prospects for marriage / romantic relationships where one is scarred from kidney removal.
- Excommunication from communities, churches, friendship groups and families.
- Discrimination towards children of kidney sellers.
- Social stigma of *not* being selected to donate.

Economic consequences

- Unemployment prospects that follow from stigmatization.
- Lost income due to physical inability to return to work.

²⁶ Article 6(4), Trafficking in Persons Protocol

²⁷ Nancy Scheper-Hughes, ‘Illegal Organ Trade: Global Justice and the Traffic in Human Organs’ (forthcoming)

- Often kidney sellers do not receive payment or the full amount agreed to, but incur further costs as a result.
- Very few organ sellers who were motivated by a desire to free themselves from debt have managed to do so after having sold an organ.

Discussion

- *What are the specific risks persons trafficked for the purpose of organs removal are exposed to during and after the trafficking process?*
- *What are the 'special needs' of victims of trafficking for the purpose of organ removal?*
- *What form of health care should be provided to a person after they have 'sold' or 'donated' a kidney or other organ?*

Non-Punishment

In order for a trafficked person to be meaningfully recognized as a victim and enjoy the protection this status does entail, the principle of non-punishment must be applied.²⁸

This means that victims of trafficking should be immune from liability every time they commit an illegal act as long as those acts are related to their trafficking, as the nature of this offence may entail commission of offences by the victims (such as illegal border crossing, etc.). While neither the UN Convention against Transnational Organized Crime nor the Trafficking Protocol makes non-criminalization mandatory, there are various non-binding guidelines, declarations and resolutions which enjoin States to prevent trafficked persons from being prosecuted. (Council of Europe Convention contains a non-punishment clause.) The non-criminalization suggested by these guidelines and instruments shall not be subject to the identification, arrest, prosecution and conviction of the perpetrators.

Discussion:

- *How is the principle of non-punishment of victims of trafficking to be reconciled with domestic legislation concerning the sale of organs?*

Compensation

Article 6(6) of the Trafficking Protocol obliges State Parties to ensure that its domestic legal system contains measures that offer victims the possibility of obtaining compensation for damages suffered. Article 25(2) of the Transnational Organized Crime Convention states that State Parties shall establish appropriate procedures to

²⁸ The term non-punishment is used rather than non-criminalization so as to enable its application in legal systems without prosecutorial discretion.

provide access to compensation and restitution for victims.²⁹ In accessing the compensation to which they are entitled, victims often face a range of challenges:

- Victims may be removed from a country before they are aware of and/or able to seek compensation.³⁰
- Victims may not have access to information and the resources necessary to seek compensation (for instance, they may not be able to afford to file a civil suit; they may not have adequate information about their rights to seek compensation; they may not have access to legal aid nor be able to afford legal representation.)
- Victims may not be able to access compensation because there is no mechanism in place to provide for compensation and/or the assets of the trafficker are difficult to trace.

Discussion

- *What are the 'special needs' of victims of trafficking for the purpose of organ removal?*
- *How should victims be compensated?*
- *From what funds should compensation for victims of trafficking for the purpose of organ removal be drawn from?*

This paper has been prepared to provide some broad background material for the workshop. Please note that fuller materials, including speaker summaries and workshop conclusions, will be included in the official report of the Vienna Forum.

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²⁹ For more on victim compensation see Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols thereto, UNODC, October 2004, p.285-286, available at <http://www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html>

³⁰ The April 29, 2004 European Council Directive Relating to Compensation to Crime Victims provides that “crime victims in the European Union should be entitled to fair and appropriate compensation for the injuries they have suffered, regardless of where in the European Community the crime was committed.”