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## **DEDICATION**

This work is dedicated to the thousands of victim-donors of human trafficking for the purpose of organ removal across the globe.

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## Chapter 1

### INTRODUCTION

#### 1.1 Background to the study

The spread of medical transplant technology across the globe has saved many lives, especially those in the final stages of diseases in which internal organs are completely failing. It has also led to a widespread of human rights abuses, especially with the development and success of organ transplantation since the mid-1950s that introduced an era in which donors and recipients no longer had to be relatives but could be biologically, socially and geographically distant.<sup>1</sup> While the common forms of human trafficking remain trafficking in women and children for sexual exploitation, forced labour, and child labour, other forms of trafficking such as use of children in armed conflicts (child soldiers), involuntary domestic servitude, debt bondage, trafficking in tissues and cells, organ trafficking and human trafficking for the purpose of organ removal (HTPOR) exist that violate the human rights of people.

Like other forms of trafficking, HTPOR is characterized by exploitation of vulnerable people, sourced from the poor, uneducated and desperate groups of people within a given population. HTPOR has remained a subject of unconfirmed reports but since the 1980s, a growing body of field work, research by medical anthropologists, journalists and academics have shown that it is truly a global phenomenon occurring on every continent involving both developed and developing countries.<sup>2</sup>

HTPOR is addressed by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children (hereinafter referred to as the TIP Protocol) which supplements the United Nations Convention against Transnational Organized Crime.<sup>3</sup> The inclusion of ‘removal of organs’ in the definition of trafficking is aimed at addressing situations where a person is exploited for the purpose of a trafficker obtaining

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<sup>1</sup> D Budiani-Saberi and S Columb ‘A Human Rights approach to Human Trafficking for Organ Removal’ (2013) 2, available at [http://cofs.org/home/wp-content/uploads/2013/08/11019\\_2013\\_9488\\_OnlinePDF.pdf](http://cofs.org/home/wp-content/uploads/2013/08/11019_2013_9488_OnlinePDF.pdf), accessed on 30 April 2015.

<sup>2</sup> Organization for Security and Co-operation in Europe (OSCE) Occasional Paper No. 6 ‘Trafficking in Human Beings for the Purpose of Organ Removal’, (July 2013) 18, available at [www.osce.org/secretariat/103393?download=true](http://www.osce.org/secretariat/103393?download=true), accessed on 21 May 2015.

<sup>3</sup> Article 3(a), Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime of 2000 (hereinafter referred to as TIP Protocol).

profit in the ‘organ market’, and/or situations where a person is trafficked for the purpose of the removal of their organ and/or body parts for purposes of witchcraft and traditional medicine.<sup>4</sup>

## **1.2 Statement of research problem/research question**

A large proportion of the debates surrounding the crime of HTPOR and organ trafficking in general, has focused on addressing the shortage of organs by developing systems to promote altruistic donation of organs. Although there is an international recognition and admittance of the fact that trafficking of persons for the removal of organs is not only a problem of organized crime or of the insufficient distribution of organs for transplants, and that it involves serious human rights abuses, there is still a wide gap in the body of research that focuses on the human rights abuses involved in this type of human trafficking, and the need to protect and promote the rights of victims of HTPOR.

It becomes imperative to examine the responses given to HTPOR by the international community and transplant societies, to see if the rights of victim-donors have been put into proper perspective. This dissertation seeks to address the gap that exists in protecting and promoting the rights of victim-donors of HTPOR. The question this dissertation seeks to answer is as follows:

‘Are the rights of the victims of human trafficking for the purpose of organ removal receiving the appropriate attention needed across the globe and thereby adequately protected and promoted?’

## **1.3 Literature review and overview of chapters**

A desk-based methodological approach has been adopted for this dissertation. In addition, a human rights-based approach will be used in addressing the research problem. This approach acknowledges that trafficking in persons is first a violation of

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<sup>4</sup> United Nations Global Initiative to fight human trafficking (UN.Gift), ‘The Vienna Forum to fight Human trafficking, Austria Center Vienna Background Paper’, (13-15 February 2008) 2, available at [www.unodc.org/documents/human-trafficking/2008/BP011HumanTraffickingfortheRemovalofOrgans.pdf](http://www.unodc.org/documents/human-trafficking/2008/BP011HumanTraffickingfortheRemovalofOrgans.pdf), accessed on 30 April 2015.

human rights to which everyone is entitled.<sup>5</sup> Proffered solutions will therefore concentrate more on the victims than on any other party involved in the crime.

For the above purpose, this dissertation is divided into six chapters including the introductory chapter. Chapter 2 introduces the crime of human trafficking in general by tracing a brief history of its evolution. Background information is given to HTPOR as a form of human trafficking, and key concepts are explained.

Chapter 3 examines the trends and patterns of HTPOR, highlighting the specific forms in which the crime can take place. The *modus operandi* of organ traffickers, as well as the role of each party in an organ trafficking network will be expounded upon. The chapter concludes with a consideration of the consequences of HTPOR on the victim-donors.

Chapter 4 concentrates on the inherent human right violations promoted through the practice of HTPOR. These rights are examined in the light of various international human rights treaties and laws. The responses that have been developed in combating the crime of HTPOR by international, regional and national governments and medical societies at large are also considered

Chapter 5 highlights five case studies from five different regions where the organ black market is active and/or where victim-donors are often sourced, while chapter 6 offers a general conclusion to the entire study.

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<sup>5</sup> United Nations Human Rights Office of the High Commissioner (UN.OHCHR) ‘Recommended Principles and Guidelines on Human Rights’ (2010) 3, available at [http://www.ohchr.org/Documents/Publications/Commentary\\_Human\\_Trafficking\\_en.pdf](http://www.ohchr.org/Documents/Publications/Commentary_Human_Trafficking_en.pdf), accessed on 29 December 2015.

## **Chapter 2**

### **BACKGROUND TO HUMAN TRAFFICKING FOR THE PURPOSE OF ORGAN REMOVAL**

#### **2.1 Introduction**

Human trafficking has a long history of evolution from the practice of slave trade. The crime has grown into numerous forms of exploitation of people, from the common forms of sexual exploitation and child labour, to the uncommon forms of organ trafficking and trafficking of persons for the removal of their organs. This chapter seeks to introduce the phenomenon of human trafficking for the purpose of organ removal, which has begun to receive numerous attention from various institutions, organisations, countries, and especially the media.

The chapter commences with a brief history of human trafficking. It then considers the evolution of organ transplantation that has fueled the black market for organs, leading to the trafficking of persons for the removal of their organs. Key concepts that are used throughout the dissertation are carefully examined. The problem of trafficking as a global problem, and more particularly human trafficking for removal of organs, are considered alongside the factors responsible for the continuation of this crime.

#### **2.2 Brief History of Human Trafficking**

As mentioned above, the history of modern day human trafficking can be traced to the practice of slavery and slave trade. Slavery in itself has a history that dates back thousands of years. It existed in prehistoric hunting societies and has persisted throughout the history of humankind as a universal institution.<sup>6</sup> The practice of slavery and slave trade were common in the ancient civilizations of the Middle East and the Mediterranean. It became more prominent during the period of the Roman Empire, and subsequently spread to Europe and North America. It is believed that the legacies left by

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<sup>6</sup> K Kangaspunta 'A short history of trafficking in persons', freedom from fear magazine, Issue 1, available at <http://f3magazine.unicri.it/?p=281>, accessed on 18 July 2015.

the Roman Empire influenced the practices in Europe and North America.<sup>7</sup> Under Roman law, slaves were treated as private properties or chattels of their owners, usually referred to as ‘masters’. Slaves were commonly used as maids, guards, cooks, sexual partners or prostitutes, manufacturers of pottery, glassware, jewels, and so on,<sup>8</sup> and were often times subjected to harsh conditions. They also did not enjoy legal personality.<sup>9</sup> The practices of slavery and slave trade declined towards the end of the Roman Empire, as masters/owners began emancipating their slaves. Some freed their slaves for moral reasons influenced by Christianity,<sup>10</sup> while others could no longer afford to own them.<sup>11</sup> Some slaves were also able to buy their freedom from their masters by accumulating wealth over the years.<sup>12</sup>

The practice of slavery and slave trade did not only spread to Europe. It was also predominant in the Islamic world, that is, the Middle-East and North Africa. Slavery was an established institution under the Koran, and the Islamic states were among the first to acquire slaves from Africa.<sup>13</sup> African slaves were mainly used as gold and copper miners, sugar plantation workers, or domestic servants, similar to the Roman slaves.<sup>14</sup>

However, the most significant expansion of slavery and slave trade in Europe occurred in the fifteenth century, when the Portuguese arrived in Africa with the initial aim of gaining access to gold. A dozen Africans were acquired on the colonisers’ arrival in Africa, to be presented before Prince Henry as gifts.<sup>15</sup> The Portuguese then began to establish themselves both in the trade of gold and slaves from Africa.<sup>16</sup> It was from this point that slavery and the slave trade of Africans spread to many parts of Europe, such as Russia, the Caucasus, the Balkans, and Norman England.<sup>17</sup>

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<sup>7</sup> T Obokata *Trafficking of Human Beings from a Human Rights Perspective: Towards A Holistic Approach* (2006) 10.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid at 11.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

Slavery and slave trade was also practiced in the United States of America. As the slave trade of Africans became prominent, a racial element was added to it, in terms of identifying and associating race and skin colour with the status of slavery.<sup>18</sup> This perception was also prevalent in the United States of America, and the slavery and slave trade of black people later became known as the old or traditional form of slavery.<sup>19</sup>

The basis upon which slavery was abolished and the several international instruments defining slavery and slave trade do not fall within the scope of this dissertation. However, common characteristics can be identified in the practice of slavery and slave trade in comparison with modern forms of slavery through human trafficking. These characteristics can be easily traced from the definitions of ‘slavery’ and ‘human trafficking’, which are provided below.

Article 1(1) of the key international instrument on slavery (the Slavery Convention of 1926) defines slavery as “the status or condition of a person over whom any or all of the power attaching to the right of ownership are exercised.”<sup>20</sup> Slavery entailed ownership and/or control over another human being. This ownership usually lasted on a life-long basis. In effect, slaves were deprived of personal rights and freedoms, such as freedom of movement, and the rights to liberty and property.<sup>21</sup>

It can therefore be seen from the above that trafficking in persons has a long history of evolution from the early forms of slavery to the modern forms of human trafficking. While slavery and the slave trade were abolished several centuries ago by the French revolution, the British Parliament and the thirteenth amendment to the American constitution, human trafficking and modern forms of human exploitation continue to thrive.<sup>22</sup> Trafficking of human beings has since acquired a new meaning since the beginning of the twentieth century. While slavery and the slave trade were commonly associated with transporting African slaves to Europe and North America, trafficking

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<sup>18</sup> Ibid.

<sup>19</sup> Ibid at 12.

<sup>20</sup> Article 1 (1), Slavery Convention of 1926, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/SlaveryConvention.aspx>, accessed on 3 September 2015.

<sup>21</sup> Obokata op cit (n7) 13.

<sup>22</sup> Kangaspunta op cit (n6).

was initially understood to take place for the purpose of prostitution and/or sexual exploitation.<sup>23</sup>

Modern day human trafficking comprises many forms, including forced labour, bonded labour, involuntary domestic servitude, forced child labour, child soldiering, sex trafficking, child sex trafficking and related abuses,<sup>24</sup> as well as the less-well known problem of organ trafficking<sup>25</sup>, which is the main focus of this dissertation and is discussed extensively in later chapters.

### 2.2.1 Trafficking As A Global Problem

*“Human trafficking happens throughout the world with millions of victims falling through the cracks of their own societies, only to be exploited by traffickers. They can be found in the world’s restaurants, fisheries, brothels, farms and homes, among many other activities”.*<sup>26</sup>

According to the United Nations Office on Drugs and Crime (UNODC) global report on trafficking in persons 2014, victims of human trafficking with 152 different citizenships were identified in 124 countries across the globe between 2010 and 2012.<sup>27</sup> It has, however, been difficult to identify major global trafficking hubs because most of the trafficking flows are intraregional. In other words, the origin and destination of the trafficked victim are usually within the same region, or sub-region. The 2014 UNODC trafficking report shows that 37% of trafficking occurs through cross-borders within the same region, 34% of people are trafficked domestically across national borders, 26% are victims of trans-regional trafficking, while 3% are from nearby sub-regions.<sup>28</sup> Trans-regional trafficking flows are mainly detected in rich countries of the Middle East, Western Europe and North America.

Trafficking victims are often sourced from the ‘global south’; mainly East and South Asia and Sub-Saharan Africa. Statistics show that there is a correlation between

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<sup>23</sup> Obokata op cit (n7) 13.

<sup>24</sup> Ibid.

<sup>25</sup> L Shelley *Human Trafficking: A global perspective* (2010) 11.

<sup>26</sup> United Nations Office on Drugs and Crime (UNODC) Global Report on Trafficking in Persons (2012) 1, available at [https://www.unodc.org/documents/data-and-analysis/glotip/Trafficking\\_in\\_Persons\\_2012\\_web.pdf](https://www.unodc.org/documents/data-and-analysis/glotip/Trafficking_in_Persons_2012_web.pdf), accessed on 2 September 2015.

<sup>27</sup> Ibid at 7.

<sup>28</sup> Ibid at 12.

the affluence of the destination country and the share of the victims trafficked there from other regions.<sup>29</sup> Victims are usually trafficked from poor countries to more affluent ones within the region.<sup>30</sup>

The 2014 UNODC report also indicates that there is no sound estimate of the number of victims of human trafficking worldwide due to methodological difficulties and challenges associated with estimating sizes of hidden populations. However, the U.S State Department estimates that there may be as many as 20 million trafficking victims around the world at any given time.<sup>31</sup>

The above statistics shows the seriousness and extent to which the crime of human trafficking cuts across the globe. It is regarded as one of the world's most shameful crimes, affecting lives of millions of people around the world and robbing them of their dignity.<sup>32</sup>

### 2.2.2 Trafficking Defined

The suppression of slavery whether in the form of classical slave trade or modern forms of slavery-like practices, is one of the longest-standing objectives of the international community.<sup>33</sup> Having traced the history of human trafficking from the early forms of slavery to the modern forms of trafficking in persons, it is important to consider the definition of trafficking in persons, especially with regard to identifying the common characteristics between slavery and human trafficking.

Trafficking in persons is defined in Article 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (TIP Protocol)<sup>34</sup> as:

“the recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, or fraud, of deception, of the abuse of power or of a position of vulnerability or 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 or the prostitution of

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<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> CR Seelke ‘Trafficking in Persons in Latin America and the Caribbean’ (29 July 2015), available at <https://www.fas.org/sgp/crs/row/RL33200.pdf>, accessed on 3 September 2015.

<sup>32</sup> UNODC ‘Transnational Organized Crime – Human Trafficking: People for sale’, available at <https://www.unodc.org/toc/en/crimes/human-trafficking.html>, accessed on 1<sup>st</sup> September 2015.

<sup>33</sup> Kangaspunta op cit (n6).

<sup>34</sup> Article 3(a), TIP Protocol of 2000.

others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”<sup>35</sup> (emphasis mine).

This broad definition covers the various forms of modern trafficking mentioned in 2.2 above. It also covers trafficking of persons for the purpose of organ removal. The definition highlights the common characteristics between slavery and human trafficking mentioned earlier, which includes the exercise of control or ownership over another individual against her/his own will, thereby denying victims of their fundamental human rights to liberty and freedom of movement. The key element of slavery stipulated in the Slavery Convention<sup>36</sup> is the right of ownership. In comparing the right of ownership with the definition of trafficking under the TIP protocol, subsequent exploitation of persons can effectively amount to slavery, because the right of ownership is fully exercised and retained when people are exploited for sex, forced labour, servitude, slavery or other related practices of slavery, and the removal of organs.

The above definition of trafficking highlights the following three elements that must be present for trafficking to occur:

- a. an action (recruitment, transportation, transfer, harbouring, or reception of persons);
- b. a means (of threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving payments or benefits to a person in control of the victim); and
- c. a purpose (exploitation, which includes exploitation or the prostitution of others, other forms of sexual exploitation, forced labour or services, slavery or practices and the removal of organs) .<sup>37</sup>

Special protection is, however, accorded to children under the age of 18 years, in that the above three elements do not need to be present for trafficking of children to have occurred. Article 3-(c) of the TIP protocol provides that the ‘the recruitment, transportation, transfer, harbouring or receipt of a child for exploitation shall be considered “trafficking in persons”, even if it does not involve any of the means set forth in subparagraph (a) of this article.’

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<sup>35</sup> Ibid.

<sup>36</sup> Article 1 (1), Slavery Convention of 1926 op cit (n20).

<sup>37</sup> AA Aronowitz *Human Trafficking, Human Misery: The global trade in human beings* (2009) 1.

### 2.3 Human Trafficking for the Purpose of Organ Removal (HTPOR)

HTPOR and organ trafficking is perhaps the least-profiled form of human trafficking. There has been almost no empirical research on this issue, but individual stories and investigations of illegally harvested organs surface on a regular basis.<sup>38</sup> Trafficking for the removal of organs seemed limited as it accounted for only 0.2% of the total number of detected victims of trafficking in 2010.<sup>39</sup> HTPOR is, however, not a new phenomenon. In recent times, the issue has received significant attention from the media, NGOs, academia and also from international and regional actors.<sup>40</sup> The crime however remains a hidden, underground activity and it seems to be greatly underreported.<sup>41</sup> Although the TIP Protocol does not deal with HTPOR extensively, it recognizes it as a criminal act. Trafficking in organs under the TIP Protocol occurs only if an individual is trafficked for the purpose of organ removal.<sup>42</sup>

As with other forms of trafficking for exploitative purposes, victims of HTPOR are often recruited from vulnerable groups (especially people living in extreme poverty). The typical route of organs is from the poorest to the richest countries, usually from Southern to Northern nations.<sup>43</sup> Traffickers are usually part of transnational organized crime groups that lure people abroad under false promises, and convince them to sell their organs.<sup>44</sup> Recipients of these organs usually pay a much higher price than donors receive. Part of this money is shared between the organ brokers, surgeons and hospital directors involved in the organized criminal network.<sup>45</sup> Victims of HTPOR usually encounter health risks both during and after the organ removal. They usually lack post-operative care and may be sent home days after the removal of an organ. The patterns and consequences of organ trafficking are discussed further in later chapters.

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<sup>38</sup> Ibid at 110.

<sup>39</sup> UNODC Global Report on Trafficking in Persons (2012) op cit (n26) 37.

<sup>40</sup> UNODC Assessment Toolkit 'Trafficking in Persons for the Purpose of Organ Removal', (2015) 5, available at [https://www.unodc.org/documents/human-trafficking/2015/UNODC\\_Assessment\\_Toolkit\\_TIP\\_for\\_the\\_Purpose\\_of\\_Organ\\_Removal.pdf](https://www.unodc.org/documents/human-trafficking/2015/UNODC_Assessment_Toolkit_TIP_for_the_Purpose_of_Organ_Removal.pdf), accessed on 28 August 2015.

<sup>41</sup> Ibid at 6.

<sup>42</sup> UN.GIFT 011 Workshop op cit (n4) 3.

<sup>43</sup> U.S. Catholic Sisters Against Human Trafficking (USCSAHT) 'Human Trafficking for the Purpose of Organ Removal' (n2), available at [www.ipjc.org/links/USCSAHT%20-%20HT%20and%20Organ%20Harvesting%20module.pdf](http://www.ipjc.org/links/USCSAHT%20-%20HT%20and%20Organ%20Harvesting%20module.pdf), accessed on 21 May 2015.

<sup>44</sup> UN.GIFT 011 Workshop (n4) 2.

<sup>45</sup> Ibid.

It should, however, be noted that the commission of HTPOR can be distinguished from other forms of human trafficking in terms of the sectors from which traffickers and organ brokers derive. HTPOR involves doctors and other health care practitioners, ambulance drivers, mortuary workers; as well as those involved in other human trafficking networks.

To further understand the fueling of the organ black market, a brief history of the evolution of HTPOR as a crime is considered in the next section.

### **2.3.1 Background to HTPOR**

The modern era of organ transplantation began with the first successful kidney transplant performed in Boston, Massachusetts in 1954.<sup>46</sup> This was followed by the transplantation of the liver, pancreas and heart in the 1960s, and living-related lung and liver in the 1980s.<sup>47</sup> The success of tissue typing to match biological characteristics between the donor graft and the recipient, and the use of an immunosuppressant drug such as cyclosporine opened up an era that allowed donors not related to recipients of organs to be able to donate their organs to such recipients.<sup>48</sup> Donors and recipients could therefore be biologically, socially and geographically distant and still donate and receive organs respectively.

Organ transplantation has been regarded as one of the most remarkable inventions of the twentieth century. The practice has saved and prolonged the lives of thousands of patients. It is now a worldwide practice conducted in hospitals in almost 100 countries all over the world.<sup>49</sup> The Global Observatory and Database on Donation and Transplant (a collaboration between the World Health Organization (WHO) and the Spanish National Transplant Organization) indicates that about 118,127 so-called solid transplantations (kidney, liver, heart, lung, pancreas, small bowel) were performed in

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<sup>46</sup> United Nations Association of Greater Boston (UNA-GB) 'Human Organ Trafficking' 1., available at <https://rmutunagb.wikispaces.com/file/view/HOT+Topic+Guide%5B1%50.pdf>, accessed on 25 May 2015.

<sup>47</sup> D Budiani-Saberi 'Human Trafficking for an Organ Removal (HTOR): A call for prevention, protection, investigations and accountability' (23 January 2012) 2, available at [http://tlhrc.house.gov/docs/transcripts/2012\\_1\\_23\\_Organ\\_Trafficking\\_Briefing/Budiani\\_testimony.pdf](http://tlhrc.house.gov/docs/transcripts/2012_1_23_Organ_Trafficking_Briefing/Budiani_testimony.pdf), accessed on 25 May 2015.

<sup>48</sup> Ibid.

<sup>49</sup> UNODC Assessment Toolkit op cit (n39) 7.

2013, the majority of which, (about 79,000) were kidney transplants, followed by about 25,000 liver transplants.<sup>50</sup>

This medical and technological development of organ transplantation would normally not be a problem, except that the demand for organs now exceeds the supply, and the shortage of organs is acute. Between 1990 and 2003, kidney donations in the United States of America increased by 33 per cent, but the number of those awaiting a kidney transplant increased by 236 per cent.<sup>51</sup> In March 2007, WHO estimated that illicit kidney removals for transplantation accounts for five to 10 per cent (between 3,400 and 6,800 commercial donors in 2007)<sup>52</sup> of the approximated 65,000 kidney transplants performed annually throughout the world.<sup>53</sup> The United States Department for Health and Human Services gave an estimate of 118,226 candidates awaiting an organ transplant as of 5 June 2013.<sup>54</sup> By 31 December 2013, a total of over 63,000 patients were officially placed on the organs' waiting lists in the European Union.<sup>55</sup>

The 2012 UNODC Global Report on Trafficking in Persons asserts that persons trafficked for organ removal have been detected in 16 countries in all regions of the world.<sup>56</sup> As mentioned earlier in 2.3, the report states that the number of victims trafficked for organ removal accounted for about 0.1 to 0.2 per cent of the total number of human trafficking cases. However, it has been difficult gathering reliable data due to the nature of underground organ trafficking across the world. Nonetheless, the statistics gathered from the WHO, UNODC global TIP reports, European Union and the United States of America reflect the constant rise in the demand for organs.

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<sup>50</sup> Ibid.

<sup>51</sup> AA Aronowitz and E Isitman 'Trafficking of human beings for the purpose of organ removal: *Are (International) legal instruments effective measures to eradicate the practice?*' (2013) 1 *GJIL* 76, available at <https://groingenjil.files.wordpress.com/2014/01/03-aronowitz-isitman.pdf>, accessed on 21 May 2015.

<sup>52</sup> European Parliament, Directorate-General for External Polices 'Trafficking in Human Organs' (July 2015) (n29) 19, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/549055/EXPO\\_STU\(2015\)549055\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/549055/EXPO_STU(2015)549055_EN.pdf), accessed on 20 October 2015.

<sup>53</sup> Budiani-Saberi op cit (n46) 3.

<sup>54</sup> Aronowitz and Isitman op cit (n50) 76.

<sup>55</sup> European Commission – Journalist Workshop on Organ Donation and Transplantation: Recent facts and figures (26 November 2014), available at [http://ec.europa.eu/health/blood\\_tissues\\_organ/docs/ev\\_20141126\\_factsfigures\\_en.pdf](http://ec.europa.eu/health/blood_tissues_organ/docs/ev_20141126_factsfigures_en.pdf), accessed on 3 September 2015.

<sup>56</sup> USCSAHT 'Human Trafficking for the Purpose of Organ Removal' op cit (n42).

The shortage of organs is a universal problem. Organs have been mainly sourced from deceased persons or brain dead people (who have sustained some sort of fatal injury that makes it impossible for them to survive without being attached to a machine.)<sup>57</sup> Deceased donation still remains the main source of some organ transplants, such as those involving hearts and lungs.<sup>58</sup> Some countries have developed a deceased organ donation programme in order to address the shortage, but studies have shown that such programmes have been hampered by sociocultural, legal and other factors.<sup>59</sup> Some of these factors include cultural and religious beliefs based on the fact that the body should be buried intact.<sup>60</sup> Countries in the Middle East for instance, uphold religious teachings that discourage and in some cases, even prohibit cadaveric organ donation.<sup>61</sup> Islamic teachings also emphasize the importance of maintaining the integrity of the body at the burial.<sup>62</sup>

The shortage of deceased donor organs; and medical advancement have resulted in the use of organs from living persons. This has become a suitable and currently the most important alternative to addressing the problem of organ scarcity.<sup>63</sup> However, it has not solved the problem of shortage of organs. Reasons for the continued shortage in organs can be attributed to ageing of populations, general growth in heart and vascular diseases leading to increased incidences of organ failure,<sup>64</sup> donor compatibility issues, as well as the ever increasing faith of recipients in the medical advancement of organ transplantation linked to the rising success and greater improvement in post-transplant outcome.<sup>65</sup> These reasons and many others that abound explains why it takes years

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<sup>57</sup> UNA-GB 'Human Organ Trafficking' op cit (n45) 2.

<sup>58</sup> J Ezeilo '68<sup>th</sup> session of United Nations General Assembly: *Trafficking in persons, especially women and children*, A/68/256', (2 August 2013) 5. Para 18, available at [www.ohcr.org/Documents/Issues/Trafficking/A-68-256-English.pdf](http://www.ohcr.org/Documents/Issues/Trafficking/A-68-256-English.pdf), accessed on 21 May 2015.

<sup>59</sup> G Abouna 'Organ shortage crisis: problems and possible solutions' 2008, available at <http://www.who.int/bulletin/volumes/85/12/06-039370/en/>, accessed on 28 October 2015.

<sup>60</sup> Aronowitz op cit (n36) 110.

<sup>61</sup> HOTT Project 'Trafficking in human beings for the purpose of organ removal: A comprehensive literature review' (December 2013) 23, available at <http://hottproject.com/userfiles/HOTTProject-TraffickinginHumanBeingsforthePurposeofOrganRemoval-AComprehensiveLiteratureReview-OnlinePublication.pdf>, accessed on 26 October 2015.

<sup>62</sup> Ibid.

<sup>63</sup> UNODC Assessment Toolkit op cit (n39) 5.

<sup>64</sup> HOTT Project 'Trafficking in human beings for the purpose of organ removal: A comprehensive literature review' op cit (n60) 20.

<sup>65</sup> Abouna op cit (n58).

before patients on ‘organ waiting lists’ get an opportunity for a transplant.<sup>66</sup> It also explains the desperation of recipients that opt for the organ black market as an option to avoid death.

Having considered a brief background to HTPOR, including its predominant cause traceable to organ scarcity, a clear distinction between ‘organ trafficking’ and ‘human trafficking for the purpose of organ removal’ is examined next. Other key concepts relevant to this form of trafficking are also considered.

### **2.3.2 Key Concepts**

#### **a. HTPOR versus Organ Trafficking**

The terms ‘organ trafficking’ and ‘human trafficking for the purpose of organ removal (HTPOR)’ are often used interchangeably. The TIP Protocol’s definition of trafficking in persons includes ‘removal of organs’ as one of the exploitative purposes for which trafficking can occur.<sup>67</sup> The inclusion of this form of exploitation into the Protocol is intended to cover situations where a person is exploited for 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.<sup>68</sup> Trafficking of persons for organ removal is a criminal act under the TIP Protocol. The Protocol does not however take into full consideration the trafficking of human organs.

The United Nations’ report on preventing, combating and punishing trafficking in human organs, resolution 59/156 of 20 December 2004, states that ‘the extent of the relationship between trafficking in organs and trafficking in persons (and other forms of organized crime) is unclear.’<sup>69</sup> Several debates have ensued on the distinction between HTPOR and the trafficking of organs that do not involve the trafficking of a human being. The provision of article 3(a) of the TIP protocol does not specifically classify organ trafficking as human trafficking. For an act to be considered trafficking in persons, a living person has to be recruited by means of force or deception for the exploitative

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<sup>66</sup> UNA-GB ‘Human Organ Trafficking’ op cit (n45) 2.

<sup>67</sup> Article 3(a), TIP Protocol.

<sup>68</sup> UN.GIFT 011 Workshop op cit (n4) 2.

<sup>69</sup> Ibid at 3.

purpose of removing an organ.<sup>70</sup> Therefore, according to the TIP Protocol, the removal and subsequent sale of organs from a corpse will not amount to human trafficking, since the act of organ removal was not committed against a living person.

At the 2008 International Summit on Transplant Tourism and Organ Trafficking, a more elaborate definition of organ trafficking derived from article 3(a) of the TIP Protocol was established as part of the Declaration of Istanbul:

“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 or control over the potential donor, for the purpose of exploitation by the removal of organs for transplantation (The Declaration of Istanbul 2008).”<sup>71</sup>

The above definition is clearly harmonious with the definition of trafficking for the purpose of organ removal as provided for in the TIP Protocol. However, the definition in the Declaration of Istanbul does not exclusively refer to trafficking of organs independent of persons. Organs are usually not transplanted independent of persons in commercial transplants. Upon removal from people, organs are transplanted.<sup>72</sup> Most abuses therefore occur when an organ is removed from a victim within a location where the recipient awaits the transplantation. The current advanced technologies and preservation techniques have made the independent transporting of organs possible. Nonetheless, the independent transportation of organs in countries where there is insufficient regulation on organ donation, and where commercial transplants is commonly practiced does not reduce the high tendencies of people being trafficked for the removal of their organs.<sup>73</sup>

Organs are usually obtained through various means ranging from coercion to deception, fraud, kidnapping, and threats. People are kidnapped, sold and even killed for their organs. The United Nations has confirmed reports of children being trafficked, sold or abducted for organ trafficking, noting that ‘many abducted or missing children have been subsequently found dead, their bodies mutilated and certain organs removed’.<sup>74</sup> The

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<sup>70</sup> UNODC Global Report on Trafficking in Persons (2012) op cit (n26) 39.

<sup>71</sup> Budiani-Saberi and Columb op cit (n1) 3.

<sup>72</sup> Ibid at 4.

<sup>73</sup> Ibid.

<sup>74</sup> Aronowitz and Isitman op cit (n50) 79.

latter is often associated with the African traditional practice of magical medicine whereby certain body parts are sold and used by deviant practitioners to increase health, fertility, wealth and or influence of a paying client.<sup>75</sup> Common trends of HTPOR reveal that some victim-donors are promised jobs in other countries, just like other forms of human trafficking. They leave their homes with such expectations, only to discover that the promised job is the selling of an organ. They are usually locked in safe houses until they are a match for a kidney recipient, and are often forced to relinquish an organ if such victim-donor hopes to return home.<sup>76</sup> Organs have also been obtained through fraudulent means where people are admitted for an unrelated illness or treatments for an accident, and an organ is removed without their consent. Such cases have been documented in hospitals in Brazil, India, and Argentina.<sup>77</sup> However, the most common form of HTPOR involves cases in which the donor and recipient agree to the sale.<sup>78</sup> Although donors may initially consent to selling one of their organs, organ brokers and traffickers often exploit their desperation, poverty and ignorance.<sup>79</sup>

Even though the use of force or coercion or explicit threats are employed in some cases of organ removal, the majority of traffickers use more manipulative methods than violence and force to obtain organs. Most cases involve implicit coercive measures, as well as a variety of other means mentioned in the above stated definitions – fraud, deception, the giving of payments or benefits and the abuse of power or vulnerability of persons.<sup>80</sup> Patterns of organ trafficking and HTPOR have shown that most victims are usually vulnerable and often times motivated by the need to get a better life by making enough money from selling their organs. This has led to many cases of victims consenting to organ donation.

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<sup>75</sup> Aronowitz op cit (n36) 117.

<sup>76</sup> Aronowitz and Isitman op cit (n50) 79.

<sup>77</sup> Ibid at 80.

<sup>78</sup> Aronowitz op cit (n36) 117.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

## **b. Consent**

‘Consent is the ethical cornerstone of all medical interventions and of particular relevance to the issue of organ removal.’<sup>81</sup> The guiding principles provided by WHO on the transplantation of human cell, tissues and organs provides that ‘live donations are acceptable when the donor is informed and voluntary consent is obtained’ and that ‘live donors should be informed of the probable risks, benefits and consequences of donation in a complete and understandable fashion; they should be legally competent and capable of weighing the information; and they should be acting willingly, free of any undue influence or coercion’.<sup>82</sup>

It is important to note that not all donors consent to selling their organs.<sup>83</sup> The crime of HTPOR is complicated by the surrounding issues of consent and exploitation related to organ removal. As mentioned earlier, manipulative measures and implicit coercive measures are usually employed by traffickers to get victims to donate their organs. Hence, individuals consent to the removal of their organs based on the promises offered by traffickers on the amount they will be paid for such organs. In most cases, there may be deception as to the amount of payment for the organ, and often times, there may be no payment at all. Also, individuals may not be fully informed of the procedure, recovery and the impact of the organ removal on their health and wellbeing.<sup>84</sup> Consent can also be obtained through varying degrees of coercion or abuse of vulnerability.<sup>85</sup>

It may seem reasonable on the surface that one should be given the freedom of choice to sell his/her organ. However, the findings of many HTPOR cases where consent has been proved shows that the vulnerability of the victims involved were exploited, as no one would make such a drastic decision to donate an organ without less pressing conditions facing them.<sup>86</sup> In other words, the consent of victim-donors of HTPOR is not

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<sup>81</sup> UNODC Assessment Toolkit op cit (n39) 15.

<sup>82</sup> World Health Organization (WHO) Guiding Principles on Human Cell, Tissue and Organ Transplantation (Resolution WHA63.22 of May 2010) Guiding Principle 3, available at [http://www.who.int/transplantation/Guiding\\_PrinciplesTransplantation\\_WHA63.22en.pdf](http://www.who.int/transplantation/Guiding_PrinciplesTransplantation_WHA63.22en.pdf), accessed on 5 September 2015.

<sup>83</sup> Aronowitz op cit (36) 116.

<sup>84</sup> UN.GIFT 011 Workshop op cit (n4) 5.

<sup>85</sup> Ibid.

<sup>86</sup> Budiani-Saberi and Columb op cit (n1) 4.

a matter of freewill but rather a result of the manipulation of vulnerable and desperate persons, who have no acceptable alternative but to submit to the abuse involved.<sup>87 88</sup>

According to Article 3(a) of the TIP Protocol, it is legally impossible to consent to being exploited when consent has been obtained through improper means of threat, use of force, abduction, fraud, deception, abuse of power or vulnerability; and the giving of payments or benefits.<sup>89</sup> Consent of the victim can be a defence in the domestic law of some countries. However, consent becomes irrelevant when any of the means set out in the Protocol has been established. Therefore, what might appear to be consent by a victim will be nullified or vitiated by the application of any improper means by the trafficker. In essence, consent of the victim at one stage of the process cannot be taken to mean consent at all stages of the process, and trafficking will be seen to have taken place without consent at every stage of the process.<sup>90</sup> Consent does not also signify that the victim had a clear understanding of the consequences of the procedure. This is because most victims are intentionally deceived, misled or given false information about the process and consequences of organ donation. Further insight is given to the patterns and consequences of organ trafficking on victims in chapter 3.

### **c. Prohibition of financial gain**

Guiding Principle 5 of the WHO principles on transplantation provides that

‘organs should only be donated freely, without any monetary payment or other reward of monetary value. Purchasing or offering to purchase ... organs for transplantation, or their sale by living persons or by the next of kin for deceased persons, should be banned.’<sup>91</sup>

The commentary on the above principle goes on to outline the implications of offering payment for organs, cells and tissues; the major implication being taking unfair advantage of the poorest and most vulnerable groups of persons. The principle however permits compensation for the costs of making donations, including medical expenses and other legitimate costs incurred in the process.<sup>92</sup>

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<sup>87</sup> Ibid.

<sup>88</sup> UN.GIFT 011 Workshop op cit (n4) 5.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid.

<sup>91</sup> Principle 3, WHO Guiding Principles op cit (n81).

<sup>92</sup> Ibid.

The sale and purchase of organs is prohibited in most countries, except Iran. Article 21 of the Council of Europe Convention on Human Rights and Biomedicine (also known as the Oviedo Convention), and Article 21 of the Additional Protocol to this convention provides that the human body and its parts shall not give rise to a financial gain or comparable advantage.<sup>93</sup> The provisions of article 3(a) of the TIP Protocol on the other hand, indicates that receipt of payments or benefits will not exclude a case from being exploitative. As in cases of persons trafficked for domestic servitude, the receipt of payment for work done does not exclude such persons from being considered as victims of human trafficking. It is not the payment or the amount of money that is relevant, but rather the manipulation of the positions of vulnerability of such persons for the purpose of labour and in this case, for the removal of their organs.<sup>94</sup> Although the removal of organs is not in itself a form of exploitation, exploitation occurs when the knowledge of a position of vulnerability is abused in order to recruit, transport, transfer, harbour or receive a person for the purpose of organ removal.<sup>95</sup>

## **2.4 Conclusion**

Human trafficking in its many forms dates back to the era of slavery and slave trade. This chapter has addressed the evolution of slavery and slave trade into modern forms of human trafficking that currently exist. Although trafficking for the purpose of sexual exploitation and labour are considered the most common forms of trafficking, hidden forms of human trafficking such as HTPOR are beginning to receive greater attention in the 21<sup>st</sup> century. The practice of this form of trafficking has been found to cut across many parts of the world, even though its hidden nature has led to underreporting.

A clear distinction has been made between organ trafficking and trafficking of persons for the removal of their organs, as the latter is addressed by the TIP Protocol. It has been established that the independent transport of organs into countries has not reduced the tendencies of individuals being trafficked for their organs.

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<sup>93</sup> UNODC Assessment Toolkit op cit (n39) 21.

<sup>94</sup> Budiani-Saberi and Columb op cit (n1) 5.

<sup>95</sup> Ibid.

Other key concepts surrounding HTPOR, such as the debate around consent given by victims and the principle of non-commercialization of organs through sale and purchase of organs, have been addressed. It is important to note that similarities exist in the patterns of all human trafficking, including HTPOR, as all victims are exploited and often times coerced, manipulated or forced into fulfilling the purposes of their traffickers.

Chapter 3 addresses the patterns, *modus operandi*, and role players involved in HTPOR, as well as the consequences of organ removal for victims.

### Chapter 3

## TRENDS IN HUMAN TRAFFICKING FOR THE PURPOSE OF ORGAN REMOVAL

### 3.1 Introduction

The previous chapter established that human trafficking for the purpose of organ removal (HTPOR) is a form of human trafficking that is currently receiving the needed attention that it deserves after several decades of not been addressed by relevant authorities, stakeholders and institutions. The crime occurs in various forms, and although the role players involved in this form of trafficking are similar to those involved in other forms of human trafficking, the crime involves other professionals, especially in the field of medicine. The scope of HTPOR is thus considered in this chapter. This entails a careful consideration of the patterns of trafficking in organs, *modus operandi* of organ traffickers, key role players or stakeholders involved, and the consequences of HTPOR on the victim-donors.

### 3.2 Patterns or Forms of Trafficking in Organs

Trafficking in organs covers a wide range of illicit activities aimed at commercializing human organs and tissues needed for therapeutic transplantation.<sup>96</sup> As discussed in chapter 2, the medical advancement/technology of being able to donate organs and receive same has turned out to be a viable solution for patients suffering end-stage organ failures. It has also led to an abuse of human rights where people are trafficked, kidnapped, and sometimes killed for the removal of their organs due to the shortage of available organs and donors compared to the ever increasing demand for these organs.

Trafficking in organs has been referred to by different terms and definitions that describe different but sometimes similar activities.<sup>97</sup> The diversity of these similar activities make up the specific forms or patterns in which organ trafficking or trafficking of persons for organ removal can manifest. These forms or patterns of trafficking in organs are considered below.

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<sup>96</sup> European Parliament, DG External Polices ‘Trafficking in Human Organs’ op cit (n51) 16.

<sup>97</sup> Ibid.

### 3.2.1 Human Trafficking for the Purpose of Organ Removal (HTPOR)

The background to human trafficking for organ removal has been covered in chapter 2. It was established that the definition of human trafficking provided in the TIP Protocol includes the removal of organs as a specific form of trafficking. The Protocol also emphasizes that consent on the part of a victim of HTPOR or any form of trafficking for that matter, is irrelevant since such consent is obtained under pressure.

The definition in the Protocol further buttresses the fact that HTPOR involves international operating networks that employ different means of deception, coercion or force to compel persons in acute poverty into selling organs.<sup>98</sup> It is a criminal offence typically committed by transnational organized criminal networks.<sup>99</sup> HTPOR constitutes a violation of the fundamental human rights of victim-donors, mainly because the positions of vulnerability of victims are often exploited. These violations are discussed in greater detail in chapter 4.

### 3.2.2 Organ Transplant Commercialism

This is simply the act of reducing an organ to a commodity. The declaration of Istanbul defines transplant commercialism as a ‘policy or practice in which an organ is treated as a commodity, including being bought or sold or used for material gain’.<sup>100</sup>

Transplant commercialism was first prohibited by WHO in 1987, where it was stated that such trade is inconsistent with the most basic human values and stood as a contravention of the Universal Declaration of Human Rights (UDHR).<sup>101</sup> The fifth WHO guiding principle on organ transplantation states clearly that organs should be donated freely, without any monetary payment or other reward of monetary value.<sup>102</sup> According to the commentary on this principle, transplant commercialism is

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<sup>98</sup> Ibid.

<sup>99</sup> Ibid.

<sup>100</sup> The Declaration of Istanbul on Organ Trafficking and Transplant Tourism, (2008) available at [http://multivu.prnewswire.com/mnr/transplantationsociety/33914/docs/33914-Declaration\\_of\\_Istanbul-Lancet.pdf](http://multivu.prnewswire.com/mnr/transplantationsociety/33914/docs/33914-Declaration_of_Istanbul-Lancet.pdf), accessed on 21 May 2015.

<sup>101</sup> HOTT Project ‘Combatting trafficking in persons for the purpose of organ removal: *Transplant Commercialism*’, available at <http://hottproject.com/about-the-crime/other-crimes/transplant-commercialism.html>, accessed on 2 November 2015.

<sup>102</sup> Principle 5, WHO Guiding Principles op cit (n81).

‘likely to take unfair advantage of the poorest and most vulnerable groups, undermines altruistic donation, and leads to profiteering and human trafficking. Such payment conveys the idea that some persons lack dignity, that they are mere objects to be used by others.’<sup>103</sup>

Transplant commercialism is prohibited in most countries in the world, as donation of organs is considered a personal choice and expected to be an altruistic gift from one person to another.<sup>104</sup> Although shortage of organs has led to the growth of black market for organs,<sup>105</sup> the commercialization of organs still remains a criminal offence and a contravention of the various legislation guiding organ transplantation.

### 3.2.3 Travel for Transplant and Transplant Tourism

Trafficking in organs also occurs through a phenomenon called ‘transplant tourism’, derivable from ‘travel for transplant’. Travel for transplantation is defined as

‘the movement of organs, donors, recipients, or transplant professionals across jurisdictional borders for transplantation purposes. Travel for transplant becomes ‘transplant tourism’ if it involves organ trafficking, transplant commercialism, or both or if the resources, organs (organs, professionals, and transplant centers) devoted to providing transplants to patients from outside a country undermine the country’s ability to provide transplants services for its own population.’<sup>106</sup>

The United Network for Organ Sharing (UNOS) defines transplant tourism as ‘the purchase of a transplant organ abroad that includes access to an organ while bypassing laws, rules, or processes of any or all countries involved.’<sup>107</sup> Unlike HTPOR, transplant tourism focuses more on the recipient of a commercially obtained organ, that is, the patient who travels abroad in search of (illegal) transplant.<sup>108</sup> Transplant tourism entails the purchase and sale of solid organs through companies, middlemen or directly

<sup>103</sup> Commentary on guiding principle 5, WHO’s guiding principles on human cell, tissue and organ transplantation organ transplantation (2010) 5, available at [http://www.who.int/transplantation/Guiding\\_PrinciplesTransplantation\\_WHA63.22en.pdf](http://www.who.int/transplantation/Guiding_PrinciplesTransplantation_WHA63.22en.pdf), accessed on 5 September 2015.

<sup>104</sup> UNA-GB ‘Human Organ Trafficking’ op cit (n45) 2.

<sup>105</sup> Black market for organs is defined as “an illegal market for organs, which market coexists with the legal systems for organ retrieval” – HOTT Project ‘Trafficking in human beings for the purpose of organ removal: A comprehensive literature review’ (December 2013) 13, available at <http://hottproject.com/userfiles/HOTTProject-TraffickinginHumanBeingsforthePurposeofOrganRemoval-AComprehensiveLiteratureReview-OnlinePublication.pdf>, accessed on 26 October 2015.

<sup>106</sup> Declaration of Istanbul on Organ Trafficking and Transplant Tourism 2008 op cit (n99).

<sup>107</sup> DA Budiani-Saberi and FL Delmonico ‘Organ trafficking and transplant tourism: A commentary on the global realities’ (2008) 8 *AJT* 926n3, available at [http://www.cofs.org/COFS-Publications/Budiani\\_and\\_Delmonico-AJT\\_April\\_2008.pdf](http://www.cofs.org/COFS-Publications/Budiani_and_Delmonico-AJT_April_2008.pdf), accessed on 23 October 2015.

<sup>108</sup> European Parliament, DG External Polices ‘Trafficking in Human Organs’ op cit (n51) 17.

with the organ seller through various means, including the internet.<sup>109</sup> International hotspots for transplant tourism include China, the Philippines and Pakistan.<sup>110</sup>

Transplant tourism depends on four groups of people:

- a. Desperate patients willing to travel far distances and face considerable insecurity in obtaining the transplants they need;
- b. Desperate and mobile organ sellers;
- c. Outlaw medical professionals and surgeons willing to break the law or ignore regulations guiding the profession;
- d. Organ brokers and other intermediaries with established connections to the key players in the organized criminal organ trafficking network.<sup>111</sup>

Transplant tourism differs from medical tourism for other kinds of medical care because it involves a live donor. The medical resource used in transplant tourism is an exploited live donor.<sup>112</sup> As established in the preceding chapter, vulnerable populations in resource-poor and underdeveloped countries have become a major source for so-called ‘transplant tourists’ who can afford to travel and purchase organs.<sup>113</sup> However, not all medical tourism requiring organ recipients and donors to travel across national borders amounts to organ trafficking.

Transplant tourism may be legal in cases where the travel of a related donor and recipient pair is from countries without transplant services to countries where organ transplantation is performed, or if an organ recipient or donor travels across borders to donate or receive a transplant via a relative.<sup>114</sup> Travel for transplantation and transplant tourism will also be legal if an official regulated bilateral or multi-lateral organ-sharing programme exists between jurisdictions and is based on a reciprocated organ-sharing programme among such jurisdictions.<sup>115</sup>

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<sup>109</sup> University of Canterbury ‘Transplant tourism and organ trafficking’, 26 October 2012, available at <http://www.comsdev.canterbury.ac.nz/rss/news/?feed=news&articleId=583>, accessed on 23 October 2015.

<sup>110</sup> *Ibid.*

<sup>111</sup> UN.GIFT 011 Workshop op cit (n4) 7.

<sup>112</sup> C Rudge et al ‘International practices of organ donation’ (2012) 108 *BJA* 53, available at [http://bjia.oxfordjournals.org/content/108/suppl\\_1/i48.full.pdf+html](http://bjia.oxfordjournals.org/content/108/suppl_1/i48.full.pdf+html), accessed on 23 October 2015.

<sup>113</sup> *Ibid.*

<sup>114</sup> Budiani-Saberi and Delmonico op cit (n106) 926.

<sup>115</sup> Rudge op cit (n111) 53.

Notable consequences identified from trafficking of organs through transplant tourism include the following:

- The commercialization of organs through rich organ tourists and brokers results in a shortage of organs for the people in the destination country, since rich organ tourists are given preferential treatment.
- Transplant tourism (and the parties involved) impedes the development of deceased or altruistic live donation of organs that otherwise would develop in the client country. If for instance, the insurance companies of a country preferentially sends patients to the Philippines or Pakistan for organs because the transplant will cost less with a meagre payment to the organ vendor, the promotion of deceased donation and altruistic living-related donation will be affected by that systematic approach to use the poor (vulnerable) of the destination country as the source of organs.<sup>116</sup>

It is assumed that organs obtained through transplant tourism involves a less overt financial transaction with the suppliers, since such donors have willingly consented to have their organs removed.<sup>117</sup> In other words, there is usually no need for coercion, force or deception to be employed in obtaining the organs. Most of the organ donors are usually impoverished local inhabitants and are not transported across borders. It is the recipients that travel from their different countries to meet these donors. Based on this assumption, transplant tourism may not strictly fall into the definition of HTPOR, as captured by the TIP Protocol, since the element of ‘means’ through force or coercion will be missing.<sup>118</sup> However, the exploitation of the vulnerability of donors by organ brokers will suffice in categorizing transplant tourism as a form of organ trafficking.

### **3.2.4 Trafficking in organs, tissues and cells (OTC)**

The global glossary of terms and definitions on donation and transplantation defines trafficking in organs, tissues and cells as:

‘the recruitment, transport, transfer, harbouring or receipt of living or deceased persons or their cells, tissues or organs, by means of 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

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<sup>116</sup> Ibid.

<sup>117</sup> European Parliament, DG External Polices ‘Trafficking in Human Organs’ op cit (n51) 17.

<sup>118</sup> Ibid.

control over the potential donor, for the purpose of exploitation by the removal of cells, tissues and organs for transplantation.’<sup>119</sup>

The above definition is derived from the definition of organ trafficking as proposed by the Declaration of Istanbul. Trafficking in organs, tissues and cells (OTC) can also be defined as ‘the handling of any human organ, tissue or cell obtained and transacted outside the legal national system for organ transplantation.’<sup>120</sup>

Trafficking in organs, tissues and cells (OTC) focuses on trafficking of human body parts derived from either living or deceased donors.<sup>121</sup> Trafficking in OTC differs from HTPOR, in that the object of trafficking in OTC is the organs, tissues and cells, while that of HTPOR is the trafficked person. Trafficking in OTC has a broader scope than HTPOR, and the latter could be considered as a marginal phenomenon of the former.<sup>122</sup> This is because it may occur either as buying and selling of organs/tissues from living persons or as stealing organs and tissues from deceased persons.<sup>123</sup>

The three elements of action, means and purpose needed for the existence of trafficking in human beings may not necessarily be fully present in trafficking in OTC. However, some parts of trafficking in OTC will involve trafficking of human beings and will therefore fall under the scope of the United Nations TIP Protocol.<sup>124</sup>

### **3.3 *Modus Operandi* of HTPOR**

Four basic modes of international organ trade and trafficking (part of which HTPOR is) were illustrated by researcher Yosuke Shimazono at the second global consultation on human transplantation that took place at the WHO headquarters in 2007.<sup>125</sup> The illustration as depicted below highlights four different modes of movement of both organ recipients and donors between countries to transplant centers.

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<sup>119</sup> WHO Global glossary of terms and definitions on donation and transplantation, (November 2009) 1, available at <http://www.who.int/transplantation/activities/GlobalGlossaryonDonationTransplantation.pdf>, accessed on 23 October 2015.

<sup>120</sup> European Parliament, DG External Polices ‘Trafficking in Human Organs’ op cit (n51) 18.

<sup>121</sup> Ibid.

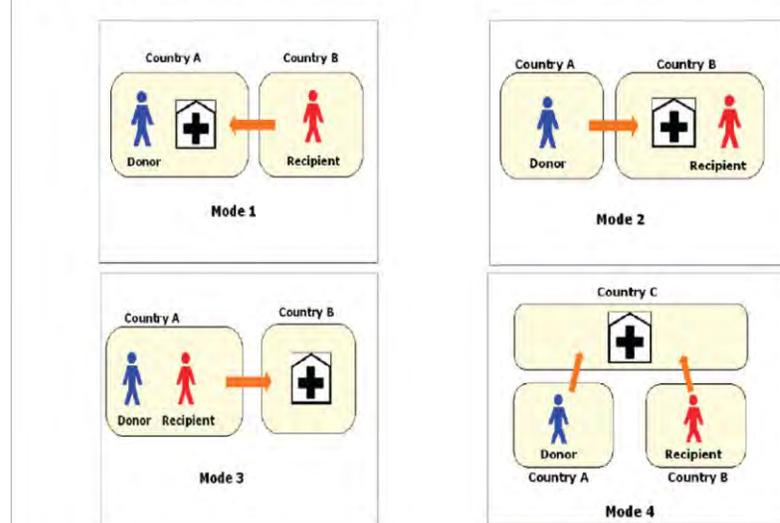
<sup>122</sup> Joint Council of Europe/United Nations Study ‘Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs’, (2009) 11, available at [https://www.coe.int/t/dghl/monitoring/trafficking/Docs/News/OrganTrafficking\\_study.pdf](https://www.coe.int/t/dghl/monitoring/trafficking/Docs/News/OrganTrafficking_study.pdf), accessed on 6 October 2015.

<sup>123</sup> European Parliament, DG External Polices ‘Trafficking in Human Organs’ op cit (n51) 18.

<sup>124</sup> Joint Council of Europe/United Nations Study op cit (n121) 11.

<sup>125</sup> Budiani-Saberi and Delmonico op cit (n106) 926.

### Modes of international organ trade and organ trafficking



Mode 1 shows a recipient travelling from country A to country B, where the organ donor and transplant center are located. Mode 2 shows an organ donor travelling from country B to country A, where the recipient and transplant center are located. Mode 3 shows a situation where both the recipient and organ donor from country A travel to country B where the transplant center is located. Mode 4 shows a situation where the recipient from country A and the organ donor from country B both travel to country C where the transplant center is located.

The above illustration shows that the operation of a trafficking network depends mainly on the travel of both recipients and organ donors, which involves other logistics that include travel documents, ground/air transportation, accommodation for both recipients and victim-donors, fraudulent consent declarations and identity documents, financial transactions, prompt blood and tissue typing tests to be carried out, and the need to obtain medical records (even where none exists).<sup>126</sup>

Organ brokers, however, ensure that the necessary documentations and processes for the smooth running of the illicit organ transplantation are ready in advance. This is in a bid to make sure that the organ removal is done within the shortest possible time, so that the victim-donor and recipient do not end up staying too long in the country where the transplant center is located. It is also done to prevent early detection of such illegal

<sup>126</sup> European Parliament, DG External Polices 'Trafficking in Human Organs' op cit (n51) 24.

operations by the regulatory bodies in the country where the operation is performed.<sup>127</sup> It is for this reason that most victim-donors are discharged almost immediately after the removal of their organs, leaving them to bear the consequences and great risks of organ donation without post-operative care.

### **3.4 Role players in HTPOR**

HTPOR though similar in some aspects to the other forms of human trafficking, is different from other forms of trafficking in terms of the role players involved. It essentially deals with organ removal, which is a medical intervention that involves a range of professionals from the medical sector.<sup>128</sup>

HTPOR networks consist of a wide range of participants, varying in size and functionality in terms of division of labour. This network also cuts across different geographical locations. This section examines the role players or stakeholders involved in HTPOR, as well as the functions of those role players. It should be noted that no single role player is confined to only one specific function. There are no clearly established roles and tasks for actors involved in the organ trafficking network.<sup>129</sup> In reality therefore, organ trafficking networks rarely demonstrate a clear division of labour or roles among their participants, and this results in some individuals acting in multiple roles in the network.<sup>130 131</sup>

#### **a. Brokers**

Every HTPOR network is usually led by an international coordinator, who is responsible for establishing the network, and is often referred to as the ‘broker’. Brokers are also referred to as recruiters, organizers, connectors, coordinators, middlemen, and so on.<sup>132</sup> The broker is responsible for making strategic decisions necessary for the smooth running of the network and its operations. Often times, the main role of the broker is to establish and regulate the supply of recipients, channel all payments to the appropriate

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<sup>127</sup> Ibid.

<sup>128</sup> UNODC Assessment Toolkit op cit (n39) 23.

<sup>129</sup> Ibid at 26.

<sup>130</sup> OSCE Occasional Paper No. 6 op cit (n2) 29.

<sup>131</sup> UNODC Assessment Toolkit op cit (n39) 26.

<sup>132</sup> Ibid.

quarters, and oversee the logistics around matching victim-donors with potential organ suppliers.<sup>133</sup> The broker is therefore the primary point of continuous contact with the organ recipients; and the one to whom potential clients come in first contact with in their search for an organ.<sup>134</sup>

There may be more than one broker in a network, and a broker could also be involved in more than one network. In some cases, doctors, surgeons, directors of hospitals or tissue-matching laboratories are brokers themselves. There are indicators that show that desperate patients or their family members often locate these brokers through word of mouth or electronic media.<sup>135</sup>

#### **b. Local Recruiters**

Local recruiters are often referred to as ‘kidney hunters’. Their role is to identify vulnerable people and to persuade them into selling one of their organs.<sup>136</sup> They are usually very skilled at gaining the trust of potential victims. Recruiters usually operate within one country or specific geographical area in which they are nationals,<sup>137</sup> or may be from the same ethnic groups as their victims since this can increase their chances of gaining the trust of their potential victims.<sup>138</sup> However, recruiters may also come from other close countries, sharing the same language or culture as the country in which victim-donors are recruited.

Recruiters are also often involved in other forms of human trafficking, such as sexual exploitation and forced labor.<sup>139</sup> Usually, there are multiple local recruiters, including those that operate at the national level and in other forms of hierarchical arrangement between fellow recruiters. Recruiters may further be former victims of HTPOR, who may be acting under coercion.<sup>140</sup> People from economically deprived areas

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<sup>133</sup> European Parliament, DG External Polices ‘Trafficking in Human Organs’ op cit (n51) 20.

<sup>134</sup> Ibid.

<sup>135</sup> OSCE Occasional Paper No. 6 op cit (n2) 29.

<sup>136</sup> UNODC Assessment Toolkit op cit (n39) 28.

<sup>137</sup> OSCE Occasional Paper No. 6 op cit (n2) 30.

<sup>138</sup> UNODC Assessment Toolkit op cit (n39) 28.

<sup>139</sup> European Parliament, DG External Polices ‘Trafficking in Human Organs’ op cit (n51) 21.

<sup>140</sup> OSCE Occasional Paper No. 6 op cit (n2) 30.

may also approach recruiters voluntarily to sell their organs.<sup>141</sup> Recruiters are generally paid per successful recruits that result in a transplant.<sup>142</sup>

### **c. Medical Professionals**

Different categories of medical professionals are needed for a successful HTPOR network. Surgeons, nephrologists and anesthesiologists are required to perform an organ removal and transplant. Nurses, lab technicians and other assistants to the transplant surgical team<sup>143</sup> are also involved in the entire process.<sup>144</sup> The transplant surgeons may come from different countries.<sup>145</sup> In some cases, the doctors or surgeons who perform the illicit organ transplants are themselves brokers or coordinators of the trafficking network. In other cases, the broker contracts local hospitals and/or staff that are open to lucrative albeit illegal organ transplantations. Other rare cases have shown that transplants are performed in hospitals in developed countries where hospital staff and executives are not aware of the illicit operation being carried out, through the payment of non-related donors.<sup>146</sup>

It is difficult to establish the extent to which these doctors, surgeons and support staff such as nurses and lab technicians, and even the management of the hospitals where the transplant is carried out, are aware of their involvement in an illicit organ transplantation, and in effect a part of the HTPOR network.<sup>147</sup> This therefore raises the difficult question of criminal liability in such cases where those involved are not aware of or did not consent to be a party to the organ trafficking network.

### **d. Hospitals and other medical facilities**

Crucial to the organ trafficking network is the availability of hospitals and laboratories in which the necessary procedures will be carried out for a successful organ transplant. Research has shown that hospitals may operate as brokers, while also providing

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<sup>141</sup> UNODC Assessment Toolkit op cit (n39) 28.

<sup>142</sup> OSCE Occasional Paper No. 6 op cit (n2) 30.

<sup>143</sup> Ibid.

<sup>144</sup> European Parliament, DG External Polices 'Trafficking in Human Organs' op cit (n51) 21.

<sup>145</sup> OSCE Occasional Paper No. 6 op cit (2) 30.

<sup>146</sup> European Parliament, DG External Polices 'Trafficking in Human Organs' op cit (n51) 21.

<sup>147</sup> Ibid.

accommodation for both recipients and organ donors.<sup>148</sup> In the case of *State v. Netcare Kwa-Zulu Limited*,<sup>149</sup> the hospital was held liable for its involvement in illegal transplantation business.<sup>150</sup> Netcare (a private health care company) responsible for the operation of the private hospital involved in this case, pleaded guilty to the 102 counts relating to the use of its employees and facilities in carrying out illegal kidney transplants; as well as receiving R3.8 million for such transplants.<sup>151</sup>

It is possible for hospitals and hospital personnel alike not to be aware of their involvement in organ trafficking networks, if they are misled into believing that the donations carried out in such hospitals are purely altruistic.<sup>152</sup> However, criminal liability of legal persons such as health care facilities can be established if any such hospital and/or its employees is deliberately involved in HTPOR.<sup>153</sup>

Medical facilities such as laboratories needed for blood-testing and tissue matching compatibility procedures are also required to carry out organ transplants. Potential donors will have to undergo various medical tests in order to detect suitability and compatibility of donor's organs with recipients. Often times, these laboratories may take on brokering functions by advertising the organ sale business among possible organ donors and recipients.<sup>154</sup>

#### **e. Administrative staff, support staff and others**

Every process involved in carrying out a successful organ transplant requires not just medical staff; but also support staff. The need for some medical facility can therefore result in the involvement of administrators and coordinators of these facilities.<sup>155</sup> This means that a wide range of medical authorities or regulators will be involved (either intentionally or unintentionally) in the organ trafficking network. The role of medical authorities or administrative staff is usually more pronounced in the issuance of licenses or provision of authorization to carry out organ transplants.

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<sup>148</sup> UNODC Assessment Toolkit op cit (n39) 33.

<sup>149</sup> *S v Netcare Kwa-Zulu (Proprietary) Limited*, Case No. 14/1804/2010.

<sup>150</sup> UNODC Assessment Toolkit op cit (n39)33. Facts of this case will be discussed in chapter 5.

<sup>151</sup> Ibid.

<sup>152</sup> Ibid at 34.

<sup>153</sup> Ibid.

<sup>154</sup> Ibid.

<sup>155</sup> OSCE Occasional Paper No. 6 op cit (n2) 30.

Support staff on the other hand, are often seen to carry out minor functions, but they are very relevant for the overall success of the network. In the case of HTPOR, the support staff may function as drivers, ‘minders’ who accompany recipients during their travel; and to hotels where they are lodged till the operation is scheduled,<sup>156</sup> enforcers who employ force or pressure on victim-donors, and interpreters or translators who assist in ensuring smooth communication between the recipients, donors and the doctors or hospital staff.<sup>157</sup>

Other parties involved in the organ trafficking network include travel agents and tour operators that organize travel, passports and visas,<sup>158</sup> directors of transplant units, postoperative nurses; and dual surgical teams working in tandem.<sup>159</sup>

#### **f. Organ Recipients**

Although the extent to which recipients of organs know their organ donors is yet to be established, organ recipients also form a major part of the organ trafficking network. Desperate people in need of organs for their survival boost the organ trade by contacting brokers for organs, especially when it becomes uncertain that they will survive the slow movement on the waiting list (for countries that have a legal organ donation process). For this reason, and many more, recipients often promise to bear all expenses and compensate donors well, but in most cases, promises are not conveyed to donors directly.<sup>160</sup> The interaction is usually between the recipients and the middleman or broker, as explained in point 3.4.1.

Recipients are usually not perceived as perpetrators of HTPOR, and are rarely held criminally responsible for any offence. It was noted at the UNODC’s expert group meeting that it might be difficult to prosecute an organ recipient due to the inherent sympathy attached to such recipient’s predicament.<sup>161</sup> <sup>162</sup> It was however suggested that a distinction be made between recipients involved in trafficking for the purpose of organ

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<sup>156</sup> European Parliament, DG External Polices ‘Trafficking in Human Organs’ op cit (n51) 21.

<sup>157</sup> Ibid.

<sup>158</sup> Aronowitz and Isitman op cit (n50) 82.

<sup>159</sup> Ibid.

<sup>160</sup> UNODC Assessment Toolkit op cit (n39) 39.

<sup>161</sup> Ibid.

<sup>162</sup> Ibid.

removal and those involved in transplant commercialization (that is, the buying of organs), as most recipients may be aware of the fact that they are paying for the organs when they travel overseas, but may not be aware of the fact that the donors are victims of HTPOR.

### **3.5 HTPOR: Victims and Consequences**

The general characteristics of victims of organ trafficking include but are not limited to people sourced from predominantly poor countries, countries in transition or countries with a large proportion of the population living below the poverty line;<sup>163</sup> people from countries without proper or weak legislative and institutional frameworks to effectively prohibit illicit organ trade, and therefore prohibit HTPOR;<sup>164</sup> those in positions of vulnerability traceable to being poor, having low or no level(s) of education; people who are usually unemployed;<sup>165</sup> those lacking basic medical knowledge of the medical consequences attached to organ donation, or no proper understanding of the nature of the organ removal surgery and the attendant health consequences;<sup>166</sup> desperately poor people in poor countries who donate to people from affluent countries;<sup>167</sup> often young people between the ages of 18 and 30;<sup>168</sup> and mostly men.<sup>169</sup> However, studies carried out on the sale of kidneys in the state of Tamil Nadu, India showed that 71% of the 305 respondents were women.<sup>170</sup>

Another common trend in the HTPOR network is that victims often receive less money than was promised to them by organ brokers and recipients. In worst cases, they may receive nothing.<sup>171</sup> Studies carried out on those who have been trafficked for the removal of their organs, including those that voluntarily offered to sell their organs in furtherance of a better life, show that the quality of life of those victims is often worse

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<sup>163</sup> Ibid at 41.

<sup>164</sup> Ibid.

<sup>165</sup> Ezeilo op cit (n57) 7. Para 24.

<sup>166</sup> OSCE Occasional Paper No. 6 op cit (n2) 31.

<sup>167</sup> Aronowitz and Isitman op cit (n50) 78.

<sup>168</sup> European Parliament, DG External Polices 'Trafficking in Human Organs' op cit (n51) 23.

<sup>169</sup> Available data at UNODC shows that majority of the cases reported between 2007 and 2013 concerned men.

UNODC Assessment Toolkit op cit (n39) 41.

<sup>170</sup> Aronowitz and Isitman op cit (n50) 78.

<sup>171</sup> UNODC Assessment Toolkit op cit (n39) 42.

than it was before they donated an organ.<sup>172</sup> Usually, victims are deceived about the true nature of the procedure, the risks involved and the follow-up care required after the transplant.<sup>173</sup> The consequences can be very severe, and could manifest in medical (or health), economic, psychological and social hardships on the victims.<sup>174</sup> These consequences are examined below.

**a. Medical or Health Consequences**

It has been established that organ traffickers select their victims from the most vulnerable populations, and lure desperate individuals into selling their organs in return for considerable payment that is often never paid in full or paid at all.<sup>175</sup> Organ brokers are usually less concerned about the well-being of their victims. Victim-donors are usually left to care for themselves after an organ removal and successful transplant operation, and after final payment has been made for the services rendered.

Research has shown that most victims of HTPOR are returned home shortly after the transplant surgery, without adequate post-operative care. Medical complications is therefore a common consequence of HTPOR on victims due to the inadequate or proper medical care that should be received before, during and after an organ donation. Victims often end up relapsing into degraded health conditions.<sup>176</sup> Lack of required medical checks and proper postoperative care leads to sickness or deterioration in health, and in some cases, death.

An extensive field research conducted by Coalition for Organ-Failure Solutions (COFS) in Egypt showed that 78 per cent of the commercial living donors reported a deterioration in their health condition.<sup>177</sup> The reasons given for this included insufficient donor medical screening for a donation, pre-existing compromised health conditions of commercial living donor groups and also that the majority of them were involved in labour-intensive jobs.<sup>178</sup>

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<sup>172</sup> Aronowitz and Isitman op cit (n50) 81.

<sup>173</sup> Ezeilo op cit (n57) 7. Para 25.

<sup>174</sup> Aronowitz and Isitman op cit (n50) 81.

<sup>175</sup> Ezeilo op cit (n57) 7. Para 25.

<sup>176</sup> OSCE Occasional Paper No. 6 op cit (n2) 29.

<sup>177</sup> Budiani-Saberi and Delmonico op cit (n106) 927.

<sup>178</sup> Ibid.

Victims are not only exposed to serious health consequences after organ removal. Some are subjected to health hazards even during the operation. Surgical operations were reportedly carried out to remove kidneys in the Philippines under poor hygienic conditions, leading to the death of some victims.<sup>179</sup> Common health consequences that have been reported include severe pain, cramping at the site of an incision, inability to carry heavy objects or do any labour-intensive work, loss of appetite, swelling of legs, insomnia, and considerable fatigue.<sup>180</sup>

### **b. Psychological Consequences**

It is not strange to see victim-donors suffer psychological traumas after being deceived or coerced into selling one of their organs. Psychological effects are displayed through experiences of existential and health anxieties; feelings of hopelessness; violated bodily integrity; serious depression;<sup>181</sup> sense of worthlessness; and feelings of regret by many victims.

Where organized crime is involved, victims are often told that a job awaits them in their destination country, only for them to discover that the job is to sell an organ. Such victims are threatened with violence while some have their passports confiscated if and when they object to the sale of their organs.<sup>182</sup> Victims end up becoming more vulnerable and dependent on the traffickers for survival in foreign countries, and in effect, submit to the demands of their traffickers.

### **c. Social Consequences**

Victims of HTPOR often suffer from stigmatization and discrimination. In Moldova for instance, organ sellers are excommunicated from the local orthodox churches.<sup>183</sup> It is also not uncommon to see victims face family problems as a result of losing one of their organs to the organ trade or falling victim of HTPOR.

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<sup>179</sup> Aronowitz and Isitman op cit (n50) 81.

<sup>180</sup> D Budiani-Saberi et al 'Human trafficking for organ removal in India: *A victim-centered, evidence-based report*' (2013) 3, available at <http://cofs.org/home/wp-content/uploads/2014/02/HTOR-in-India-ARTICLE-in-J-of-TP.pdf>, accessed on 26 October 2015.

<sup>181</sup> UNODC Assessment Toolkit op cit (n39) 42.

<sup>182</sup> UNA-GB 'Human Organ Trafficking' op cit (n45) 5.

<sup>183</sup> Aronowitz and Isitman op cit (n50) 82.

Other common social consequences include but are not limited to reduced prospects for marriage or romantic relationships due to scars from kidney removal; discrimination towards children of kidney sellers; social stigma of not being selected to donate in societies where the organ trade has become a norm; and shame that comes from being ridiculed by friends, family and the community.<sup>184</sup>

Victims who have been deceived, cheated out of the promised sum for the removal of their organs or are being stigmatized by their communities also face the challenge of inability to seek redress by reporting to either the police or any other relevant authority; due to the illegality of the act.<sup>185</sup>

#### **d. Economic Consequences**

As mentioned already, studies have shown that most victims are often cheated out of the agreed or promised sums for the removal of their organs, and are usually left without any postoperative care after the transplant. A study conducted in Pakistan showed that 85 out of 93 per cent of sellers who agreed to donate their kidneys for financial reasons were either still in debt or unable to achieve their objective.<sup>186</sup> Other studies carried out on kidney sellers in Iran, India, Moldova and the Philippines indicate that donors experience unemployment, reduced income, and economic hardship.<sup>187</sup> Many victims therefore end up lacking the means to take care of their health after the operation.

The medical consequences of HTPOR alluded to in (a) above often leads to the inability of most victims to become employed; and those with jobs losing their jobs due to inability to perform properly caused by weakness. Some others lose employment opportunities due to victimization that comes with organ removal.<sup>188</sup> There are frequent reports of victim-donors relapsing into worse debt and poverty, contrary to expectations of elevation in their economic and financial status. Only a few organ sellers who were motivated by a desire to free themselves from debt have been able to do so after selling

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<sup>184</sup> Budiani-Saberi et al op cit (n178) 3.

<sup>185</sup> Aronowitz and Isitman op cit (n50) 81.

<sup>186</sup> UNA-GB 'Human Organ Trafficking' op cit (n45) 5.

<sup>187</sup> Aronowitz op cit (n36)119.

<sup>188</sup> UN.GIFT 011 Workshop op cit (n4) 16.

an organ.<sup>189</sup> Overall, victim-donors of HTPOR do not generally benefit economically from selling their organs.<sup>190</sup>

### **3.6 Conclusion**

This chapter examined the various forms in which trafficking in organs manifest, thereby buttressing the serious nature of the crime. In all forms of organ trafficking, the vulnerability of the victim-donors are exploited. The major role players or stakeholders involved in the organ trafficking network were also considered. What makes HTPOR different from the other common forms of human trafficking is the involvement of medical professionals, other health practitioners; and medical facilities in a successful organ trafficking network.

As illustrated in this chapter, organ trafficking has various effects and consequences on the victims. These consequences have also been addressed, including the deterioration of the victim-donor's health due to lack of post-operative care, and worse economic or financial positions obtained than before they donated their organs.

The next chapter focuses on the international, regional and national responses to the crime of HTPOR; as well as the inherent human rights violations identifiable from the crime.

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<sup>189</sup> Ibid at 17.

<sup>190</sup> European Parliament, DG External Polices 'Trafficking in Human Organs' op cit (n51) 26.

## Chapter 4

### HTPOR: HUMAN RIGHTS VIOLATIONS AND RESPONSES TO CURBING IT.

#### 4.1 Introduction

In the previous chapters, the crime of HTPOR was expounded upon, and it was established that it is a fairly new form of trafficking when compared to other common forms of trafficking. Like other forms of trafficking, HTPOR constitutes a grave violation of human rights and dignity of individuals.<sup>191</sup>

The general components of trafficking (that is, the act, means and purpose of trafficking) are laced with human rights abuses. HTPOR victims often have their rights violated by various actors involved in the organized crime, traceable to the fact that the majority of victim-donors are usually sourced from vulnerable, poor, uneducated and desperate groups of people. The trends of HTPOR discussed earlier,<sup>192</sup> also show that quite a number of victim-donors voluntarily locate organ brokers to sell their organs with the hope of getting a better life from the expected or promised proceeds of the sale. However, most of those victim-donors find themselves in worse physical, mental and financial conditions than they were before they donated or sold their organs. They are often deceived, defrauded and sometimes deprived of the agreed sum for their organs.

The first part of this chapter seeks to examine the various human rights abuses inherent in the crime of HTPOR, in the light of the numerous international human rights instruments available to protect the rights of all individuals. The violated rights of victim-donors are considered in detail, as the approach adopted for this research requires concentration on the HTPOR victims than any other involved party.

There have been numerous responses from different organizations, bodies, and institutions at both international and regional level, suggesting ways to address the crime of HTPOR and protect the rights of victim-donors. The second part of this chapter therefore examines the responses, suggestions and possible solutions suggested by international, regional and national bodies and institutions to address the human rights violations that result from HTPOR.

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<sup>191</sup> OSCE Occasional Paper No. 6 op cit (n2) 7.

<sup>192</sup> See Point 2.3.2 (a), Chapter 2; Chapter 3.

## 4.2 Analysis of Human Right Violations Associate with HTPOR

The link between human rights and the fight against all forms of human trafficking cannot be overemphasized. It is an established fact that human rights law has continually and unequivocally proclaimed the illegality and inappropriateness of one person exploiting the legal personality, labour or humanity of another;<sup>193</sup> which is more relatable in cases of HTPOR. It should be noted that similarities abound in the human rights abuses faced by HTPOR victims and those experienced by victims of more common forms of human trafficking.

A human rights-based approach to addressing the crime of HTPOR requires a consideration of the human rights abuses that victims are subjected to through the continuation of the organ black market. Studies have shown that numerous human rights are violated in the process of recruitment, transportation, transfer, harbouring or receipt of victims of HTPOR, and upon return to their countries of origin.<sup>194</sup> Those violated rights are examined in the light of the international legal framework for the protection of all human rights, which includes but are not limited to the following international human rights instruments:

- i. Universal Declaration of Human Rights (UDHR), 1948.
- ii. International Covenants on Civil and Political Rights (ICCPR); and on Economic, Social and Cultural Rights (ICESCR), 1966.
- iii. Convention on the Elimination of all Forms of Racial Discrimination (CERD), 1965.
- iv. Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), 1979.
- v. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 1984.
- vi. Convention on the Rights of the Child (CRC), 1989.

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<sup>193</sup> UN.OHCHR, Fact Sheet No. 36 'Human Rights and Human Trafficking', (2014) 4, available at [http://www.ohchr.org/Documents/Publications/FS36\\_en.pdf](http://www.ohchr.org/Documents/Publications/FS36_en.pdf), accessed on 21 December 2015.

<sup>194</sup> OSCE Occasional Paper No. 6 op cit (n2) 50.

- vii. International Convention for the Protection of All Migrant Workers and Members of their Families (ICRMW), 1990.
- viii. Convention on the Rights of Persons with Disabilities (CRPD), 2006.
- ix. International Convention on the Protection of All Persons from Enforced Disappearance (ICERF), 2006.

The specific fundamental human rights violated through the continued operation of organ trafficking networks and the organized crime of HTPOR include the right to life, liberty and security of person; freedom from torture and other cruel, inhuman or degrading treatment or punishment; freedom of movement; violation of human dignity; right to non-discrimination, equality before the law and equal protection by the law; right not to be held in slavery or servitude and forced labour; right to the highest attainable standard of physical and mental health; right to an adequate standard of living; right to education and access to information; and right to justice and access to effective remedy. These rights are examined in greater detail below.

#### **4.2.1 Right to life, liberty and security of person**

Articles 3 and 9, UDHR; articles 6 and 9 ICCPR; article 5(b) ICERD; articles 6 and 37 CRC; and articles 9 and 16 ICRMW provide for the protection of the right to life, liberty and security of person for every individual.

The right to life is considered to be the most fundamental of all rights accruing to every individual. The Human Rights Committee (HRC)'s General Comment No. 6 (1982) on Article 6, ICCPR on the right to life, declared this right as the supreme right from which no derogation is allowed, even in times of public emergency that threatens the life of a nation.<sup>195</sup>

In the light of HTPOR, the right to life of the victim-donors is encroached upon through the various means employed to recruit organs from them. In a recent report, an official document captured by US Special Forces was purportedly released by Isis, endorsing the harvesting of organs from live prisoners in order to save the lives of

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<sup>195</sup> 'Article 3: Everyone has the right to life, liberty and Security of Person': Meaning/Definition, available at [http://ccnmtl.columbia.edu/projects/mmt/udhr/article\\_3/meaning.html](http://ccnmtl.columbia.edu/projects/mmt/udhr/article_3/meaning.html), accessed on 31 December 2015.

Muslims.<sup>196</sup> The document obtained by Reuters revealed that Isis opined that “the apostate’s life and organs don’t have to be respected and may be taken with impunity”.<sup>197</sup> The report gives a vivid example of the violation of the right to life, as it provides a justification for the removal of the organs from apostates, which indirectly promotes or fuels the organ black market.

The lives of victim-donors are often exploited based on their vulnerability and desperation. They are often times not afforded pre or post-operative care, and reports abound to show that a large percentage of victim-donors end up with worse health conditions and some even die. States have been implored to take effective measures to investigate cases of missing and disappeared persons in circumstances that may involve a violation of the right to life.<sup>198</sup>

On the other hand, the right to liberty and security of persons is expounded upon in HRC’s General Comment 35, which points out that deprivation of those rights have historically impaired the enjoyment of other rights.<sup>199</sup> Paragraph 3 of General Comment 35 notes that liberty of persons denotes the freedom of persons from all forms of confinement of their person-hood or body while security of persons speaks to freedom from injury to the body and mind or bodily and mental integrity;<sup>200</sup> all of which is violated through HTPOR.

#### **4.2.2 Freedom from torture and other cruel, inhuman or degrading treatment or punishment**

This is provided for in article 5, UDHR; article 7, ICCPR; articles 2, 4 and 16, CAT; article 37, CRC; and article 10, ICRMW. Article 1 (1), CAT defines torture to mean any act that causes intentional pain or suffering to be inflicted on a person for the purpose of

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<sup>196</sup> D Bolton ‘Isis sanctions ‘harvesting’ the organs of ‘apostates’, document seized during US raid reveals’, 26 December 2015, available at <http://www.independent.co.uk/news/world/middle-east/isis-organ-harvesting-seized-documents-syria-apostates-a6786876.html>, accessed on 31 December 2015.

<sup>197</sup> Ibid.

<sup>198</sup> OHCHR ‘16<sup>th</sup> session of Human Rights Committee: General Comment No. 6: *Article 6 (The right to life)*, HRI/GEN/1/Rev.9 (Vol.I)’, (30 April 1982) 1. Para 4, available at [http://ccprcentre.org/doc/ICCPR/General%20Comments/HRI.GEN.1.Rev.9%28Vol.I%29\\_%28GC6%29.en.pdf](http://ccprcentre.org/doc/ICCPR/General%20Comments/HRI.GEN.1.Rev.9%28Vol.I%29_%28GC6%29.en.pdf), accessed on 31 December 2015.

<sup>199</sup> HRC ‘International Covenant on Civil and Political Rights: General Comment No. 35’ *Article 9 (Liberty and security of person)*, (16 December 2014) 1. Para 2, available at <https://www1.umn.edu/humanrts/crc/gencom35.pdf>, accessed on 31 December 2015.

<sup>200</sup> Ibid at Para 3.

retrieving information or confession. In the case of HTPOR, intentional pain or suffering is inflicted on the victim-donors for the selfish gain of organ brokers, without according such victims adequate pre or post-operative care for the removal of their organs.

The rights to freedom from torture, cruel, inhuman or degrading treatment seeks to protect the human dignity of persons. Inhuman treatment is defined as treatment that causes severe mental or physical harm,<sup>201</sup> while degrading treatment refers to grossly humiliating and undignified treatment.<sup>202</sup>

A major consequence of HTPOR is the stigmatization and discrimination victim-donors face after an organ removal, which automatically contributes to humiliation and undignified treatment.

#### **4.2.3 Freedom of movement**

Article 13, UDHR and Article 12, ICCPR provide for this right to freedom of movement. Freedom of movement is also a fundamental right to which every individual is entitled. It is therefore provided for in the laws of numerous countries. With respect to HTPOR, the movement of victim-donors are often limited once they are trafficked either within or outside their country of origin. Cases of victim-donors who are promised jobs and then transported outside the borders of their countries for the removal of their organs abound. Those victims are often confined in ‘safe houses’ until a suitable organ recipient to which they can be matched is found.<sup>203</sup> Victim-donors are often forced to relinquish an organ in exchange for a safe return home. An example is found in the Philippines where police raided a safe house in Manila and freed nine men who had been held hostage by a gang that lured them with the promise of a good job, without knowing that the job was to donate a kidney.<sup>204</sup>

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<sup>201</sup> Equality and Human Rights Commission ‘Article 15 Freedom from torture, inhuman or degrading treatment’, available at <http://www.equalityhumanrights.com/your-rights/human-rights/human-rights-guidance/guide-un-disability-convention/article-15-freedom-torture-or-cruel-inhuman-or-degrading-treatment-or-punishment>, accessed on 6<sup>th</sup> January 2016.

<sup>202</sup> Ibid.

<sup>203</sup> Ibid at 79.

<sup>204</sup> Ibid at 79, 80.

#### 4.2.4 Violation of human dignity linked to organ commercialization

“Organ transplantation generally consist of a wide range of commercialism; from the subtle financial rewards to the relatives of a cadaver donor to cover burial costs to the criminal exploitation of the poor in the purchase of their kidneys for the rich.”<sup>205</sup>

Parting with any part of the body for monetary gain violates the dignity of the human person.<sup>206</sup> Guiding Principle 5 of the WHO Principles on human cell, tissue and organ transplantation provides that ‘organs should be donated freely, without any monetary payment or other reward of monetary value. Purchasing or offering to purchase cells, tissue or organs for transplantation or their sale by living persons... should be banned’.<sup>207</sup> The commentary on this principle highlights one of the dangers of organ commercialism to include taking unfair advantage of the poorest and most vulnerable groups of society.<sup>208</sup> Commercialization of organs also undermines altruistic donation and boosts organ black market and organ trafficking in general. More importantly, it infringes on the dignity rights of victims by commodifying organs for monetary gain.

The prohibition of the sale and purchase of organs is provided for in article 21 of the Oviedo Convention;<sup>209</sup> articles 21 and 22 of the Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin;<sup>210</sup> and section 301 (a) of the United States National Organ Transplant Act, 1984.

The Declaration of Istanbul, 2008 recognizes that transplant commercialism violates the principle of equity, justice and respect for human dignity.<sup>211</sup> The Declaration goes further to explain that transplant commercialism targets impoverished and vulnerable donors, which eventually leads to inequity and injustice. Principle 6 of the Declaration therefore highlights the resolutions made by the World Health Assembly (WHA) on banning commercialization and sale of body parts for any purpose.

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<sup>205</sup> International Society of Nephrology ‘Organ trafficking: a time for action’, (2008) 74 *KI* 839, available at <http://www.nature.com/ki/journal/v74/n7/pdf/ki2008389a.pdf>, accessed on 27 December 2015.

<sup>206</sup> *Ibid.*

<sup>207</sup> Principle 5, WHO Guiding Principles *op cit* (n81).

<sup>208</sup> Commentary on Guiding Principle 5, *op cit* (n102).

<sup>209</sup> Council of Europe Convention on Human Rights and Biomedicine (Oviedo Convention) of 2000.

<sup>210</sup> Additional Protocol to Oviedo Convention of 2002.

<sup>211</sup> Principle 6, Declaration of Istanbul *op cit* (n99) 3.

Despite the recognition that the act of commercialization of organs is a breach of medical ethics and violation of the human dignity of the victim-donors, the practice still continues.

#### **4.2.5 Right to non-discrimination, equality before the law and equal protection by the law**

This is provided for in articles 2, 6, 7 and 8, UDHR; Articles 2(1), 8, 14, 16 and 26, ICCPR; articles 2 (2), ICESCR; articles 1 and 2, CEDAW; articles 1 and 5, CERD; and articles 1 and 24, ICRMW.

Trends of HTPOR reveal that it invariably leads to a violation of the right to non-discrimination for victim-donors involved. In some communities and societies, victim-donors are subjected to discrimination and stigmatization due to their organ removal.<sup>212</sup> Acts of discrimination and stigmatization are manifested through excommunication from religious bodies, reduced prospects for marriage and romantic relationships due to scars retained from transplant operations; as well as stigmatization from family members of the victim-donors.<sup>213</sup>

The right to access the justice system is also limited for victims of HTPOR. Most times, they are unable to report the victimization, discrimination and stigmatization they experience.<sup>214</sup> The rights of victims to equality before the law and equal protection by the law is thereby infringed.

Studies have shown that victims of HTPOR often get punished and their involvement criminalized, while recipients rarely get punished for buying these organs. The debate on the non-punishment for buyers/recipients of organs from the organ black market falls outside the scope of this research. However, the non-criminalization or non-punishment of victims of HTPOR becomes necessary in order to encourage them to approach the relevant authorities for reporting. No mandatory provision exists to promote the non-criminalization and non-punishment of trafficking in the UN Convention against Transnational Organized Crime Convention and the TIP protocol.<sup>215</sup>

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<sup>212</sup> Aronowitz and Isitman op cit (n50) 82.

<sup>213</sup> Ibid.

<sup>214</sup> Ibid at 81.

<sup>215</sup> UNODC Assessment toolkit op cit (n39) 54.

Hence, the continuous infringement of victims' right to equal access to justice and protection by the law.

#### **4.2.6 Right not to be held in slavery or servitude and forced labour**

Article 4 UDHR; article 8 ICCPR; article 10 ICESCR; article 6 CEDAW; articles 32, 34, 35 and 36, CRC all provide for this right. HTPOR and other forms of trafficking have a target of exploiting the victims involved. Article 3(a) of the TIP Protocol defines exploitation of persons to include forced labour or services, practices similar to slavery, servitude or the removal of organs.<sup>216</sup>

Generally, human trafficking is synonymous to modern-day slavery, and HTPOR in particular emphasizes the violation of this right. HTPOR also involves some form of debt bondage, forced labour or slavery. Often times, this is traceable to victims' poor standard of living which makes them vulnerable to sell their organs in order to improve their lives.

A study carried out in India, involving 305 persons who had sold their kidneys in Chennai, India revealed that 96 per cent of the victims had sold their organs to escape debt.<sup>217</sup> However, the study showed that victims were still in debt after selling an organ and the number of those who lived below the poverty line had also increased.<sup>218</sup> HTPOR therefore reflects the continued practice of modern-day slavery for victims with serious debts; and more particularly in communities where the removal of organs is required for payment of debts.

#### **4.2.7 Right to the highest attainable standard of physical and mental health**

This is provided for in article 25, UDHR; article 12, ICESCR; article 5 (e) (iv), ICERD; article 14 (2) (b), CEDAW; articles 24, 25 and 39, CRC; and article 28, ICRMW.

One of the obvious consequences of HTPOR is the deterioration of the health conditions of most victims. HTPOR affects health security in a grave way, as victim-donors are usually afforded no pre or post-operative care. There are cases of victims who had their organs removed under poor hygienic conditions, and some had reportedly died

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<sup>216</sup> Article 3(a), TIP Protocol.

<sup>217</sup> Aronowitz and Isitman op cit (n50) 81.

<sup>218</sup> Ibid.

under such circumstances.<sup>219</sup> Lack of proper post-operative care results in the deterioration of the physical health of victim-donors. Numerous cases revealed that most victims complain of chronic pain, ill-health and weakness after the operation.<sup>220</sup> Usually, the proceeds from the organ sale is never enough to cover the required treatment.

Victim-donors also face the violation of their mental or psychological health. There are reports of victims experiencing a sense of worthlessness, depression, social isolation and family problems, after selling an organ.<sup>221</sup> The Declaration of Istanbul recommends that follow-up care should be given to victims, especially those in developing countries without universal health care and adequate health care services for the majority of the population. However, there are no concerted efforts to ensure that this is done.<sup>222</sup>

#### **4.2.8 Right to an adequate standard of living**

Articles 25, UDHR; and article 11, ICESCR provide for the right to an adequate standard of living. Article 11 (1), ICESCR goes further to outline the components of this right. The right to an adequate standard of living requires, at a minimum, access to adequate food, clothing and housing, as well as the continuous improvement of living conditions.<sup>223</sup>

There is no doubt that the infringement of this right exists separately amongst most populations from which victim-donors are sourced. However, it is important to note that HTPOR thrives on the violation of this right to individuals who fall prey of organ brokers; and/or voluntarily offer to sell their organs in exchange for money.

A closer look at the trafficking cycle reveals that the denial or infringement of this right constitutes a vital human right abuse that contributes to the vulnerability and poverty levels of individuals who become victims of HTPOR. This is because so-called voluntary organ donors will not sell their organs in the first place if they had access to an adequate standard of living. Poverty places limitations on the choices individuals make that can lead them to take risks (such as organ commercialism) and make decisions that

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<sup>219</sup> Ibid.

<sup>220</sup> Ibid.

<sup>221</sup> Ibid at 82.

<sup>222</sup> Budiani-Saberi and Columb op cit (n1) 10; Declaration of Istanbul op cit (n99) 3.

<sup>223</sup> Article 11 (1) International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966.

they would never have taken if their basic needs were met.<sup>224</sup> HTPOR continuously thrives on the infringement of this right as organ brokers and traffickers alike take undue advantage of the vulnerable, desperate and poor groups of people.

#### **4.2.9 Right to education/Access to information**

Article 26, UDHR and article 13, ICESCR provide for the right to education as a fundamental right that should accrue to all individuals. The resultant effect of education is access to vital information necessary for survival in any given society.

HTPOR thrives on the deprivation of the victims' access to proper information and adequate education on the consequences of losing an organ. Most victim-donors are unable to assess the deceptive information given to them by organ brokers and doctors involved in the organ trafficking network on the potential health consequences of donating an organ.<sup>225</sup> Although some victim-donors voluntarily consent to selling their organs, organ brokers often times exploit the ignorance, desperation, and illiteracy of such victims.

#### **4.2.10 Right to justice and access to effective remedy**

This right is provided for in article 2 (3), ICCPR; article 6, ICERD; articles 12, 13 and 14, UNCAT; and article 18, ICRMW.

Victim-donors, like other trafficked persons, have a right to remedies for the harms and acts of torture, cruel or degrading treatment committed against them. This right places an obligation on States to provide victims with access to such remedies.<sup>226</sup> However, only few cases of HTPOR have gone to court either for criminal prosecution or civil claims.<sup>227</sup> This is due to several reasons including the low rate of victim identification in HTPOR,<sup>228</sup> traceable to the other violated rights and consequences discussed earlier.

As mentioned already, victims are often stigmatized and discriminated against. This has led to underreporting of HTPOR cases by victims. Low rate of victim

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<sup>224</sup> UN.OHCHR, Fact Sheet No. 36 op cit (n193) 41.

<sup>225</sup> OSCE Occasional Paper No, 6 op cit (n2) 16.

<sup>226</sup> Ezeilo op cit (n57) 16. Para 56.

<sup>227</sup> OSCE Occasional Paper No.6 op cit (n2) 54.

<sup>228</sup> Ezeilo op cit (n57) 16. Para 57.

identification also means that a large number of persons (victims) who have suffered harm from HTPOR will not be able to gain access to any form of legal remedy or justice.<sup>229</sup>

### 4.3 Responses to HTPOR

Having identified the major human right abuses faced by victims of HTPOR, it is necessary to consider what efforts have been adopted to address the crime of HTPOR in general, and the protection of victims' rights in particular. A greater percentage of the responses to HTPOR have emanated from health and professional organizations at the international level. For instance, the 40<sup>th</sup> session of WHA in May 1987 requested the Director-General of WHO to develop appropriate guiding principles that would regulate human organ transplants.<sup>230</sup> This resulted in the development of the 1991 WHO Guiding Principles on Human Organ Transplantation that was adopted in resolution WHA44.25, which outlined a comprehensive framework for living and deceased organ donation in order to increase the legal supply of organs and to curb commercialization of organs.

Prior to the development of these principles, the general assembly of the World Medical Association had issued a series of resolutions and guidelines since 1985 that condemned the human organ trade and urged governments to take steps to prevent the black organ market from thriving.<sup>231</sup> The issue of using organs from executed prisoners was also addressed.<sup>232</sup> At the 63<sup>rd</sup> WHA in May 2010, a revision of the WHO guiding principles was endorsed in resolution WHA63.22, wherein States were urged to implement same in order to promote altruistic donation of organs, establish transparent transplant systems and promote the collection of data relating to organ trafficking.<sup>233</sup> The updated WHO principles addressed current trends in transplantation, especially organ transplants from living donors, and the increasing use of human cells and tissues.<sup>234</sup>

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<sup>229</sup> Ibid.

<sup>230</sup> Budiani-Saberi and Columb op cit (n1) 5.

<sup>231</sup> Ezeilo op cit (n57) 8. Para 32.

<sup>232</sup> Ibid.

<sup>233</sup> Aronowitz and Isitman op cit (n50) 86.

<sup>234</sup> Budiani-Saberi and Columb op cit (n1) 6.

A Global Glossary of Terms and Definitions on Donation and Transplantation was also published by WHO in 2009.<sup>235</sup> It was necessary to develop a glossary in order to have internationally recognized definitions and terminologies for the operations of HTPOR and organ trafficking in general. The aim of the glossary was to ‘clarify communication in the area of donation and transplantation, whether for the lay public or for technical, clinical, legal or ethical purposes.’<sup>236</sup>

Another response to HTPOR is the development and adoption of the 2008 Declaration of Istanbul on organ trafficking and transplant tourism. This Declaration was a result of an international summit convened by the Transplantation Society and the International Society of Nephrology in April 2008 to address both the quality and availability of organ transplantation, as well as key ethical issues faced by transplant practitioners.<sup>237</sup> The Declaration condemns organ commercialism, and recognizes that such a practice mainly affects the vulnerable populations in resource-poor countries. It urges transplant professionals to desist from unethical activities that promotes transplant commercialism and also calls for an accountable transplant system across borders.<sup>238</sup> Responses have also emanated from civil society and the media through the creation of awareness about the scope and operation of organ trade.<sup>239</sup>

However, the already mentioned responses constitute non-binding instruments to combat HTPOR. HTPOR on its own has not been a major concern for the international human rights system.<sup>240</sup> The resultant effect is that no specific international legislation or binding instrument exists that deals solely with HTPOR and other organ trafficking related offences. The crime is only categorically addressed under Article 3 (1) (a) (i) (b) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, where the transfer of organs of a child for profit is prohibited.<sup>241</sup> Apart from the above, HTPOR is only recognized as one of the forms of human trafficking that should be combatted in the United Nations Protocol to

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<sup>235</sup> WHO Global glossary of terms and definitions op cit (n118).

<sup>236</sup> Aronowitz and Isitman op cit (n50) 87.

<sup>237</sup> Ezeilo op cit (n57) 9. Para 33.

<sup>238</sup> Special Article ‘The Declaration of Istanbul on organ trafficking and transplant tourism’ (2008) 3 *ASN* 1227, available at <http://cjasn.asnjournals.org/content/3/5/1227.full.pdf>, accessed on 19 May 2015.

<sup>239</sup> Budiani-Saberi and Columb op cit (n1) 1.

<sup>240</sup> Ezeilo op cit (n57) 9. Para 35.

<sup>241</sup> Ibid; Article 3 (1) (a) (i) (b), Optional Protocol to the Convention of the Rights of the Child of 2000.

Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children.<sup>242</sup> It therefore becomes imperative to develop a specific legislation or binding instrument that deals with HTPOR, due to the gravity of the crime as reflected through the consequences and human rights violations on victim-donors discussed previously.

At the regional level, responses to HTPOR have emanated mainly from the European system. The responses have focused on trafficking in organs, as well as the inclusion of ‘organ removal’ in definitions and instruments that deal with trafficking in persons.<sup>243</sup> The 2008 Council of Europe (CoE) Convention on Action against Trafficking in Human Beings serves as a major regional binding instrument that addresses HTPOR. It however focuses on the inter-European cooperation and the prevention of trafficking in persons.<sup>244</sup> Another legally binding document emanating from the European region, which addresses trafficking in organs is the 1997 CoE Convention on Human Rights and Biomedicine, and its Additional Protocol of 2002, that specifically prohibits organ and tissue trafficking.<sup>245</sup> In 2013, the Council of Europe drafted the first international criminal law to address human organ trafficking.<sup>246</sup> This draft law is to be known as the Convention against Trafficking in Human Organs, and is intended to provide a solution to the problems of HTPOR and organ trafficking by identifying distinct activities that constitute the crime,<sup>247</sup> protect the human rights of victims, as well as facilitate international and national cooperation on the issue.<sup>248</sup>

As for national or domestic responses, quite a number of States have enacted laws that regulate the organ transplant system, and seek to address the imbalance between the demand and supply of organs. Countries have adopted various systems, including the presumed (or opt-out) and opt-in system to increase the supply of organs. Most States, however, recognize the illegality of the sale of organs. Studies show that 91 countries have specific legislation on organ donation and transplant; organ transplant

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<sup>242</sup> Aronowitz and Isitman op cit (n50) 83; Article 3 (a), TIP Protocol.

<sup>243</sup> Ezeilo op cit (n57) 10. Para 37.

<sup>244</sup> Aronowitz and Isitman op cit (n50) 84.

<sup>245</sup> Article 22, Additional Protocol to Oviedo Convention of 2002.

<sup>246</sup> Budiani-Saberi and Columb op cit (n1) 8.

<sup>247</sup> M López- Fraga et al ‘A needed Convention against trafficking in human organs’ (28 June 2014) 383 [www.thelancet.com](http://www.thelancet.com) 2187, available at [http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(14\)60835-7/fulltext](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(14)60835-7/fulltext), accessed on 13 January, 2016.

<sup>248</sup> Ezeilo op cit (n57) 10. Para 38.

commercialism is prohibited in 55 countries, and 52 of those countries have specific penalties for organ sale.<sup>249</sup>

States continually develop new pieces of legislation and amend existing ones to combat and prevent HTPOR, organ trafficking and transplant tourism. 157 States are parties to the TIP Protocol and are required to criminalize HTPOR in all its forms.<sup>250</sup> Although, quite a number of countries have enacted laws to combat organ trafficking and HTPOR, not many have included HTPOR in the scope of such laws.<sup>251</sup> Specific laws prohibiting the sale of organs can be found in section 301 of the United States of America's National Organ Transplant Act of 1984; section 19 of the Indian Transplantation of Human Organs Act of 1994; section 11 of Pakistan's Transplantation of Human Organs and Tissues Act of 2009; article IV, section 6 of the Rules and Regulations implementing section 4(g) of Philippines' Anti-trafficking in Persons Act of 2003; and section 3 of Israel's Organ Transplant Act of 2008, to mention but a few. The laws relating to the sale of organs in the aforementioned countries are discussed in the next chapter.

#### **4.4 Conclusion**

This chapter established that victims of human trafficking and HTPOR in particular have their fundamental human rights violated by all processes involved in the trafficking cycle. The human rights abuses inherent in HTPOR were extensively examined in the light of international human rights instruments. The approach adopted for this dissertation necessitated a consideration of the efforts that have been put into combating and preventing the continuation of HTPOR and organ trafficking as a whole. Hence, this chapter also provided insight into the international, regional and national responses to the crime of HTPOR.

The next chapter examines five cases of HTPOR, selected from five different regions. Those cases highlight the elements, patterns, trends, and consequences of

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<sup>249</sup> Joint Council of Europe/United Nations Study op cit (n121) 47.

<sup>250</sup> Ezeilo op cit (n57) 12. Para 42.

<sup>251</sup> Ibid.

HTPOR on victim-donors; as well as the human rights violations to which victims are subjected to, already discussed in previous chapters.

## Chapter 5

### REGIONAL CASE STUDIES ON HTPOR

#### 5.1 Introduction

After a careful consideration of the crime of HTPOR, its trends, the mode of operation of organ trafficking networks, the consequences on the victims, and the human rights violated through the commission of this crime, this chapter considers a few cases of HTPOR that have been prosecuted in five regions where the business of organ trafficking is known. The regions are Africa, Europe, the Middle East, the Americas, and Asia. There is no doubt that more cases of HTPOR than will be highlighted here may abound, but the challenge of data collection, victim-identification and poor reporting by victims of those cases has affected compilation of cases and accurate facts and figures for the few cases brought forward. There are cases with conflicting figures and accuracy of some cases have proven difficult to verify. Nonetheless, the few cases that are examined in this chapter will showcase the trends, mode of operation of traffickers, and the consequences on the victims involved. An attempt is also be made to highlight the responses of States in combatting HTPOR and the shortage of organs through various means of organ donation.

#### 5.2 Case Studies

##### 5.2.1 AFRICA

##### The Netcare case – South Africa<sup>252</sup>

In November 2010, the Netcare cases (a series of cases involving a private hospital group known as Netcare Kwa-Zulu Natal (Pty) Limited, for its involvement in illegal organ trafficking since June 2001) regained media publicity. Prior to this time, the South African Police Service (SAPS) had received information about illegal transplants being carried out at St Augustine's hospital, part of the Netcare company. Part of the information received was from Nancy Sheper-Hughes, an American anthropologist and founder of Organs Watch.<sup>253</sup>

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<sup>252</sup> *The State v Netcare Kwa-Zulu (Proprietary) Limited – Agreement in terms of section 105(1) of the Criminal Procedure Act 51 of 1977, Netcare Kwa-Zulu Natal Durban – Case No 41/1804/2010*

<sup>253</sup> European Parliament, DG External Polices 'Trafficking in Human Organs' op cit (n51) 37.

SAPS commenced investigations in 2003. A search warrant was obtained to search transplant premises and relevant files and documents corroborating the allegations were confiscated.<sup>254</sup> Those documents included patient records and surgery reports. A search was also conducted at the blood bank and all documents relating to cross-match tests for potential organ suppliers were seized. The documents revealed that the suppliers and recipients were blood-related, but further investigations proved that the documents were forged.<sup>255</sup>

The CEO of Netcare, Richard Friedland, along with eight others (four transplant doctors, one nephrologist, two transplant administrative coordinators, and one interpreter) were arrested based on the compiled evidence in 2003.<sup>256</sup> The evidence showed that not less than 109 illegal kidney operations had been performed on suppliers from Israel, Brazil and Romania between the period June 2001 and November 2003. The evidence also showed that money had been exchanged for kidney transplants that emanated from five minors.<sup>257</sup>

On November 2010, the Netcare company pleaded guilty to 102 counts relating to charges that included the use of its employees and facilities to conduct illegal kidney transplant operations,<sup>258</sup> fraud, forgery, assault with intent to do grievous bodily harm, violation of the Human Tissues Act (HTA) No 65 of 1983 (including the use of organs without informed consent, transplantation of the tissues of minors into another living person, and the purchase of tissue such as kidney),<sup>259 260</sup> and money laundering (from the provisions of the Prevention of Organized Crime Act of 1998).<sup>261</sup> A ministerial policy of the Department of Health that specifically stipulates that ‘donor organs must be used primarily for South African citizens and permanent residents’ and that a written consent

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<sup>254</sup> Ibid.

<sup>255</sup> Ibid.

<sup>256</sup> Ibid.

<sup>257</sup> J Allain ‘Commentary: Trafficking of persons for the removal of organs and the admission of guilt of a South African hospital’ (2011) 19 *MLR* 119, available at [https://www.researchgate.net/publication/49784856\\_Commentary\\_trafficking\\_of\\_persons\\_for\\_the\\_removal\\_of\\_organ\\_and\\_the\\_admission\\_of\\_guilt\\_of\\_a\\_South\\_African\\_Hospital](https://www.researchgate.net/publication/49784856_Commentary_trafficking_of_persons_for_the_removal_of_organ_and_the_admission_of_guilt_of_a_South_African_Hospital), accessed on 3 November 2015.

<sup>258</sup> Ibid at 117.

<sup>259</sup> Section 18 (a), South African’s Human Tissue Act 65 of 1983.

<sup>260</sup> Allain op cit (n261) 118.

<sup>261</sup> OSCE Occasional Paper No. 6 op cit (n2) 63.

must be obtained from the Minister of Health before a non-citizen can be accepted into a transplantation programme<sup>262</sup> was also breached.<sup>263</sup>

The prosecution alleged that kidney recipients paid between \$100 000 and \$120 000, while the suppliers (or donors) were initially paid \$20, 000 before the organ brokers sourced for more cost-effective suppliers from Brazil and Romania, to whom they paid an average of \$6 000.<sup>264</sup>

The company admitted the receipt of R3.8 million from the illegal organ trafficking syndicate.<sup>265</sup> It also admitted guilt in respect of the 102 transplant operations that did not include the minors, and agreed that its employees had received money that had formed part of the proceeds of unlawful activities.<sup>266</sup>

A plea agreement was entered into with the State under the authority of the South African National Director of Public Prosecution.<sup>267</sup> The agreement set out the penalty imposed on the company, which included a confiscation order of the R3.8 million (the amount derived from the illegal transplant) and a fine of R4 million. The terms of the agreement led to the withdrawal of criminal charges against Netcare Limited and the CEO.<sup>268</sup> Charges against the remaining accused persons (four surgeons and two transplant staff members) were withdrawn in the Commercial Crimes Court in February 2013.<sup>269</sup>

The Netcare case is the only known case where a medical facility was charged with a crime of HTPOR.<sup>270</sup> Also, it is the one case in which an organ recipient admitted to the purchase of a kidney and the falsification of documents to show that he was

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<sup>262</sup> Allain op cit (n261) 118-119.

<sup>263</sup> Ibid at 118.

<sup>264</sup> OSCE Occasional Paper No. 6 op cit (n2) 24; Allain op cit (n261) 118.

<sup>265</sup> The Telegraph 'South African hospital pleads guilty to organ trafficking case', 10 November 2010, available at

<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/southafrica/8124710/South-African-hospital-pleads-guilty-to-organ-trafficking-case.html>, accessed on 23 January 2016.

<sup>266</sup> Allain op cit (n261) 120.

<sup>267</sup> *The State v Netcare Kwa-Zulu (Proprietary) Limited – Agreement in terms of section 105(1) of the Criminal Procedure Act 51 of 1977, Netcare Kwa-Zulu Natal Durban – Case No 41/1804/2010*; Allain op cit (n261).

<sup>268</sup> HOTT Project 'Trafficking in human beings for the purpose of organ removal: A case study report' (November 2014) 13, available at <http://hottproject.com/userfiles/Reports/3rdReportHOTTProject-TraffickinginHumanBeingsforthePurposeofOrganRemoval-ACaseStudyReport.pdf>, accessed on 19 May 2015; OSCE Occasional Paper No. 6 op cit (n2) 63.

<sup>269</sup> Ibid.

<sup>270</sup> OSCE Occasional Paper No. 6 op cit (n2) 30.

related to the organ supplier.<sup>271</sup> The case shows specifically the different role players in the organ trafficking network as discussed in chapter 3. Medical professionals, transplant surgeons, interpreters, transplant coordinators, the medical facility itself, organ brokers and even organ recipients played active roles in this organ trafficking network. The charges brought against the accused reflected the various aspects of HTPOR as a crime that violates the rights of people, as it referred to fraud, assault and violence. However, no specific charge of trafficking in persons was brought against the company and its employees.<sup>272</sup> A reason for this could be that no legislation prohibiting HTPOR existed in South Africa. Both the HTA and Prevention of Organized Crime Act used in preparing the charges; were not entirely applicable to the case. The HTA also contained a major loophole, which was the non-recognition of the illegality in buying an organ or receiving payments for same by an authorized health institution.<sup>273</sup>

Although there are speculations about the practice of HTPOR in African countries due to the lack of organ transplant technologies in the region,<sup>274</sup> this landmark case proves such beliefs wrong as it confirms the operation of active organ trafficking networks in Africa. Reports and other studies exist to show that recipients from countries like Botswana, Mauritius, Israel, and Namibia travel to South Africa to buy organs. Organ suppliers are usually sourced from Nigeria, Brazil, Romania and Moldova.<sup>275</sup>

Apart from South Africa, cases of kidnapping (especially of children) abound in the Southern and Western parts of Africa. It has been alleged that persons kidnapped are usually killed for the removal of their organs. These reports have however not been verified.<sup>276</sup> Nigeria is one of the countries where cases abound of children being abducted or killed and having their organs removed for 'ritual purposes'. However, there is little or no information to verify the extent of those cases and the recognition of such criminal activities as 'trafficking' in Nigeria.<sup>277</sup>

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<sup>271</sup> Ibid at 31. (Refer to footnote 141 of this paper: The recipient was given a suspended sentence and subjected to a fine).

<sup>272</sup> Ibid at 35; *The State v Netcare Kwa-Zulu (Proprietary) Limited* op cit (n271).

<sup>273</sup> Section 28 (1), Human Tissue Act 65 of 1983.

<sup>274</sup> Center for Legal Research and Resource Development (CeLRRd) *Human Organ Harvesting: Kidney transplantation & trafficking in and from Nepal*, (2012) 24.

<sup>275</sup> Ibid at 24 – 25.

<sup>276</sup> Ibid at 25.

<sup>277</sup> Ibid.

## 5.2.2 EUROPE:

### The Medicus Clinic Cases – Republic of Kosovo

An illegal organ trafficking network was established through the use of the Medicus clinic in Pristina, Kosovo. This network first raised suspicion among the police and Immigration service in October 2008, when it was discovered that foreigners were arriving in the country with letters of invitation from the Medicus clinic for treatment of heart conditions.<sup>278</sup> The visits by those foreigners were suspicious because the countries from which they came were more renowned for the treatment of heart diseases unlike Kosovo where they had alleged been invited to receive treatment.<sup>279</sup>

In November 2008, three people who turned out to be Israeli organ brokers, a kidney supplier and the brother of the organ recipient to whom the supplier had sold his kidney, were accosted at the airport. The kidney supplier was found to be in a poor state of health, and he confessed to the removal of his kidney at the Medicus clinic<sup>280</sup> for an agreed sum. Based on this information, a search was conducted at the clinic by the local police, the Department of Organized Crime and the United Nations Interim Administration Mission in Kosovo (UNMIK) International police.<sup>281</sup> The organ recipient that the supplier donated his kidney to was found at the clinic during the search. The director and owner of the clinic were arrested and all medical and business documents and computers were confiscated.<sup>282</sup> The clinic was also shut down in 2008 and subsequently sold to new owners. After some time, the UNMIK police took over the investigation of the case due to its sensitive nature.<sup>283</sup>

Investigations revealed that the establishment of the organ trafficking network commenced in 2005 when the director of Medicus clinic made contacts with Turkey to set up the illegal network. In subsequent years, a Turkish transplant surgeon (who was granted a license by the Kosovo Ministry of Health in 2008) was contracted to carry out

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<sup>278</sup> European Parliament, DG External Polices ‘Trafficking in Human Organs’ op cit (n51) 38.

<sup>279</sup> HOTT Project ‘Trafficking in human beings for the purpose of organ removal: A case study report’ op cit (n272) 14.

<sup>280</sup> European Parliament, DG External Polices ‘Trafficking in Human Organs’ op cit (n51) 38.

<sup>281</sup> Ibid.

<sup>282</sup> HOTT Project ‘Trafficking in human beings for the purpose of organ removal: A case study report’ op cit (n272) 15.

<sup>283</sup> Ibid at 15 (Refer to footnote of the said page).

transplant operations in Pristina.<sup>284</sup> The Ministry of Health (MOH) also granted Medicus clinic a license to perform transplant operations despite the fact that Kosovo's health law prohibited organ transplants.<sup>285</sup> Investigations revealed that the organ trafficking network was allegedly headed by a Turkish transplant surgeon, a Kosovo transplant surgeon and an Israeli broker. The organ recipients came from several countries including Germany, Canada, Israel, Poland and USA, and were matched with suppliers from Belarus, Israel, Moldova, Turkey, Russia, Ukraine and Kazakhstan.<sup>286</sup> The nationality of five suppliers and nine recipients were unknown.<sup>287</sup>

The suppliers were made to sign false declarations stating that their organs were donated voluntarily to relatives or altruistically to strangers, without any form of compensation or payments made afterward.<sup>288</sup> Declarations were written in the local languages of the suppliers but no explanation was given about the content of the document that they were forced to sign. After each successful transplant operation, suppliers were discharged four to five days later and sent to their home country, with the promise of an advance fee of \$30 000.<sup>289</sup> No post-operative care or medication was given to them. Only a few of them received part of the promised sum, while others received nothing at all. Investigations also revealed that some were contacted and required to find other donors before they could be paid the sums owed to them. They were promised higher sums of money if they agreed to cooperate with the proposal.<sup>290</sup>

Recipients on the other hand, contacted the organ brokers through word of mouth and agreed sums of up to \$108 000 were reached for each transplant operation. Payments were made in instalments, electronically and in cash upon arrival at the clinic. The recipients were also given documents to sign before each operation, without any explanation about the content of the documents. Like the suppliers, organ recipients

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<sup>284</sup> European Parliament, DG External Polices 'Trafficking in Human Organs' op cit (n51) 38.

<sup>285</sup> Ibid.

<sup>286</sup> Ibid; OSCE Occasional Paper No. 6 op cit (n2) 66.

<sup>287</sup> European Parliament, DG External Polices 'Trafficking in Human Organs' op cit (n51) 38.

<sup>288</sup> Ibid.

<sup>289</sup> Ibid; HOTT Project 'Trafficking in human beings for the purpose of organ removal: A case study report' op cit (n272) 16.

<sup>290</sup> Ibid.

were also discharged after a limited number of days but were given medications and instructions on their health condition before departing for their home countries.<sup>291</sup>

The case was handed over to the EU Rule of Law Mission (EULEX) deployed in Kosovo in December 2008, due to the involvement of top government officials in the organized trafficking network.<sup>292</sup> The EU-led court found five people guilty of HTPOR in April 2013. The clinic's director was found guilty of organized crime and trafficking in persons, and sentenced to eight years imprisonment with a fine of EUR10 000. He was also banned from practicing as a professional urologist for two years.<sup>293</sup> His son was found guilty of the same charges and was sentenced to seven years imprisonment with a fine of EUR2 500. They were both ordered to pay a compensation fee of EUR15 000 to about seven HTPOR victims who had been lured to sell their organs to rich recipients in exchange for lucrative payments.<sup>294</sup>

The clinic's head anesthesiologist and his assistant were found guilty of grievous bodily harm and were sentenced to three years and one year imprisonment respectively. The head anesthesiologist was banned from practicing for one year.<sup>295</sup> A senior official of the Kosovo MOH was acquitted of abusing his official position, while the charges of illegal medical activity brought against another defendant (a medical doctor at the clinic) was thrown out by the court for lack of evidence.<sup>296</sup> The transplant surgeon and the Israeli broker who were absent from court during the trial, became subjects of an international wanted notice of Interpol.<sup>297</sup> In 2011, the surgeon was arrested in Turkey in 2011, while the Israeli broker was arrested in Israel in May 2012.

At the end of April 2013, EULEX began another fresh investigation into other people (apart from the five already sentenced) suspected to have been involved in the organized criminal group that carried out the HTPOR activities. Investigations were carried out on eight people in relation to the 2008 crime and they were charged with

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<sup>291</sup> Ibid at 17.

<sup>292</sup> Ibid at 15.

<sup>293</sup> UNODC Assessment toolkit op cit (n39) 32.

<sup>294</sup> E Peci 'Kosovo Convicts five over human organ trafficking' *Balkan transitional justice*, 29 April 2013, available at <http://www.balkaninsight.com/en/article/kosovo-convicts-five-over-human-organ-trafficking>, accessed on 25 January 2016.

<sup>295</sup> UNODC Assessment toolkit (n39) 32.

<sup>296</sup> Ibid; OSCE Occasional Paper No. 6 op cit (n2) 66.

<sup>297</sup> European Parliament, DG External Polices 'Trafficking in Human Organs' op cit (n51) 39.

involvement in the organized crime, trafficking in persons, causing grievous bodily harm, abuse of position of authority, fraud and trading in influence.<sup>298</sup>

The Medicus case reflects the international organized nature of the crime of HTPOR, as recipients and organ suppliers were recruited from about 16 countries. Like the Netcare case in South Africa. The Medicus case shows the different role players in an organ trafficking network. However, the charges laid were of trafficking in persons and organized crime from the start of the trial. Quite a number of the victim-donors and recipients could be traced. Statements obtained from most victim-donors proved that their positions of vulnerability and poverty were exploited by the brokers and recipients altogether.

This case show-cased the response of the European region in combating the crime of HTPOR and trafficking in persons in general, through the specific recognition of HTPOR as a crime to be curbed. Nonetheless, the case faced some challenges with investigations of defendants from other countries involved in the organ trafficking network.

It is important to note that HTPOR cases require international legal cooperation due to the nature of the crime as an international organized crime, involving numerous countries. The Medicus case was faced with this challenge. The prosecution of some of the main defendants was frustrated because of extradition issues.<sup>299</sup> The Medicus case also highlighted that HTPOR cases require timely investigations and arrests due to the sensitive nature of the crime. Prompt responses to known cases will therefore prevent the destruction of vital evidence and documents needed for securing the arrests of perpetrators of this heinous crime.

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<sup>298</sup> M Ristic and E Peci 'EU launches new Kosovo organ trafficking probe' *Balkan transitional justice*, 30 April 2013, available at <http://www.balkaninsight.com/en/article/serbia-welcomes-verdict-in-medicus-case>, accessed on 25 January 2016; EULEX Press Release 'Eight other suspects under investigation related to the Medicus case', 30 April 2013, available at <http://www.eulex-kosovo.eu/en/pressreleases/0437.php>, accessed on 26 January 2016.

<sup>299</sup> European Parliament, DG External Polices 'Trafficking in Human Organs' op cit (n51) 39.

### 5.2.3 MIDDLE EAST

#### **The State of Israel v. Muhammed (John) ben Taha Jeeth (Alen) et.al**

One of the first indictments on organ trafficking crimes in Israel was made on 12 August 2007 against two men namely John Allan and Hassan Zakhalka. They were both charged with ‘committing a transaction in persons for the purpose of removing an organ from the person’s body’ in contravention of Article 3777A (a) (1) of the amendment to the Penal Law of 1977 on the prohibition of trafficking in persons. They were also charged with committing crimes of grievous injury, exploitation of vulnerable persons and obtaining by deceit under aggravated circumstances.<sup>300</sup>

The defendants recruited victim-donors from the most vulnerable and poorest population groups in Israel and took them to the Ukraine to donate their organs for \$7 000.<sup>301</sup> They admitted to recruiting their victim-donors from the developmentally challenged or mentally ill groups of Arabs from Galilee and Central Israel to have their organs removed for an agreed sum.<sup>302</sup> Victims were located through newspaper advertisement and were deceived about the nature and health implication of donating an organ.<sup>303</sup>

Organ recipients on the other hand paid between \$125 000 and \$135 000 for a kidney, with the defendants taking the bulk of the money for themselves. Many of the victim-donors were defrauded of the promised sum for their kidneys, while others were held in debt bondage by the defendants for costs of traveling, medical examinations, accommodation, food and clothing before the operation was carried out.<sup>304</sup>

One of the victims who changed her mind about donating her kidney was threatened by the defendants. She was told that it was a crime to agree to donate a kidney for a fee and would be reported to the police.<sup>305</sup> She was forced to continue on

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<sup>300</sup> Ministry of Justice, State of Israel: ‘*Report of the National Coordinator for the Battle against trafficking in persons on trafficking in persons in Israel*’ (April 2011) 27, available at [www.ungift.org/doc/knowledgehub/resource-centre/Governments/Israel\\_Ministry\\_of\\_Justice\\_TIP.pdf](http://www.ungift.org/doc/knowledgehub/resource-centre/Governments/Israel_Ministry_of_Justice_TIP.pdf), accessed on 26 January 2016.

<sup>301</sup> Ibid.

<sup>302</sup> F Eyadat ‘Two Haifa men sentenced to jail for organ trafficking’ *Haaretz*, 17 December 2007, available at <http://www.haaretz.com/two-haifa-men-sentenced-to-jail-for-organ-trafficking-1.235355>, accessed on 26 January 2016.

<sup>303</sup> Ibid.

<sup>304</sup> Ibid.

<sup>305</sup> Ibid.

with the surgery, but like every other victim-donor, she was not paid the agreed sum after the operation.

The first defendant was sentenced to four years imprisonment, with a three-year suspended sentence, while the second defendant was sentenced to 20 months imprisonment with a 12-month suspended sentence for aiding and abetting the crime of HTPOR.<sup>306</sup>

Israel is known for its involvement in organ trafficking networks. According to Nancy Scheper-Hughes, Israel is at the top of organ trafficking networks in operation across the world.<sup>307</sup> Furthermore, Israel has a working organ trafficking system with active brokers, bank accounts, recruiters, translators, and travel agents.<sup>308</sup> Reasons for this could be traced to the prohibition of organ donation under Jewish law, resulting in the need to source for organs through other alternatives like the organ black market. Numerous studies and reports reveal that Israelis partake extraordinarily in organ transplantation through transplant tourism. The national government of Israel contributed to this high participation of its citizens in transplant tourism by granting subsidies and reimbursements for medical operations performed abroad.<sup>309</sup>

The case at hand reflects the modus operandi of traffickers in coercing, threatening and defrauding victim-donors into selling their organs. A year before the institution of this case, the criminal code of Israel was amended to include clauses prohibiting trafficking in humans for the purpose of harvesting organs.<sup>310</sup> This helped in framing the charges to reflect trafficking in persons for organ harvesting or HTPOR as a contravention of the amended law.

This case reveals the efforts made by the Israeli government to combat HTPOR in the country, which is further buttressed by the passage into law of Israel's Organ Transplant Act of 2008, with a specific section on the prohibition of organ trafficking.<sup>311</sup> The Act is also one of the few laws that recognize the operations of organ brokers who

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<sup>306</sup> Ibid.

<sup>307</sup> A Weir 'Israeli organ harvesting: From Moldova to Palestine' *Washington Report on Middle East Affairs*, November 2009, available at <http://www.wrmea.org/2009-november/israeli-organ-harvesting-from-moldova-to-palestine.html>, accessed on 26 January 2016.

<sup>308</sup> Ibid.

<sup>309</sup> Ibid.

<sup>310</sup> Eyadat op cit (n308).

<sup>311</sup> Section 3, (Israel) Organ Transplant Act of 2008,

employ different means to illegally obtain organs from people. It therefore prohibits brokering between organ donors and recipients.<sup>312</sup>

## 5.2.4 THE AMERICAS

### The Rosenbaum Case – U.S.A

In 1999, the Federal Bureau of Investigation (FBI) kick-started an ‘Operation Bid Rig’ investigation on corrupt politicians in New Jersey. During the third phase of the investigation in 2008, the FBI investigators detected an organ trafficking operation through the help of one of the suspects in the ‘operation bid rig’ investigation who became an FBI informant. The latter led the FBI to the main organ broker, an Israeli citizen – namely Levy Izhak Rosenbaum. In another undercover operation, an FBI agent approached Rosenbaum to assist in facilitating a kidney transplant for a family member.<sup>313</sup> Rosenbaum agreed to help for a sum of \$160 000. In further discussions (that were recorded), he confessed to his operation of an organ sale business that had been running for almost 10 years, and he mentioned the names of two recipients that had received a kidney through his services.<sup>314</sup>

It was also established that Rosenbaum had recruited both victim-donors and recipients from Israel under the guise of a Jewish charity organization established by Rosenbaum himself. As time went by, recipients were mainly U.S citizens, while the suppliers remained impoverished immigrants from Israel and Eastern Europe.<sup>315</sup> Rosenbaum explained the processes involved; and the need to forge documents in order to cover the tracks of both the suppliers and the recipients. According to him, donors agreed to the removal of their kidneys for monetary gain due to economic hardship.<sup>316</sup>

In July 2009, Rosenbaum was arrested with 43 other people from the ‘operation bid rig’ investigation. On 27 October 2011, Rosenbaum pleaded guilty to three counts of acquiring, brokering and transferring for “valuable consideration” organs from bodies of

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<sup>312</sup> Section 4, (Israel) Organ Transplant Act of 2008.

<sup>313</sup> European Parliament, DG External Polices ‘Trafficking in Human Organs’ op cit (n51) 39.

<sup>314</sup> HOTT Project ‘Trafficking in human beings for the purpose of organ removal: A case study report’ op cit (n272) 25.

<sup>315</sup> European Parliament, DG External Polices ‘Trafficking in Human Organs’ op cit (n51) 40.

<sup>316</sup> OSCE Occasional Paper No. 6 op cit (n2) 68.

poor Israelis trafficked into the US for transplant needs of US recipients,<sup>317</sup> in contravention of 42 U.S. Code §274e.<sup>318</sup> He also pleaded guilty to another count of conspiracy to broker illegal kidney sales,<sup>319</sup> which contravened 18 U.S Code §371.<sup>320</sup>

Rosenbaum was sentenced to an imprisonment of 30 months and confiscation of the proceeds of the three illegal transplants that was proved, including the \$10 000 paid by the FBI undercover agent.<sup>321</sup>

The Rosenbaum case was the first case of organ trafficking prosecuted under the U.S National Organ Transplant Act of 1984 (NOTA). When it comes to organ donations for transplants, NOTA upholds and adopts the principle of altruism by prohibiting the sale of organs for transplantation purposes in the United States of America.<sup>322</sup>

The mode of operation adopted by the broker is similar to the previous cases already considered. Deception, coercion; and exploitation of the vulnerability of victims were employed by Rosenbaum in recruiting his victim-donors. However, no charges of human trafficking were brought against Rosenbaum because none of the suppliers had been traced at the time of the prosecution.<sup>323</sup> Another reason for this could be because the United States of America is not a party to the United Nations Convention against Transnational Organized Crime of 2000 that prohibits trafficking in persons including for the purpose of organ removal.

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<sup>317</sup> N Scheper-Hughes 'The Rosenbaum kidney trafficking gang' *Counter Punch News*. 30 November 2011, available at <http://www.counterpunch.org/2011/11/30/the-rosenbaum-kidney-trafficking-gang/>, accessed on 27 January 2016.

<sup>318</sup> It provides that it is unlawful to 'knowingly acquire, receive or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce'. 42 U.S Code §274e – prohibition of organ purchases.

<sup>319</sup> OSCE Occasional Paper No. 6 op cit (n2) 68.

<sup>320</sup> It prohibits conspiracy to commit an offence against the United States or to defraud the United States.

<sup>321</sup> European Parliament, DG External Polices 'Trafficking in Human Organs' op cit (n51) 40.

<sup>322</sup> Scheper-Hughes op cit (n323); Section 301 (a), National Organ Transplant Act of 1984.

<sup>323</sup> European Parliament, DG External Polices 'Trafficking in Human Organs' op cit (n51) 40.

### 5.2.5 ASIA

#### **Gurgaon Kidney Scandal – Delhi, India**

In January 2008, a kidney racket was busted in Gurgaon by police teams from Haryana and Uttar Pradesh.<sup>324 325</sup> The kidney racket operated within a residential house and a guest house owned by the kingpin of the kidney racket, Dr Amit Kumar.<sup>326</sup> A state-of-the-art hospital was also located within the residential building, while the guest house was used to house recipients and victim-donors alike until a match was found and the transplant operation carried out. Victim-donors recruited for the kidney sale were often poor labourers and impoverished members of the township, while recipients of the kidneys came from different countries including the United States of America, the United Kingdom, Canada, Saudi Arabia, and Greece.<sup>327</sup> The brokers often lured the victim-donors to the clinic on the pretext of job opportunities awaiting them. They were afterwards asked to donate their kidneys for a fee (Rs 30 000), and those who refused the offer were drugged against their will, and their kidneys were removed.<sup>328</sup>

Investigations revealed that between 500 and 600 kidney transplants had been carried out by Dr Amit and his accomplices over a period of nine years. Recipients paid between Rs 15 lakh and Rs 25 lakh for a kidney while donors were paid between Rs 50 000 and Rs 11 lakh. The rest of the money was shared among doctors and middle men involved in the business.<sup>329</sup>

During the raid, the police rescued five victim-donors, out of which three had been operated upon. Investigations further revealed that Dr Amit, his brother and three other people had been previously arrested thrice on charges of illegal human organ transplantation, but were released on bail.<sup>330</sup> Arrest warrants were issued by a Gurgaon

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<sup>324</sup> The times of India ‘Kidney racket busted in Gurgaon’, 25 January 2008, available at <http://m.timesofindia.com/city/delhi/Kidney-racket-busted-in-Gurgaon/articleshow/2729795.cms>, accessed on 27 January 2016.

<sup>325</sup> ‘Gurgaon kidney scandal’, available at [https://en.wikipedia.org/wiki/Gurgaon\\_kidney\\_scandal](https://en.wikipedia.org/wiki/Gurgaon_kidney_scandal), accessed on 27 January 2016.

<sup>326</sup> T Sharma ‘Spilling the beans: How the kidney racket unfolded’, 8 February 2008, available at <http://m.ibnlive.com/news/india/spilling-the-beans-how-the-kidney-racket-unfolded-282437.html>, accessed on 27 January 2016.

<sup>327</sup> Ibid; Gurgaon kidney scandal op cit (332).

<sup>328</sup> Gurgaon kidney scandal op cit (n332).

<sup>329</sup> B Sterling ‘The global kidney racket’ 28 January 2008, available at <http://www.wired.com/2008/01/the-global-kidn/>, accessed on 27 January 2016.

<sup>330</sup> Sharma op cit (n333).

court for Dr Amit and his brother, and on 7 February 2008, Dr Amit was arrested in a neighbouring country in Nepal. A criminal case was registered against him as the main accused, along with other accused persons on 8 February 2008 in a Central Bureau of Investigation (CBI) court. Dr Amit was charged with voluntarily causing grievous hurt by dangerous weapon, wrongful confinement, cheating and criminal conspiracy, all in contravention of sections 326, 342, 420 and 120B of the India Penal Code (IPC).<sup>331</sup> The conspiracy charges were based on the discovery of the involvement of Dr Amit and his associates in a criminal conspiracy between 1999 and 2008 in pursuance of the illegal organ sale business, through which recipients were charged huge amounts of money.<sup>332</sup>

On 22 March 2013, Dr Amit, and four others were convicted by a special CBI court of the above charges. Five other accused persons (including Amit's brother) from the kidney transplant racket unveiled in 2008, were acquitted based on lack of substantial evidence.<sup>333</sup> <sup>334</sup> Dr Amit and a certain Dr Upender Dublesh were both sentenced to seven (7) years rigorous imprisonment and a fine of Rs 60 lakh each.<sup>335</sup>

India is another country where organ trafficking thrives. Studies show that many people travel to India to receive kidney transplants from living donors.<sup>336</sup> It is therefore not surprising that over 500 cases of illegal kidney transplants had been carried out by the kidney racket in the above case.

In the case against Dr Amit et al, no specific HTPOR charges were laid against the accused persons. However, the sections under which the penalties were framed came under the Transplantation of Human Organs Act (THOA) of 1994. The accused persons

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<sup>331</sup> Gurgaon kidney scandal op cit (n332).

<sup>332</sup> Zeenews Bureau 'Gurgaon kidney racket kingpin Dr Amit convicted', 22 March 2013, available at [http://zeenews.india.com/news/haryana/gurgaon-kidney-racket-kingpin-dr-amit-convicted\\_837210.html](http://zeenews.india.com/news/haryana/gurgaon-kidney-racket-kingpin-dr-amit-convicted_837210.html), accessed on 27 January 2016.

<sup>333</sup> Gurgaon kidney scandal op cit (n332); B Thakur 'Kidney racket: Mastermind doctors get 7-yr jail', 23 March 2013, available at <http://m.hindustantimes.com/india/kidney-racket-mastermind-doctors-get-7-yr-jail/story-OUEAL33HijQabKVnlhATsK.html>, accessed on 27 January 2016.

<sup>334</sup> Thakur op cit (n340).

<sup>335</sup> Gurgaon kidney scandal op cit (n332); Thakur op cit (n340).

<sup>336</sup> CeLRRd Human organ harvesting op cit (n279) 18.

were found guilty of violating various sections of the IPC and were penalized in accordance to sections 18,<sup>337</sup> 19,<sup>338</sup> and 20<sup>339</sup> of THOA.<sup>340</sup>

The court recognized the act of the accused in violating the THOA and furthering the crime of HTPOR through the various means of coercion, deception, fraud and exploitation of vulnerable people for the removal of their organs.

The response of the government through the enactment of THOA has helped to reduce cases of organ trafficking in India.<sup>341</sup> Nonetheless, more work still needs to be done to ensure the strict prohibition of HTPOR, and the protection of the poor and vulnerable from falling prey to organ brokers.

### 5.3 Conclusion

Case studies from five different regions were examined in this chapter to further explain the numerous HTPOR issues already discussed in preceding chapters. A common characteristic among all the cases examined relates to the mode of operation of organ brokers through the recruitment of victim-donors from poor, impoverished and vulnerable groups of a given population.

The cases reflect the efforts that have been made by the regions in curbing the continuous perpetration of trafficking in persons for organ removal; through the enactment of various laws, amendment of existing laws, and the inclusion of organ removal as a form of human trafficking in laws where necessary.

There is a need for international legal cooperation, prompt responses, and accuracy in gathering required evidence to pursue HTPOR cases, continues to pose a serious challenge for most countries.

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<sup>337</sup> Punishment for removal of human organ without authority, section 18 of the Transplantation of Human Organs Act (THOA) of 1994.

<sup>338</sup> Punishment for commercial dealing in human organ.

<sup>339</sup> Punishment for contravention of any other provision of THOA.

<sup>340</sup> A Sura 'Gurgaon kidney scam: Two doctors get 7 years' jail' *The times of India*, 22 March 2013, available at <http://m.timesofindia.com/city/gurgaon/Gurgaon-kidney-scam-Two-doctors-get-7-years-jail/articleshow/19129441.cms>; accessed on 27 January 2016.

<sup>341</sup> M Abraham 'Human trafficking: Issues beyond criminalization' 17-21 April 2015, available at [http://www.endslavery.va/content/endslavery/en/publications/acta\\_20/abraham.html](http://www.endslavery.va/content/endslavery/en/publications/acta_20/abraham.html), accessed on 27 January 2016.

## Chapter 6

### CONCLUSION

The research question this dissertation has attempted to answer is whether the rights of the victims of human trafficking for the purpose of organ removal has received the appropriate attention needed across the globe; and is thereby adequately protected and promoted.

Human trafficking for the purpose of organ removal is a peculiar form of trafficking in persons, which in the past used to be an uncommon form of trafficking, but has since gained popularity and has demanded urgent attention. The urgency has led to its inclusion in various international, regional and national laws prohibiting human trafficking and other forms of organized crime.

This dissertation has expounded on the crime of HTPOR by first tracing its evolution from the introduction of medical technologies designed to save and/or prolong lives. It was established that the disparity between the demand and supply of human organs for transplantation, coupled with the desperation of people to stay alive and the desperation of poor, vulnerable and impoverished people to survive has become the fuel for the organ black market.

The trends and patterns of HTPOR were examined in detail, with a consideration of four different forms of organ trafficking which are human trafficking for the purpose of organ removal (HTPOR), organ transplant commercialism, travel for transplant and transplant tourism; and trafficking in organs, tissues and cells (OTC). The mode of operation of organ brokers was also examined, and it was established that although similarities exist in the modus operandi of human traffickers generally, that of HTPOR is peculiar because of its links with international organized crime. Four modes of international organ trade and trafficking designed by Yosuke Shimazono were discussed in order to show the workings of the organ black market.

The importance of the role players involved in the organ trafficking network was emphasized. It was established that HTPOR stands out from other forms of human trafficking because of the involvement of medical professionals, other health practitioners and the use of medical facilities in executing the crime. Interestingly, organ recipients also contribute to the booming black organ market, as studies have shown that

most recipients prefer to buy the organs needed for their transplants instead of waiting endlessly on an organ transplant waiting list.

The consequences of HTPOR on the victim-donors were carefully analyzed. It was concluded that most victim-donors end up in worse conditions than they were before selling their organs, either willfully or forcefully. The trends of HTPOR revealed that most victim-donors are deceived and defrauded of the promised sums of money by organ brokers; battle with deteriorating health conditions for lack of pre and post-operative care; are stigmatized and discriminated against by their family members and community at large; and the aftermath is often death or the launch of new organ trafficking networks by these victims.

The inherent human rights violations in the crime of HTPOR were considered. It should be reiterated that the approach adopted for this dissertation demanded a greater focus on the victims of HTPOR, than any other party. This was aimed at shifting the focus of numerous debates and discussions on HTPOR from addressing the problem of organ shortage to protecting the rights of victims. It was concluded that all processes involved in the trafficking cycle infringes on one or more rights of the victims involved.

The second section of chapter 4 considered in detail the responses to combating HTPOR. Those responses have been couched in form of enacted or amended laws that specifically prohibit the commodification of organs for any purpose whatsoever. Other responses have emanated from various documents and guiding principles developed by health and professional organizations at the international level to regulate organ donations and transplants in general, as well as from civil society and media through the raising of awareness on the scope and operation of the organ black market. It was noted that most responses to HTPOR constitute non-binding instruments. The conclusion reached on the fundamental gap of the absence of a binding instrument on HTPOR is that HTPOR has not been the focus of the international human rights system, and this has led to the unavailability of a specific international legislation or a binding instrument on the crime. Nevertheless, it was noted that most countries have recognized the need for amendment of their laws to contain specific provisions on the prohibition of HTPOR.

The last section of this dissertation examined prosecuted cases from five different regions where active organ trafficking networks exist and/or that victims are often

recruited from. The examination of those cases illustrated the various patterns and forms of HTPOR, the role players involved, the *modus operandi* of organ traffickers; and the consequence of the crime on the victim-donors. The cases also reflected the issues raised regarding efforts made by various countries in combatting the crime of HTPOR, as the charges filed against accused persons highlighted the contravention of laws prohibiting organ sale. Some of the challenges faced in the prosecution of HTPOR cases was linked to the absence of international cooperation among law enforcement authorities. This is an important element needed for more successful prosecution of HTPOR cases.

This dissertation has attempted to answer the research question posed at the beginning and it concludes that not enough attention has been given to victims of HTPOR. It is recommended that the international community at large, and the regional community in particular should focus more on the rights of victims by setting in motion various support mechanisms for victims of HTPOR. These support mechanisms can manifest in the form of guaranteed access to post-operative care for known victims of HTPOR, as well as guaranteed access to justice. The realization of the human rights discussed in chapter 4 for victims is highly important to curb the continuous exploitation of victims.

Mechanisms should also be put in place to ensure the reinstatement of victim-donors back into society by providing basic social needs that would constitute a realization of the fundamental right to an adequate standard of living for all. The reinstatement of those victim-donors will go a long way to help overcome the economic, social, medical and psychological consequences of HTPOR.

There is no doubt that more work still has to be done on enacting specific laws on HTPOR at international, regional and national levels. Specific laws should also be put in place to penalize medical professionals and corporations that are involved in organ trafficking.

The prosecution of HTPOR cases is another area that requires urgent attention. As noted in the dissertation, international legal cooperation is required for the successful prosecution of these cases. The problem of gathering accurate facts and figures on HTPOR should be attended to, as it continues to pose a huge challenge in conducting thorough research on HTPOR in general.

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